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# FEDERALISM & SEPARATION OF POWERS

## INTRODUCING “ARTICLE V 2.0”: THE COMPACT FOR A BALANCED BUDGET

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### Note from the Editor:

This article discusses the use of interstate compacts to advance Article V amendments to the U.S. Constitution. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the issues involved. To this end, we offer links below to other perspectives on the issue, and we invite responses from our audience. To join the debate, please e-mail us at [info@fed-soc.org](mailto:info@fed-soc.org).

### Related Links:

- THOMAS H. NEALE, CONGRESSIONAL RESEARCH SERVICE, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS (Apr. 2014): <http://fas.org/sgp/crs/misc/R42589.pdf>
  - Lew Uhler, *Discipline of the Federal Fisc—Article V*, HUMAN EVENTS, Apr. 29, 2014: <http://beta.humanevents.com/2014/04/29/discipline-of-the-federal-fisc-article-v/>
  - ROBERT GREENSTEIN & RICHARD KOGAN, CENTER ON BUDGET & POLICY PRIORITIES, A CONSTITUTIONAL BALANCED BUDGET AMENDMENT THREATENS GREAT ECONOMIC DAMAGE (July 2011): <http://www.cbpp.org/cms/?fa=view&cid=3509>
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Our gross federal debt is approaching \$18 trillion.<sup>1</sup> That’s more than twice what was owed (\$8.6 trillion) when then-U.S. Senator Barack Obama opposed lifting the federal debt limit in 2006—just eight years ago.<sup>2</sup> That’s nearly as big a percentage of the American economy (107+% of Gross Domestic Product) as during the height of World War II.<sup>3</sup> That’s over \$150,000 per taxpayer.<sup>4</sup> And that is the tip of the iceberg, with unfunded federal liabilities being recently estimated at \$205 trillion.<sup>5</sup>

But what if the States could advance and ratify a powerful federal balanced budget amendment in the next twelve months? It could happen with a new approach to state-originated amendments under Article V of the United States Constitution. With the stroke of their pens on April 12 and 22, 2014, respectively, Governors Nathan Deal<sup>6</sup> and Sean Parnell,<sup>7</sup> formed the “Compact for a Balanced Budget” among the States of Georgia and Alaska. A binding commitment to fix the national debt now exists that spans the nation from the Atlantic to the Pacific, from the far Southeast to the far Northwest.<sup>8</sup>

And that commitment means business.

Unlike any other effort to reform Washington from the States using their Article V amendment power, the formation of the Compact for a Balanced Budget changes the political game almost immediately.

#### I. A PERSISTENT PLATFORM FOR REFORM SPINS UP

Alaska and Georgia are expected to organize the Compact’s Commission before the summer of 2014 ends. The Commission is an interstate agency dedicated to organizing a convention for proposing a Balanced Budget Amendment. Al-

though it starts operating with appointees from just two states, eventually the Commission will expand to include appointees from three states—and possibly more.<sup>9</sup> It is designed to unify the states and lead the charge for fiscal reform shoulder-to-shoulder with allied legislators, citizens and public interest groups. In doing so, it will lend instant credibility to and ignite support for the effort. It could also start immediate engagement with Congress on fulfilling its role in the amendment process, furnishing a national platform for the states to address Washington’s unsustainable fiscal policies.

Think of the Compact’s Balanced Budget Commission as an outside-the-beltway Erskine-Bowles Commission that can do much more than “jaw-bone” hypothetical fiscal reforms—it will marshal a state-based effort to propose and ratify a powerful Balanced Budget Amendment.

#### II. THE COMPACT’S BALANCED BUDGET AMENDMENT IN A NUTSHELL

The Compact’s proposed amendment would constitutionally codify a five point plan for fixing the national debt.<sup>10</sup>

First, it would put a fixed limit on the amount of federal debt.<sup>11</sup>

Second, it would ensure that spending by Washington cannot exceed revenue at any point in time, with the sole exception of borrowing under that fixed debt limit.<sup>12</sup> In so doing, the amendment is designed to prevent all known forms of fiscal gaming by adopting a strictly cash-based limit on spending that uses carefully crafted definitions to prevent trust fund-raiding, sale-leaseback schemes, and no-recourse borrowing.<sup>13</sup>

Third, by compelling spending impoundments when 98% of the debt limit is reached, the proposed amendment would ensure that Washington is forced to reduce spending before borrowing reaches its debt limit—preventing any default on our obligations.<sup>14</sup>

Fourth, if new revenues are needed to avoid borrowing

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beyond the debt limit, the amendment would ensure that all possible spending cuts are considered first by requiring the most abusive taxing measures to secure supermajority approval from Congress, and reserving simple majority approval for completely replacing the income tax with a national sales tax, flattening the tax code, tariffs or fees.<sup>15</sup> This would drive any push for new revenues through a narrow gap defended by powerful special interests.

Fifth, and finally, if borrowing beyond the debt limit were truly needed, it ends the absurdity of allowing a bankrupt debtor (Washington) to unilaterally increase its credit. Instead, it gives the States and the People the power to impose outside oversight by requiring a majority of state legislatures to approve any increase in the federal debt limit within sixty days of congressional proposal of a single subject measure to that effect.<sup>16</sup> Using the time-tested structure of dividing power between the states and the federal government, and balancing ambition against ambition, requiring a referendum of the states on any increase in a fixed constitutional debt limit would undoubtedly minimize the abusive use of debt as compared to the status quo. Moreover, any abuse of that power through quid pro quo trades of debt approval for appropriations would prevent any increase in the debt limit from having legal effect<sup>17</sup> and would render any debt thereby incurred void.<sup>18</sup>

This powerful reform proposal, which will be advanced by an interstate agency—the Compact Commission, would certainly kick-start the fiscal discussion in Washington—especially during an election year. It has already been championed by George Will.<sup>19</sup> And for that reason, April 2014 could go down in history as the month the States finally took charge of federal fiscal reform with the formation of the Compact for a Balanced Budget.

### III. WHY THE COMPACT IS THE NEXT GENERATION ARTICLE V MOVEMENT

The Compact for a Balanced Budget uses an interstate agreement to vastly simplify the state-originated Article V convention process. Ordinarily, without an interstate compact—an agreement among the states, the Article V convention process would require at least 100 legislative enactments, six independent legislative stages, and five or more legislative session years to generate a constitutional amendment.

In particular, the non-compact Article V approach first requires two-thirds of the state legislatures to pass resolutions applying for a convention (34 enactments). Second, at least a majority of states must pass laws appointing and instructing delegates (26 enactments). Third, Congress must pass a resolution calling the convention. Fourth, the convention must meet and actually propose an amendment. Fifth, Congress must pass another resolution to select the mode of ratification (either by state legislature or in-state convention). And sixth, three-fourths of the states must pass legislative resolutions or successfully convene in-state conventions that ratify the amendment (at least 38 enactments).

By contrast, the compact approach to Article V consolidates everything states do in the Article V convention process into a single agreement among the states that is enacted once by three-fourths of the states<sup>20</sup> and everything Congress does

in a single concurrent resolution passed just once with simple majorities and no presidential presentment.

Specifically, the compact includes everything in the Article V amendment process from the application to the ultimate legislative ratification.<sup>21</sup> The counterpart congressional resolution includes both the call for the convention and the selection of legislative ratification for the contemplated amendment.<sup>22</sup>

The Compact is able to pack both the front and back-end of the Article V convention process into just two overarching legislative vehicles by using the “secret sauce” of conditional enactments. For example, using a conditional enactment, the “nested” Article V application contained in the Compact only goes “live” once three-fourths of the states join the compact (three-fourths, rather than two-thirds, is the threshold for activating the Article V application because the compact is designed to start and complete the entire amendment process).<sup>23</sup> The Compact also includes a “nested” legislative ratification of the contemplated Balanced Budget Amendment, which only goes “live” if Congress selects ratification by state legislature rather than in-state convention.<sup>24</sup>

Correspondingly, using conditional enactments, the nested “call” in the congressional counterpart resolution only goes live once three-fourths of the states join the Compact.<sup>25</sup> Likewise, the nested selection of legislative ratification in the congressional resolution only becomes effective if, in fact, the contemplated amendment is proposed by the Article V convention organized by the Compact.<sup>26</sup>

By using an interstate agreement and conditional enactments to coordinate and simplify the state-originated Article V amendment process, the Compact approach to Article V reduces the number of necessary legislative enactments, stages and sessions from 100+ enactments to 39 (38 states joining the compact, 1 congressional resolution), from 6 legislative stages to 3 (passage of compact, convention proposal of amendment, congressional passage of resolution), and from 5 or more session years to as few as 1 (however, the current target is 3 years).

More than that, like any well-drafted contract, the Compact approach eliminates all reasonable uncertainty about process. It identifies and specifies the authority of the delegates from all of its member states.<sup>27</sup> It specifies in advance all Article V convention ground rules, limiting the duration of the convention to 24 hours.<sup>28</sup> It requires all member state delegates to vote into place rules that limit the agenda to an up or down vote on a specific, pre-drafted Balanced Budget Amendment.<sup>29</sup> It disqualifies from participation any member state and the vote of any member state or delegate who deviates from that rule.<sup>30</sup> It further bars all member states from ratifying any other amendment that might be generated by the convention.<sup>31</sup>

Thus, from the vantage points of efficiency, public policy and certainty, the Compact for a Balanced Budget is an upgrade from the non-compact approach to Article V—with one significant caveat. The requirement of such detailed and up-front agreement will probably only work for well-formed reform ideas that likely already command supermajority support among the states and the people. The list of such reform ideas is concededly short. But sustained polling data across four decades undoubtedly puts a Balanced Budget Amendment on that short list.

One would expect all “Fivers” to be rejoicing at this point.

Indeed, many are. But some have instead criticized the Compact effort. All miss the mark.

#### IV. ARTICLE V WAS NOT MEANT TO BE AN INSURMOUNTABLE OBSTACLE COURSE

One critique is that the Compact for a Balanced Budget somehow violates the text of Article V by avoiding a difficult, multi-staged, multi-generational amendment quest. It usually focuses this criticism on the fact that the Compact includes pre-ratification of the amendment it contemplates. But this criticism is meritless. Through the operation of conditional enactments, the Compact conforms strictly to the text of Article V. Furthermore, the “spirit” of Article V in no way requires states to originate amendments in an uncoordinated, multi-staged amendment process.

First of all, it is important to emphasize that there is perhaps no more universally accepted legislative provision than the conditional enactment. Conditional enactments are common components of congressional legislation, including legislation approving interstate compacts,<sup>32</sup> as well as within many existing interstate and federal-territorial compacts.<sup>33</sup> In fact, the U.S. Supreme Court and courts in 45 states and territories have recognized the viability of conditional enactments for a wide range of both state and federal legislation,<sup>34</sup> including state laws that were enacted contingent on the passage of new federal laws.<sup>35</sup> As explained by one typical court decision, “[l]egislation, the effectiveness of which is conditioned upon the happening of a contingency, has generally been upheld.”<sup>36</sup> Courts defer to “broad legislative discretion”<sup>37</sup> when conditional enactments are used. Because a State’s authority over whether to apply for an Article V convention or whether to legislatively ratify an amendment is as plenary as any other form of legislation, the foregoing case law sustains the use of a conditional enactment in connection with Article V applications and ratifications.

Secondly, it is also important to emphasize that there is absolutely no textual conflict between Article V and the use of a conditional enactment to pre-ratify a desired amendment. The Compact’s pre-ratification is entirely contingent on Congress effectively selecting legislative ratification of the contemplated amendment, which, in turn, presumes the proposal of the amendment either by Congress or an Article V convention. Because of the foregoing conditional enactment, the pre-ratification will go live (if it ever goes live) only in the precise sequence required by the text of Article V. Hence, there is no textual conflict between Article V and the Compact’s use of a conditional enactment to pre-ratify a desired amendment.

Thirdly, there is no meritorious argument that coordinating and simplifying the state-originate amendment process somehow violates the “spirit” of Article V. Simply put, the Founders never “sold” ratification of the Constitution on the basis that the Article V convention process was meant to be nearly impossible to use. They never said that the convention itself was a mysterious, autonomous body that no one controlled outside of the convention. They never said that the states had to apply for a convention without having any specific amendments in mind and without coordinating the ratification of those amendments. As against opponents of ratification, like Patrick Henry, the Founders would have never succeeded with

such absurdly unpersuasive arguments.

In fact, the amendment process under Article V was neither supposed to be extraordinarily difficult nor extraordinarily easy. It was meant to strike a balance between these two extremes. We know this because, in Federalist No. 43, James Madison emphasized that Article V “guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”<sup>38</sup> If anything, the balance struck by Article V between facility and difficulty was meant to allow for amendments to be accomplished more easily than was the Founder’s experience in attempting to revise the Articles of Confederation.

During the New Jersey ratification debates, for example, the New Jersey Journal wrote that the Constitution included “an easy mode for redress and amendment in case the theory should disappoint when reduced to practice.”<sup>39</sup> Similarly, at the time of the Connecticut ratification debates, Roger Sherman wrote, “[i]f, upon experience, it should be found deficient, it [the Constitution] provides an easy and peaceable mode of making amendments.”<sup>40</sup> Rebutting Patrick Henry’s lengthy oration at the Virginia Ratification convention that it was too difficult for the states to use Article V, George Nicholas responded, “[i]t is natural to conclude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments.”<sup>41</sup> Notice that Nicholas represented that state-originated amendments would be agreed upon from application to ratification. Finally, in Federalist No. 85, Alexander Hamilton represented there was “no comparison between the facility of affecting an amendment, and that of establishing in the first instance a complete Constitution.”<sup>42</sup>

These representations formed the basis of the public understanding of the Constitution as it was ratified. If anything, the targeted, streamlined, coordinated Compact approach to Article V is more consistent with the actual “spirit” of Article V as described by advocates of ratification, than the multi-staged legislative quest which a non-compact approach to Article V necessitates.

#### V. CONSENT OF CONGRESS IS NOT REQUIRED BEFORE THE CONVENTION IS CALLED

Another common objection is that the Compact approach is defective because article I, section 10, of the U.S. Constitution provides that states may not enter into compacts without the “consent” of Congress. While there is no question that the Compact approach requires some form of congressional consent for the convention to be called and for legislative ratification to be selected, such consent need not be express and it need not come in advance of the formation of an interstate compact.

The Supreme Court has held for nearly 200 years that congressional consent to interstate compacts can be given expressly or impliedly, both before or after the underlying agreement is reached.<sup>43</sup> Moreover, under equally longstanding precedent, a binding interstate compact can be constitutionally formed without congressional consent so long as the compact does not trench on the federal government’s delegated powers.<sup>44</sup>

Nothing in the Compact for a Balanced Budget trenches on any federally-delegated power because conditional enactments and express provisions ensure that all requisite congress-

ional action in the Article V amendment process would be secured before any compact provision predicated on such action became operative. For example, no member state or delegate appointed by the Compact can participate in the convention it seeks to organize before Congress calls the convention in accordance with the Compact.<sup>45</sup> Similarly, as discussed above, the pre-ratification of the contemplated Balanced Budget Amendment only goes live if Congress effectively selects legislative ratification. In this way, no provision of the Compact in any way invokes or implicates any power textually conferred on Congress by Article V unless implied consent is first received from Congress exercising its call and ratification referral power in conformity with the Compact.

While it is true that the Compact Commission will operate immediately upon the membership of two states, that changes nothing in the analysis. The Compact Commission serves essentially as a unified platform for securing congressional cooperation in originating constitutional amendments by way of Article V convention. A compact does not trench on federal power necessitating prior congressional consent merely because it provides “strength in numbers” among the states for a more effective federal educational or lobbying campaign.<sup>46</sup>

To claim that the Compact trenches on powers delegated to the federal government, one would have to demonstrate that the federal government, not the states, has the exclusive power to direct and control an Article V convention by way of setting the convention agenda and delegate instructions. But there is no evidence that anyone during the Founding era or immediately thereafter—whether Federalist or Anti-Federalist—thought that the Article V convention process was meant to be exclusively controlled by Congress in these crucial respects. Rather, all of the available Founding-era and near-Founding-era evidence shows that it was the public understanding of the Framers and the Ratifiers that the states would target the Article V convention process to desired amendments.

For example, on January 23, 1788, Federalist No. 43 was published with James Madison’s attributed observation that Article V “equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.”<sup>47</sup> Similarly, George Washington wrote on April 25, 1788, “it should be remembered that a constitutional door is open for such amendments as shall be thought necessary by nine States.”<sup>48</sup> On June 6, 1788, as discussed above, George Nicholas reiterated the same points at the Virginia ratification convention, observing that state legislatures may apply for an Article V convention confined to a “few points;” and that “it is natural to conclude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments.”<sup>49</sup> This public understanding of Article V was further confirmed by the last of the Federalist Papers, Federalist No. 85, in which Alexander Hamilton concluded, “We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority” by using their amendment power under Article V.<sup>50</sup> Because Congress selects the mode of ratification, we know that Hamilton was speaking of the targeting of state legislature-originated Article V application, not state legislative ratification, as source of such barriers.

Indeed, at the time of the framing of the Constitution, the word “application” was a legal term of art that described a written means of petitioning a court for specific relief. The historical record of “applications” to the Continental Congress confirms that this meaning extended to legislative bodies as well, with applications being addressed to Congress by various states with very specific requests on a regular basis.<sup>51</sup> The contemporaneous usage of “application” thus naturally supports the conclusion that state legislatures had the power to apply for an Article V convention with a specific agenda. Moreover, the usual and customary practice in response to specific applications was either to grant what was requested or to deny them.<sup>52</sup> Given Congress’ mandatory obligation to call a convention for proposing amendments in response to the requisite number of applications, any convention called in response to applications of state legislatures seeking a convention with a specific agenda is—and was<sup>53</sup>—naturally understood as adopting that specific agenda.

Consistently with this understanding of the specific agenda-setting power of an Article V application, ten years later, on February 7, 1799, James Madison’s Report on the Virginia Resolutions further observed that the states could organize an Article V convention for the “object” of declaring the Alien and Sedition Acts unconstitutional.<sup>54</sup> Specifically, after highlighting that “Legislatures of the States have a right also to originate amendments to the Constitution, by a concurrence of two-thirds of the whole number, in applications to Congress for the purpose,” Madison wrote both that the states could ask their senators to propose an “explanatory amendment” clarifying that the Alien and Sedition Acts were unconstitutional, and also that two-thirds of the Legislatures of the states “might, by an application to Congress, have obtained a Convention for the same object.”

As illustrated by Madison’s Report on the Virginia Resolutions, no one in the founding era thought the states were somehow preempted or otherwise disabled by Article V in setting the agenda of the convention for proposing amendments and securing desired amendments through the convention. An Article V convention was obviously not regarded as an autonomous body following an agenda and populated by delegates selected by Congress. An Article V convention was meant to bypass Congress, as a “convention of the states.” As such, it is only logical to conclude that the states would determine who will represent them at the convention, how they will represent them, how they will run the convention, what they will propose, and how the states will respond to those proposals. This basic principle further reinforces the conclusion that the Compact for a Balanced Budget does not trench on any power delegated to the federal government by fully occupying the space of convention logistics—hence there is no need for Congressional consent for the compact to be validly formed, although such consent is unavoidably necessary before the compact’s contemplated convention call and ratification referral can be effective.

## VI. PRESIDENTIAL PRESENTMENT IS NOT NECESSARY FOR CONGRESSIONAL CONSENT

Another concern occasionally expressed about the Compact is that the counterpart congressional concurrent resolution,

which gives implied consent to the Compact by calling the convention and pre-selecting legislative ratification in accordance with its terms, would require Presidential presentment, as do ordinary bills.<sup>55</sup> However, the Supreme Court has already ruled in *Hollingsworth v. Virginia* that Congress' role in the Article V amendment process does not implicate Presidential presentment.<sup>56</sup> Although this ruling was applied specifically to the congressional proposal of amendments, there is every reason to conclude that Congress' convention call and ratification referral powers would be treated the same way, even if exercised by way of a resolution giving implied consent to an interstate compact.

Even more so than the congressional proposal of amendments in *Hollingsworth*, Congress' call and ratification referral powers under Article V are purely ministerial, procedural powers of the sort not ordinarily subject to Presidential presentment. Simply put, the contemplated concurrent resolution's exercise of Congress' Article V call and ratification referral power is similar in legal effect to the direct proposal of constitutional amendments. In both cases, Congress is merely channeling a legislative proposal for further action by other bodies—it is not, itself, making federal law.

If anything, the convention call component of the contemplated resolution has an even more attenuated relationship to law-making than does the direct congressional proposal of amendments. This is because any convention call will precede *both* the convention's proposal of an amendment (which is not guaranteed) *and* the ultimate ratification referral. The exercise of such call power is far more like an exercise of the rulemaking power conferred by the Constitution exclusively upon each House of Congress,<sup>57</sup> to which Presidential presentment clearly does not apply, than it is like ordinary law-making.

A different conclusion is not warranted by the fact that a concurrent resolution exercising such powers in accordance with the Compact would be construed as giving implied congressional consent to the Compact. There is no textual difference between the role of the President in regard to the Compact Clause (Article I, Section 10, of the U.S. Constitution) and the role of the President in regard to the congressional proposal of amendments under Article V. In both provisions, the text of the Constitution articulates no role for the President whatsoever. Where the Constitution is silent, as here, the Supreme Court has ruled that Presidential presentment applies only to congressional actions that are *equivalent to ordinary lawmaking*.<sup>58</sup>

As discussed above, in substance, the contemplated congressional resolution is no more like ordinary lawmaking than is the direct congressional proposal of amendments under Article V. Although congressional consent has been regarded as rendering an interstate compact the functional equivalent of federal law, this doctrine has only been applied in the context of such consent being furnished by *federal statute*.<sup>59</sup> In the absence of consent being furnished by federal statute, the legal effect of any congressional consent would be entirely derivative of the member states' own underlying sovereign power, not ordinary federal law making, to which Presidential presentment obviously does not apply.<sup>60</sup> Thus, like the direct congressional proposal of amendments, which is meant to facilitate subsequent legislative action, the contemplated counterpart congressional resolution

does not implicate legislative action that is equivalent to ordinary lawmaking by exercising congressional call and ratification referral powers.<sup>61</sup> Therefore, its passage does not require Presidential presentment.

## VII. EXISTING ARTICLE V APPLICATIONS ARE IN THE EYE OF THE BEHOLDER

The last few criticisms of the Compact for a Balanced Budget come from the great and venerable Lew Uhler, a key member of the Reagan-Friedman drive for a Balanced Budget Amendment in the 1970s and 80s. Uhler criticizes the Compact for a Balanced Budget for starting the Article V application process from scratch and failing to aggregate 23 (or 24) existing Article V applications that seek a balanced budget amendment convention.<sup>62</sup> But the claim that 23 or 24 applications exist that can be aggregated to trigger a convention call cannot be sustained if one takes the Founders at their word that the Article V convention process was meant to allow the states to obtain the amendments they desired.

The truth is that only a handful of the supposedly 23 or 24 Article V applications actually call for the same convention agenda. The remaining applications are a grab bag of resolutions that differ in significant respects. For example, one application from Mississippi, which was passed in 1979, very clearly seeks a convention agenda that would consider only one specific amendment proposal—and the text of that amendment is even specified in the application.<sup>63</sup> If a convention were to be organized in accordance with the intent expressed by the states in their applications, it is hard to see how this application could be viewed as capable of being aggregated with applications that request the calling of a convention that could consider a broader array of balanced budget amendment proposals.

The same problem crops up with aggregating the applications that specifically call for a convention for proposing a balanced budget amendment, but with a wide variety of emergency spending exceptions.<sup>64</sup> It is doubtful that those states intended for their applications to be aggregated with others that have no such exceptions, and thereby risk Congress calling a convention with an agenda that would include the possible proposal of a balanced budget amendment without exceptions.<sup>65</sup> And a similar problem crops up with the applications that coyly apply for a balanced budget amendment convention “alternatively” to Congress proposing such an amendment—but without imposing a deadline on Congress to act.<sup>66</sup> It is unclear whether those applications will ever go or stay “live” because Congress could always propose a balanced budget amendment at any time and thereby render them inactive.

In view of these substantive differences, by proclaiming that 23 or 24 Article V applications exist that Congress must aggregate, Uhler is essentially proclaiming that Congress will presume the power to mix and match applications that neither activate on the same terms nor seek the same convention agenda. Apparently, Uhler believes that the aggregation of applications would be based on Congress' sole and discretionary judgment that they are “close enough.” But ascribing such discretion to Congress is contrary to the text of Article V which references “Application” in the singular, implying that two-thirds of the

state legislatures would be concurring in the same application. It is also contrary to the text of Article V that indicates that Congress' role in calling the convention was meant to be ministerial, mandatory and non-discretionary; including the text in Article V stating Congress "shall call" the convention and the representation in Federalist No. 85, that Congress' role would be "peremptory." It is entirely possible that Congress would rightfully refuse to aggregate such a grab-bag of different Article V applications because doing so would require the constitutionally impermissible exercise of a large degree of non-ministerial judgment and discretion.

But even if Congress played along with the grab-bag approach to Article V, a successful aggregation of applications that do not seek the same convention agenda on the same terms would be a disaster for the wider Article V movement. It would set a precedent that Congress is entitled to cobble together applications to produce a convention agenda, which was never actually sought by the state applicants. In other words, Congress would be empowered to call a convention with an agenda largely determined by Congress. That would tend to consolidate all amendment power in Congress, rather than allowing the states to have a parallel means of obtaining the amendments they desire—hardly what "Fivers" or originalists should want from the process.

Getting to an Article V convention should not be an end-in-itself. Hopefully, Uhler and others like him will reconsider their support for this short-sighted approach to Article V.

#### VIII. THE COMPACT IS NOT OVERLY RESTRICTIVE

Uhler also contends that the Compact for a Balanced Budget deviates from constitutional requirements by pre-committing member state delegates to voting up or down the proposal of a specific balanced budget amendment. In response, it should be observed that nothing in the text of Article V requires states to organize a "black box" drafting convention. As discussed above, the founding-era evidence is replete with repeated and sustained representations that the states would have an equal power with Congress to propose desired amendments through the Article V convention process. These representations, if taken as true, imply the states would have the same ability as Congress to direct the convention process by proposing specific amendments.<sup>67</sup>

The Article V convention was meant to be an instrumentality of the states, not an independent agency with a mysterious constitutional reform agenda of its own. No Founder, after all, ever expressed the distinctly modern view that the states must first organize an Article V convention to find out what constitutional amendments it might propose. If anything, as evidenced by the arguments of Federalist No. 85, discussed above, the Founders took pains to distinguish the Article V amendment process from the secrecy-shrouded Philadelphia Convention, which many opponents of the Constitution claimed was inadequately faithful to the states that organized it.

Uhler's criticism also fails to grasp the mechanism by which the Compact sets and limits the agenda. Although the application nested in the Compact sets the agenda, it is actually the delegate instructions set out in the Compact that cause the

adoption of convention rules that limit the agenda to an up or down vote on the contemplated Balanced Budget Amendment. As the first order of business, delegates are strictly instructed to adopt the Compact's contemplated convention rules, which require an up or down vote on the contemplated amendment, or else they forfeit their authority in a variety of ways.<sup>68</sup>

In other words, the scope limitations of the compact are enforced based on the agency principle that the delegates are the agents of the states that send them. Thus, the extent of targeting in the Compact only differs in degree, not kind, from the custom and practice of more than a dozen interstate and inter-colonial conventions that were organized prior to the ratification of the U.S. Constitution. Simply put, it was usual and customary for states to set the agenda for any such convention and to instruct their delegates specifically on what to advance and address at the convention.<sup>69</sup> Delegates were regarded as "servants" of the states that sent them. As their "master," under ordinary understandings of agency law, states have every right and power to circumscribe the authority of their delegates as tightly as they wish. Because no convention is ever organized in response to the Compact before three-fourths of the states join it, this virtually guarantees that the delegates of member states will control a quorum at the convention by any reasonable measure—and the contemplated rules and limited agenda will win the day.

This last point underscores the superiority of the Compact approach for advancing and ratifying a powerful balanced budget amendment. Simply put, without an agreement in advance among the states directing the convention process, which also co-opts Congress, you have no idea what you are going to get, if anything, from the incredibly difficult process of organizing an Article V convention. Most importantly, before shouldering the heavy lift of securing convention applications from two-thirds of the states, you have no way of determining whether Congress will be friend or foe in the process.

#### IX. CONGRESS HAS LEVERAGE

As the Congressional Research Service recently emphasized, Congress has never regarded its role in Article V as purely ministerial.<sup>70</sup> As analyst Thomas Neale puts it, Congress "has traditionally asserted broad and substantive authority over the full range of the Article V Convention's procedural and institutional aspects from start to finish."<sup>71</sup> Congress has repeatedly introduced bills that purport to give it a substantial role in delegate selection, convention rules and even setting or enforcing the convention agenda.<sup>72</sup> All of these efforts are power grabs in view of the public understanding of the purpose of Article V discussed above, but they nevertheless pose a real and substantial political and litigation risk. Furthermore, even if Congress called a convention with no federal strings attached on the front end, there is no guarantee that Congress would not set an impossibly short ratification sunset date for any proposal it disliked on the back end.

In short, whether Fivers like it or not, Congress has significant leverage in the Article V amendment process. By fully occupying all logistical spaces and then deliberately seeking to co-op Congress at the states' time of choosing—using the plat-

form of a Compact Commission to unite the states and enable them to parlay institution-to-institution, the Compact approach minimizes the risk that Congress will abuse that leverage. This, in turn, allows the Compact effort to neutralize the principal political and litigation risk to the Article V movement—the erroneous view that Congress, not the states, control convention logistics in significant ways.<sup>73</sup>

But even if Congress took an uncharacteristic hands-off approach to the Article V convention process, a compact-organized Article V convention remains the superior approach for a balanced budget amendment. This is because the organization of a convention of indefinite duration populated by as-of-yet unidentified delegates governed by as-of-yet unidentified rules is as likely to produce deadlock or to generate something worthless as something worthwhile. Even if a worthwhile balanced budget amendment were proposed, the drafting convention approach would still require the subsequent step of ratification. And there is no guarantee that any amendment proposed by the convention would secure ratification from the requisite 38 states.

#### X. BOTTOM LINE: YOU KNOW WHAT YOU'RE GOING TO GET WITH THE COMPACT APPROACH

By contrast, with the Compact for a Balanced Budget, you know what you are going to get. The text of the contemplated balanced budget amendment is known in advance. The identities of convention delegates are known in advance. The convention agenda and rules are known in advance. The convention itself would be limited to 24 hours, ensuring that the fiscal impact of the convention itself is minimal. The amendment would be ratified if it is approved by the convention because the Compact pre-commits each member state to ratifying the contemplated amendment. Congress' willingness to call the convention in accordance with the Compact would be known in advance because the introduction of the requisite congressional resolution could be sought whenever the political stars align (the conditional enactments utilized in the resolution would allow the resolution to lie dormant if sought early, and later activate).

The Compact's amendment payload would be worth the effort. Imposing a fixed constitutional debt limit, which requires a referendum of the states on any debt limit increase, would increase transparency and be far more likely to generate a balanced budget than the status quo of limitless debt spending.

With the Compact's balanced budget amendment in place, Washington would no longer have the ability to set its own credit limit and write itself a blank check. The states would become an active board of directors charged with keeping an eye on our wayward federal CEO and staff. Debt would finally become scarce. Priorities would have to be set. Sustainable federal programs would have to become the norm. A broad national consensus—not midnight hour panic—would have to support any further increases in the national debt.

Of course, before this crucial reform can become a reality, 36 more states must join the Compact (to reach the ratification threshold of three-fourths of the states) and simple majorities of Congress must approve it. But this can be done in as little as twelve months because the Compact for a Balanced Budget consolidates everything states do in the constitutional amend-

ment process into a single agreement among the states that is enacted once by each state; and everything Congress does in a single resolution passed once. This greatly simplifies the cumbersome amendment process outlined in Article V of the United States Constitution, which would otherwise take more than one hundred legislative actions—a process that no one, not even Ronald Reagan, Milton Friedman or Lew Uhler, has ever successfully navigated to its conclusion despite decades of trying.

Not only is the Compact's payload worth the effort, the Compact approach is clearly a superior Article V vehicle for advancing and ratifying a balanced budget amendment.

It is time for Fivers to upgrade.

#### Endnotes

1 Treasury Direct, *The Debt to the Penny and Who Holds It*, <http://www.treasurydirect.gov/NP/debt/current>.

2 Whet Moser, *Remember When Barack Obama Voted Against Raising the Debt Limit?*, CHICAGO MAGAZINE (July 14, 2011), <http://www.chicagomag.com/Chicago-Magazine/The-312/July-2011/Remember-When-Barack-Obama-Voted-Against-Raising-the-Debt-Limit/>.

3 US National Debt and Deficit History, Chart 4.02, [http://www.usgovernmentsdebt.us/debt\\_deficit\\_history](http://www.usgovernmentsdebt.us/debt_deficit_history).

4 US Debt Clock, <http://www.usdebtclock.org/>.

5 LAURENCE J. KOTLIKOFF, ASSESSING FISCAL SUSTAINABILITY, MERCATUS INSTITUTE, GEORGE MASON UNIVERSITY 4 (Dec. 12, 2013), [http://mercatus.org/sites/default/files/Kotlikoff\\_FiscalSustainability\\_v2.pdf](http://mercatus.org/sites/default/files/Kotlikoff_FiscalSustainability_v2.pdf).

6 Georgia General Assembly, Legislation, Enactment History of HB794, <http://www.legis.ga.gov/legislation/en-US/Display/20132014/HB/794>.

7 Georgia General Assembly, Legislation, Enactment History of HB284, [http://www.legis.state.ak.us/basis/get\\_bill.asp?bill=HB%20284&session=28](http://www.legis.state.ak.us/basis/get_bill.asp?bill=HB%20284&session=28).

8 Although the effective date of Alaska's HB284 is July 21, 2014, the contractually binding nature of Alaska's adoption of the compact proposed by HB794 is not tethered to that effective date. Georgia's HB794 has been effective since it was signed on April 12, 2014. By its express terms, HB794 becomes contractually binding on Georgia immediately upon enactment of counterpart legislation by another state and Georgia's receipt of seasonable notice. The relevant language of the compact (Article III, section 2) provides: "in addition to having the force of law in each Member State upon its respective effective date, this Compact and each of its Articles shall also be construed as contractually binding each Member State when: (a) at least one other State has likewise become a Member State by enacting substantively identical legislation adopting and agreeing to be bound by this Compact; and (b) notice of such State's Member State status is or has been seasonably received by the Compact Administrator, if any, or otherwise by the chief executive officer of each other Member State." HB794, <http://www.legis.ga.gov/Legislation/20132014/144709.pdf>. In essence, Georgia invited acceptance of its offer to compact through performance without specifying a deadline for acceptance. As a result, under ordinary contractual principles, upon Alaska's part performance of the terms of acceptance (enactment of HB284), Georgia became contractually obligated thereafter to keep its offer open for a reasonable period of time—and certainly that time will not expire before the effective date of Alaska's legislation. RESTATEMENT (SECOND) OF CONTRACTS, §§ 41, 45 (1981). Therefore, by enacting the counterpart compact legislation HB284 and giving seasonable notice, the State of Alaska has performed the terms of acceptance proposed by HB794; and the Compact has been formed, although its various provisions will not have the force of law *in Alaska* until July 21, 2014. *Oklahoma v. New Mexico*, 501 U.S. 221, 236 (1991) (holding contractual principles, as well as statutory interpretive principles, govern the interpretation of a compact).

9 See HB284/HB794, Article IV, section 9, <http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF>, <http://www.legis.ga.gov/Legislation/20132014/144709.pdf>.

10 See *id.*, Article II, section 7.

11 *Id.* (section 2).

12 *Id.* (section 1).

13 *Id.* (section 6).

14 *Id.* (section 4).

15 *Id.* (section 5).

16 *Id.* (section 3).

17 *Id.*

18 *Id.* (section 4).

19 George Will, *Amend the Constitution to Control Federal Spending*, WASH. POST (Apr. 9, 2014), [http://www.washingtonpost.com/opinions/george-will-amend-the-constitution-to-control-federal-spending/2014/04/09/00fa7df6-bf3c-11e3-bcec-b71ee10e9bc3\\_story.html](http://www.washingtonpost.com/opinions/george-will-amend-the-constitution-to-control-federal-spending/2014/04/09/00fa7df6-bf3c-11e3-bcec-b71ee10e9bc3_story.html).

20 See HB284/HB794, <http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF>, <http://www.legis.ga.gov/Legislation/20132014/144709.pdf>.

21 Georgia General Assembly, House Bill 794, <http://www.legis.ga.gov/Legislation/20132014/144709.pdf>.

22 Model Congressional Resolution, <http://goldwaterinstitute.org/sites/default/files/CFA%20-%20Text%20-%20Cong%20Omnibus%20Resolution%20Final%282%29.pdf>.

23 HB284/HB794, Article V, section 3, <http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF>, <http://www.legis.ga.gov/Legislation/20132014/144709.pdf>.

24 HB284/HB794, Article IX, section 2, <http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF>, <http://www.legis.ga.gov/Legislation/20132014/144709.pdf>.

25 Goldwater Institute, Model Congressional Resolution, Title I, section 103, <http://goldwaterinstitute.org/sites/default/files/CFA%20-%20Text%20-%20Cong%20Omnibus%20Resolution%20Final%282%29.pdf>.

26 *Id.*, Title II, section 202.

27 HB284/HB794, Article VI, <http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF>, <http://www.legis.ga.gov/Legislation/20132014/144709.pdf>.

28 *Id.*, Article VII.

29 *Id.*, Article VI, section 9.

30 *Id.*, Article VI, section 10.

31 *Id.*, Article VIII, section 3.

32 See, e.g., Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. 99-240, Title II, 99 Stat. 1842, 1859 (1986), available at <http://www.gpo.gov/fdsys/pkg/STATUTE-99/pdf/STATUTE-99-Pg1842.pdf>; Northeast Interstate Dairy Compact, 7 U.S.C. § 7256 (1996).

33 See, e.g., Compact of Free Association Act of 1985, Pub. L. 99-239, Title II, 99 Stat. 1770, 1800, available at <http://www.gpo.gov/fdsys/pkg/STATUTE-99/pdf/STATUTE-99-Pg1770.pdf>; Jennings Randolph Lake Project Compact authorized, W. VA. CODE § 29-1J-1 (1994); Interstate Compact on Licensure of Participants in Live Racing with Parimutuel Wagering, KY. REV. STAT. § 230.3751 (2001); Interstate Compact on Juveniles, WYO. STAT. § 14-6-102 (1977).

34 See, e.g., *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *Opinion of the Justices*, 287 Ala. 326 (1971); *Thalheimer v. Board of Supervisors of Maricopa County*, 11 Ariz. 430, 94 P. 1129 (Ariz. Terr. 1908); *Thomas v. Trice*, 145 Ark. 143 (1920); *Busch v. Turner*, 26 Cal. 2d 817 (1945); *People ex rel. Moore v. Perkins*, 56 Colo. 17 (1913); *Pratt v. Allen*, 13 Conn. 119 (1839); *Rice v. Foster*, 4 Harr. 479 (De. 1847); *Opinion to the Governor*, 239 So. 2d 1 (Fla. 1970); *Henson v. Georgia Industrial Realty Co.*, 220 Ga. 857 (1965); *Gillesby v. Board of Commissioners of Canyon County*, 17 Idaho 586 (1910); *Wirtz v. Quinn*, 953 N.E.2d 899 (Ill. 2011); *Lafayette, M&BR Co. v. Geiger*, 34 Ind. 185 (1870); *Colton v. Branstad*, 372 N.W. 2d 184 (Iowa 1985); *Phoenix Ins. Co. of N.Y. v. Welch*, 29 Kan. 672 (1883); *Walton v. Carter*, 337 S.W. 2d 674 (Ky. 1960); *City of Alexandria v. Alexandria Fire Fighters Ass'n, Local No. 540*, 220 La. 754 (1954); *Smigiel v. Franchot*, 410 Md. 302 (2009); *Howes Bros. Co. v. Mass. Unemployment Compensation Commission*, 296 Mass. 275 (1936);

*Council of Orgs. & Ors. For Educ. About Parochiaid, Inc. v. Governor*, 455 Mich. 557 (1997); *State v. Cooley*, 65 Minn. 406 (1896); *Schuller v. Bordeaux*, 64 Miss. 59 (1886); *In re O'Brien*, 29 Mont. 530 (1904); *Akin v. Director of Revenue*, 934 S.W.2d 295 (Mo. 1996); *State v. Second Judicial Dist. Ct. in & for Churchill County*, 30 Nev. 225 (1908); *State v. Liedtke*, 9 Neb. 490 (1880); *State ex rel. Pearson*, 61 N.H. 264 (1881); *In re Thaxton*, 78 N.M. 668 (1968); *People v. Fire Ass'n of Philadelphia*, 92 N.Y. 311 (1883); *Fullam v. Brock*, 271 N.C. 145 (1967); *Enderson v. Hildenbrand*, 52 N.D. 533 (1925); *Gordon v. State*, 23 N.E. 63 (Ohio 1889); *State ex rel. Murray v. Carter*, 167 Okla. 473 (1934); *Hazell v. Brown*, 242 P.3d 743 (Or. App. 2010); *Appeal of Locke*, 72 Pa. 491 (1873); *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634 (1999); *Clark v. State ex rel. Bobo*, 113 S.W.2d 374 (Tenn. 1938); *State Highway Dept. v. Gorham*, 139 Tex. 361 (1942); *Bull v. Reed*, 54 Va. 78 (1855); *State v. Baldwin*, 140 Vt. 501 (1981); *State ex rel. Zilisch v. Auer*, 197 Wis. 284 (1928); *Brower v. State*, 137 Wash. 2d 44 (1998); *Le Page v. Bailey*, 114 W. Va. 25 (1933).

35 See, e.g., *State v. Dumler*, 559 P.2d 798 (Kan. 1977); *Bracey Advertising Co. v. North Carolina Dept. of Transportation*, 241 S.E.2d 146 (N.C. Ct. App. 1978).

36 *Helmsley v. Borough of Ft. Lee*, 394 A.2d 65, 82 (N.J. 1978). Of course, this robust general rule is not totally without exception. In a case of first impression, the Missouri Supreme Court recently rejected the use of contingent effective dates where a legislative act was made contingent on the passage of another act on a “completely different matter” because doing so violated a state constitutional single subject rule. *Missouri Roundtable for Life, Inc. v. State*, 396 S.W.3d 348 (Mo. 2013). The Compact’s contingent effective dates, however, do not pose a single subject rule violation. The contingencies are subject to the passage of legislation that obviously relates to the same purpose as the Compact; specifically, the passage of substantially identical compact language in other states and the congressional components of the Article V process the Compact invokes. Thus, the contingent effective dates in the Compact are exactly like the contingency upheld in *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 299 (Mo. 1996), in which the Missouri Supreme Court ruled the “legislature may constitutionally condition a law to take effect upon the happening of a future event.”

37 *Helmsley*, 394 A.2d at 83.

38 Federalist No. 43 in *The Federalist (The Gideon Edition)*, Edited with an Introduction, Reader’s Guide, Constitutional Cross-reference, Index, and Glossary by George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), available at [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=788&chapter=108643&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=788&chapter=108643&layout=html&Itemid=27)

39 Reply to George Mason’s Objections to the Constitution, *New Jersey Journal*, (December 19, 26, 1788) in *The Documentary History of the Ratification of the Constitution Digital Edition*, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009, available at [http://history.wisc.edu/csac/documentary\\_resources/ratification/attachments/nj%20a%20reply%20to%20george%20mason.pdf](http://history.wisc.edu/csac/documentary_resources/ratification/attachments/nj%20a%20reply%20to%20george%20mason.pdf).

40 Letters of a Citizen of New Haven in Friends of the Constitution: Writings of the “Other” Federalists, 1787-1788, edited by Colleen A. Sheehan and Gary L. McDowell, p. 271 (Indianapolis: Liberty Fund, 1998), available at [http://files.libertyfund.org/files/2069/Sheehan\\_0118\\_Bk.pdf](http://files.libertyfund.org/files/2069/Sheehan_0118_Bk.pdf).

41 Jonathan Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, vol. 3, pp. 101-02 (Virginia) (1827), available at [http://files.libertyfund.org/files/1907/1314.03\\_Bk.pdf](http://files.libertyfund.org/files/1907/1314.03_Bk.pdf).

42 Federalist No. 85 in *id.*, available at [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=788&chapter=108727&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=788&chapter=108727&layout=html&Itemid=27).

43 *Cuyler v. Adams*, 449 U.S. 433, 441 (1981); *Wharton v. Wise*, 153 U.S. 155 (1894); *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893); *Green v. Biddle*, 21 U.S. 1, 39-40 (1823).

44 *Cuyler*, 449 U.S. at 440; *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452, 459 (1978) (holding congressional consent is only required for an interstate compact that attempts to enhance “states power quoad [relative to] the federal government”).



45 HB284/HB794, Article VI, section 4, Article VIII, section 1, <http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF>, <http://www.legis.ga.gov/Legislation/20132014/144709.pdf>.

46 *U.S. Steel*, 434 U.S. at 479 n. 33.

47 Federalist No. 43 in *The Federalist* (The Gideon Edition), Edited with an Introduction, Reader's Guide, Constitutional Cross-reference, Index, and Glossary by George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), available at [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=788&chapter=108643&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=788&chapter=108643&layout=html&Itemid=27).

48 The Writings of George Washington, collected and edited by Worthington Chauncey Ford, Vol. XI (1785-1790), p. 249 (New York and London: G. P. Putnam's Sons, 1890), available at [http://files.libertyfund.org/files/2415/Washington\\_1450-11\\_Bk.pdf](http://files.libertyfund.org/files/2415/Washington_1450-11_Bk.pdf).

49 Jonathan Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, vol. 3, pp. 102 (Virginia) (1827), available at [http://files.libertyfund.org/files/1907/1314.03\\_Bk.pdf](http://files.libertyfund.org/files/1907/1314.03_Bk.pdf).

50 Federalist No. 85 in *The Federalist* (The Gideon Edition), Edited with an Introduction, Reader's Guide, Constitutional Cross-reference, Index, and Glossary by George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), available at [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=788&chapter=108727&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=788&chapter=108727&layout=html&Itemid=27).

51 See, e.g., *Journals of the Continental Congress, Proceedings*, vol. VI, at 189 (June 1780) (application from New Hampshire); *id.* at 331 (October 1780) (application from New York), available at <https://play.google.com/store/books/details?id=QmgFAAAAQAAJ&rdid=book-QmgFAAAAQAAJ&rdot=1>.

52 See, e.g., *id.*

53 Robert Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Goldwater Institute Policy Report No. 241, at 15-18 (Sept. 16, 2010).

54 The Writings of James Madison, comprising his Public Papers and his Private Correspondence, including his numerous letters and documents now for the first time printed, Vol. 6, pp. 403-04 (ed. Gaillard Hunt, New York: G.P. Putnam's Sons, 1900), available at [http://files.libertyfund.org/files/1941/1356.06\\_Bk.pdf](http://files.libertyfund.org/files/1941/1356.06_Bk.pdf).

55 U.S. CONST. art. I, § 7, cl. 2.

56 *Hollingsworth v. Virginia*, 3 U.S. 378 (1798); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 460 (D.C. Cir. 1982); Special Constitutional Convention Study Committee, American Bar Association, *Amendment of the Constitution by the Convention Method under Article V* 25 (1974).

57 U.S. CONST. art. I, § 5 cl. 2.

58 *Ins v. Chadha*, 462 U.S. 919, 951 (1983); *Myers v. United States*, 272 U.S. 52, 123 (1926).

59 See, e.g., *New Jersey v. New York*, 523 U.S. 767, 811 (1988) (holding that congressional approval “transforms an interstate compact within [the Compact Clause] into a law of the United States”); *Bryant v. Yellen*, 447 U.S. 352, 369 (1980); *McKenna v. Washington Metropolitan Area Transit Authority*, 829 F.2d 186 (D.C. Cir. 1987).

60 See, e.g., *Poole v. Fleecker's Lessee*, 36 U.S. 185, 1837 Westlaw 3559, \*24 (1837) (Baldwin, J., concurring) (“[t]he effect of such consent is, that thenceforth, the compact has the same force as if it had been made between states who are not confederated . . . or as if there had been no restraining provision in the constitution. Its validity does not depend on any recognition or admission in or by the constitution, that states may make such compacts with the consent of congress; the power existed in the states, in the plenitude of their sovereignty, by original inherent right; they imposed a single restraint upon it, but did not make any surrender of their right, or consent to impair it to any greater extent. Like all other powers not granted to the United States, or prohibited to the states, by the constitution, it is reserved to them, subject only to such restraints as it imposes, leaving its exercise free and unlimited in all other respects, without any auxiliary by any implied recognition or admission of the existence of the general power, consequent upon the particular limitation”).

61 Compare *Ins v. Chadha*, 462 U.S. 919, 951 (1983), with *Hollingsworth v. Virginia*, 3 U.S. 378 (1798).

62 Lew Uhler, *Discipline of the Federal Fisc—Article V*, HUMAN EVENTS, Apr. 29, 2014, <http://www.humanevents.com/2014/04/29/discipline-of-the-federal-fisc-article-v/>.

63 125 CR 2111 (HCR51 (MS 1979)).

64 See, e.g., HJR548 (TN 2014); SJR5 (OH 2013); 125 CR 3007 (R5 (NC 1979)); 125 CR 2112 (SJR (NM 1979)); 126 CR 1104 (SJR8 (NV 1980)); SR371 (GA 2014); 125 CR 9188 (SJR1 (IN 1979)); 125 CR 2110 (SCR1661 (KS 1979)); SJR4 (MD 1977); SJRV (MI 2013).

65 See, e.g., 129 CR 20352 (SCR3 (MO 1983)); 125 CR 15227 (SJR1 (IA 1979)).

66 See, e.g., 125 CR 2112 (LR106 (NB 1979)); 125 CR 2113 (R236 (PA 1979)); 125 CR 5223 (HCR31 (TX 1979)).

67 A similar conclusion has been reached by numerous experts. See, e.g., Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, CONSTITUTIONAL COMMENTARY, Vol. 81, p. 53 (2012); Mike Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765 (2011); Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J. LAW & PUB. POL'Y 1005, 1022 (2007).

68 First, the Compact's limitations on delegate authority and instructions are enforced by automatic forfeiture of the appointment of all delegates for that Member State if any delegate violates such limitations and instructions (see HB284/HB794, Article VI, section 10, <http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF>, <http://www.legis.ga.gov/Legislation/20132014/144709.pdf>). Second, the legislature of the respective member state could also immediately recall and replace the runaway delegate (see *id.*, sections 3 and 4). Third, if such behavior were disorderly, in addition to all other standard means of maintaining order and enforcing the rules furnished under Robert's Rules of Order and the American Institute of Parliamentarians Standard Code of Parliamentary Procedure, the Chair of the Convention could suspend proceedings and the Commission could relocate the Convention as needed to resume proceedings with a quorum of states participating (see *id.*, Article VII, Sections 2, 7 and 8). Fourth, a declaratory judgment ruling all actions of the runaway delegate “void ab initio” and an injunction or temporary restraining order forcing the delegate to cease participation and to return to his or her state capitol would be another option because attorneys general of each member state are required to seek injunctions to enforce the provisions of the Compact (compare *id.*, Article X, section 3, with *id.*, Articles VI, sections 6, 7, 10). These delegate-specific direct enforcement mechanisms are in addition to the following backstop “kill-switches” (which every member state attorney general must also enforce): 1) the prohibition on Member States participating in the Convention unless the Compact rules are adopted as the first order of business (*id.*, Article VIII, section 1(b)); 2) the prohibition on transmission of any amendment proposal from the Convention other than the contemplated amendment (*id.*, Article VII, section 9); 3) the nullification of any Convention proposal other than the contemplated amendment (compare *id.*, Article VIII, section 2(a), with *id.*, Articles VI, sections 6, 7, 10, and *id.*, Article VII, section 2); and 4) the disapproval of ratification of any amendment by all Member States other than the contemplated amendment (*id.*, Article VIII, section 3).

69 See, *inter alia*, Robert Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Goldwater Institute Policy Report No. 241 (Sept. 16, 2010).

70 THOMAS H. NEALE, CONGRESSIONAL RESEARCH SERVICE, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS 18 (Apr. 11, 2014), [www.fas.org/sgp/crs/misc/R42589.pdf](http://www.fas.org/sgp/crs/misc/R42589.pdf).

71 *Id.*

72 *Id.* at 36 (“Between 1973 and 1992, 22 bills were introduced in the House and 19 in the Senate that sought to establish a procedural framework that would apply to an Article V Convention. Proponents argued that constitutional convention procedures legislation would eliminate many of the uncertainties inherent in first-time consideration of such an event and would also facilitate contingency planning, thus enabling Congress to respond in an orderly fashion to a call for an Article V Convention. The Senate, in fact, passed constitutional convention procedures bills, the “Federal Constitutional Convention Procedures Act,” on two separate occasions: as S. 215 in 1971 in the 92nd Congress, and

as S. 1272 in 1983, in the 98th Congress”).

73 Congressional implied consent could be construed as transforming the Compact’s terms and conditions relating to the Article V convention it organizes into the functional equivalent of federal law for procedural purposes under current precedent, if Congress’ call power were wrongly regarded as entailing such power. *See, e.g., New Jersey*, 523 U.S. at 811; *Bryant*, 447 U.S. at 369; *McKenna*, 829 F.2d 186.

