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Using a Compact for Article V Amendments: *Experts Answer FAQs* *January 24, 2014*

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We have two paths under Article V of the United States Constitution for amendments that can reform Washington. One path requires two-thirds of each house of Congress to originate amendments. This path has been used twenty-seven times. The problem is that Congress has not tied its own hands for over 200 years, and shows no willingness to do so in the future.

The other path to reform involves states originating constitutional amendments. This path has never been used successfully to conclusion. The problem is that everyone walking that second path has been trying to pass over one hundred legislative enactments across five or more legislative sessions. Not surprisingly, no one has succeeded. But a better approach has been developed for well-formed reform ideas that already command super majority support. It involves the states compacting—agreeing—to advance and ratify a constitutional amendment with the consent of Congress.

The Compact approach to Article V makes the second path to reform quicker, easier and more certain than ever before. It allows states to agree in advance to everything they control in the amendment process in a single bill passed once. It allows Congress to fulfill its entire role in the amendment process in a single resolution passed once. It cuts the time and resources needed to originate an amendment from the states by more than 60%. The ground-breaking nature of this approach to amending the Constitution has also raised important questions, which are answered by experts in this report.

The following answers to frequently asked questions represent the opinions and conclusions of Goldwater Institute Constitutional Policy Director Nick Dranias, Cato Institute Senior Fellow in Constitutional Studies Ilya Shapiro, American Academy for Constitutional Education Director Shane Krauser, *New York Times* Best-Selling Author and Professor of History at Western Connecticut State University, Dr. Kevin Gutzman, and Senior Judge Harold DeMoss of the United States Court of Appeals, Fifth Circuit.¹

EXECUTIVE SUMMARY

The Compact for a Balanced Budget is an agreement among the states that quickly and safely advances a powerful federal balanced budget amendment under Article V of the United States Constitution. Without this agreement in place, Article V would otherwise require the following legislative actions to take place before the Constitution would be deemed amended by the states: 1) two-thirds of the legislatures of the states would have to pass a resolution applying for Congress to call a convention for proposing amendments; 2) Congress would then need to pass a resolution calling the convention; 3) at least a majority of states would then need to pass resolutions or bills appointing and instructing delegates to the convention; 4) the convention would then need to meet and propose the amendment for ratification; 5) Congress would then need to pass a resolution referring that amendment to the States for ratification by legislative action or in-state convention; and 6) three-fourths of the states would then be required to pass resolutions ratifying the amendment or the same number must pass bills organizing in-state conventions and those conventions must ratify the proposed amendment.

By contrast, the Compact for a Balanced Budget allows the member states to agree in advance in a single piece of legislation to *all* components of the constitutional amendment process that the states control—from the application to Congress, to the text of the proposed amendment, to delegate selection and instructions, to convention logistics and rules, to the ultimate ratification. The amendment process is set in motion by a single counterpart congressional resolution, which impliedly consents to the Compact and completely fulfills Congress' role under Article V—from the call for the convention, to the ultimate ratification referral of the proposed amendment.

Using this “Compact for America” approach to Article V, a federal balanced budget amendment originating from the states can be proposed and ratified within the span of a single session year and with a grand total of 39 legislative actions. This is in stark contrast to what would otherwise be required to generate a constitutional amendment from the states under Article V without a compact—namely, 100+ legislative actions across five or more legislative sessions. The compact approach thereby promises to enable states to originate many other amendments long sought outside of Washington, including term limits and tax reform.

Naturally, this ground-breaking vehicle for reform has raised a number of important legal and constitutional questions. We welcome those questions because settled law and history provide clear answers.

¹ Judge DeMoss joins this publication in a personal capacity and should not be regarded as expressing an opinion of the United States Court of Appeals, Fifth Circuit.

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1. Can the States combine into one bill all of the legislative actions that must follow the sequence set forth in Article V to generate a constitutional amendment?

Yes. The key to consolidating so much sequentially-triggered legislation into the Compact’s two overarching legislative components (the interstate compact and the counterpart congressional resolution) is the use of contingent effective dates—also known as “conditional enactments” or “tie-barring”—to ensure that each piece of consolidated legislation only goes “live” at the right time.

By using contingent effective dates, the Compact is able to embed or “nest” each legislative stage of the amendment by convention process into a single enactment for the states and a single resolution for Congress. Each nested legislative component only becomes effective upon the happening of an appropriate trigger event. For example, the Compact’s nested Article V application is designed not to go live and trigger a convention call from Congress until at least 38 states join the compact and agree to be bound by its provisions. Similarly, the prospective ratification of the contemplated balanced budget amendment will only go live if Congress first enacts the counterpart omnibus concurrent resolution, which prospectively refers the BBA for legislative ratification, and only if the BBA is first proposed by the convention.

Such conditional enactments are common components of congressional legislation, including legislation approving interstate compacts,² as well as within many existing interstate and federal-territorial compacts.³ 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,⁴ including state laws that were enacted

² 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).

³ 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)

⁴ 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, McBR 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*

contingent on the passage of new federal laws.⁵ 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.”⁶ Courts defer to “broad legislative discretion”⁷ when conditional enactments are used.

Because a State’s authority over whether to apply for an Article V convention or to legislatively ratify an amendment is as plenary as any other form of legislation, it is therefore our finding and conclusion that the foregoing case law sustains the use of a conditional enactment in connection with Article V applications and ratifications. The novelty of this approach is no argument against the overwhelming weight and logic of centuries of case law that is directly on point.

In connection with this conclusion, it is 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. After all, the Compact’s pre-ratification is made subject to a conditional enactment that makes its effectiveness entirely contingent on: a) the convention proposing the balanced budget amendment; and b) Congress selecting

Commission, 296 Mass. 275 (1936); *Council of Orgs. & Ors. For Educ. About Parochialism, 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).

⁵ See, e.g., *State v. Dumlery*, 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).

⁶ *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.”

⁷ *Helmsley*, 394 A.2d at 83.

legislative ratification of that proposed amendment. Because of the foregoing conditional enactment, the 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.

To find a constitutional problem, one would have to resort to an argument that the Compact violates the "spirit" or purpose of Article V. But to the extent that the use of conditional enactments makes the ratification process more controllable by a legislature or the process more conducive to generating amendments from the states, the following FAQ answers demonstrate that effect is fully consistent with the public understanding and purpose of Article V at the time of the founding. Simply put, the text, original intent and purpose of Article V is fully consistent with using conditional enactments to embed multiple legislative actions within a compact to more easily originate specific constitutional amendments from the States.

2. Was it supposed to be extraordinarily difficult to originate constitutional amendments using an Article V convention?

Not really. 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, for example, 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."⁸

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. After all, Madison famously complained prior to the Philadelphia Convention that the unanimous alteration provision of the Articles of Confederation allowed Rhode Island, which had only 1/60th of the population of the country, to thwart the will of all other states in regard to delegating a tariff power to the Confederation Congress. There is no question amendments through Article V convention process are easier than that. The relative ease of amendments was also emphasized in Federalist No. 85, in which Alexander Hamilton represented there

⁸ 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

was “no comparison between the facility of affecting an amendment, and that of establishing in the first instance a complete Constitution.”⁹

The relative ease with which the Article V amendment process was meant to be utilized by the states was further emphasized during the ratification debates. 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.”¹⁰ Likewise, during the New Jersey ratification debates, 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.”¹¹ 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.”¹² No advocate of the ratification of the Constitution argued that the mode of amendment available to the States was meant to be difficult, much less extraordinarily difficult. No one intended for constitutional amendments to become an everyday occurrence, to be sure, but the Article V amendment process was never meant to be reserved only for the most extraordinary world-historical issues like ending slavery.

3. Does Article V require free-ranging legislative deliberation by different and independent legislative bodies acting as “circuit breakers” during each of its stages?

No. While free-ranging, independent legislative deliberation by distinct legislative bodies *can* take place in the course of the Article V amendment process, there is no founding era evidence that such deliberation was a *requirement* of the process. If anything, the best evidence indicates that the convention mode of proposing amendments was meant to

⁹ 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

¹⁰ 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

¹¹ 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

¹² 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

facilitate and streamline, not frustrate, the proposal of amendments desired by the States given the limitations of 18th Century technology. We know this by looking to the Report of Proceedings from the Philadelphia Convention on September 15, 1787 and to the understanding expressed by advocates of ratification as to how the states would coordinate and unify behind desired amendments.

The actual rationale given for the insertion of the convention mode of proposing amendments in Article V stands against any claim that the convention was meant to serve as an independently deliberative body, standing between the States and their desired amendments. As reported in Farrand, the original language of Article V as proposed by James Madison would have required Congress to propose amendments on application of two-thirds of the legislatures of the several States.¹³ To the modern eye, this original formulation would seem to be a more direct route for the States to obtain desired amendments. Nevertheless, on September 15, 1787, George Mason objected to this formulation because it made the proposal of amendments desired by the States entirely dependent upon Congress, and he feared Congress would not propose amendments that would limit its own power.¹⁴ To address Mason's objection, the congressional proposal of amendments on application of two-thirds of the State legislatures was replaced with the convention mode of proposing amendments, which Congress would call upon application of two thirds of the Legislatures of several States.

In short, the convention mode of proposing amendments was explicitly adopted in order to better guarantee that the States could obtain the proposal of desired amendments. This rationale is utterly inconsistent with the notion that an Article V convention was meant to be a freewheeling, independently deliberative body. However ironic that rationale may look to modern eyes, it makes perfect sense in light of the technological limitations of the 18th Century. After all, at the time, communications would take days, weeks or months to travel from state capitol to state capitol, traveling by horse, rather than by telegraph, telephone or email. Ensuring that the States all convened at a central location through their own representatives to propose desired amendments was simply a practical necessity to ensure unity and control over what was proposed.¹⁵

¹³ The Records of the Federal Convention of 1787, ed. Max Farrand, pp. 629-30 (New Haven: Yale University Press, 1911). Vol. 2, available at http://files.libertyfund.org/files/1786/0544-02_Bk.pdf

¹⁴ *Id.*

¹⁵ Indeed, given the technological limitations of the 18th Century, Mason's preferred formulation of Article V not only ensured state control over the formulation of proposed amendments, it actually streamlined the amendment process. After all, the states would have had to first organize an informal convention to reach consensus on their desired amendments before delivering conforming applications to Congress. Because an informal convention was a practical predicate to States making use of Madison's proposed amendment process, Mason's preferred formulation of Article V, which instead allows a formal convention of the States to directly propose amendments, actually sidestepped the additional hurdle imposed by Madison's original formulation of requiring the States to apply to Congress to propose amendments.

Not surprisingly, it was also a basic assumption of Federalists arguing for ratification of the Constitution that the *same* state legislatures applying for amendments through an Article V convention would concur in *both* their proposal *and* ratification. The convention itself was simply assumed to have no independent deliberative agency whatsoever. For example, George Washington argued in a letter to John Armstrong on April 25, 1788 that the “constitutional door is open for such amendments as shall be thought necessary by nine States.”¹⁶ Similarly, referring to both the application and ratification thresholds, Alexander Hamilton wrote in Federalist No. 85, “whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place . . . [n]or however difficult it may be supposed to unite two thirds or three fourths of the State legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people.”¹⁷ Likewise, the premise that the entire state-originated amendment process—from application to ratification—*could* be in the same state legislative hands is implicit in Hamilton’s closing argument of Federalist No. 85 that “[w]e may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.”¹⁸ It was also clearly the premise of George Nicholas’ argument at the Virginia ratification convention that “[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.”¹⁹

None of these representations would have been truthful if the Constitution actually *required* the Article V convention to have deliberative autonomy from the states that applied for it. None of these representations would have been truthful if the Constitution *required* the ratifying state legislature to be a distinct legislative body from the state legislature that originally applied for the proposal of amendments through a convention. *All* of these representations imply that independent, freewheeling legislative deliberation by different legislative bodies acting as circuit-breakers in successive stages was not a *requirement* of the Article V process.

¹⁶ 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

¹⁷ 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

¹⁸ *Id.*

¹⁹ 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

In conclusion, the Framers and Ratifiers anticipated that amendments desired by the states would ordinarily be applied for, proposed through the instrumentality of a convention, and ratified in a coordinated fashion by the same state legislatures united in their desire for specific amendments. For this reason, it is entirely consistent with Article V for the states to use the device of an interstate compact to enable them to do so.

4. Does an Article V convention have to involve more legislative deliberation than just an up or down vote on a pre-drafted amendment after entertaining debate on the topic?

Yes and no. First of all, it should be recalled that the States retain full, unbridled legislative discretion in considering whether to join or propose modifications to the Compact in the first place. The decision to join the Compact occurs only after a thorough legislative vetting of the amendment process it proposes and the public policy implications of the contemplated balanced budget amendment. Likewise, Congress' decision to call the convention in accordance with the Compact necessarily follows a period of free-ranging legislative deliberation. Prior to adopting the Compact, the States and Congress necessarily retain the power and ability to engage in the same breadth and depth of legislative deliberation that would otherwise take place at the most freewheeling stage of any non-compact approach to Article V.

Secondly, even after the Compact is enacted and delegates of member states are limited to voting up or down the contemplated balanced budget amendment for ratification at the convention it organizes, sufficient legislative deliberation is involved. This is because the essence of legislative deliberation is the discretion to consider, accept or reject public policy proposals. As such, legislative deliberation does not intrinsically require more than a discretionary up or down vote. Indeed, state legislatures have long entertained special sessions limited to considering or reconsidering specific bills or laws—essentially an up or down vote—without anyone questioning the existence of legislative deliberation in doing so. There is no reason to believe that an Article V convention requires greater deliberative latitude than this. After all, Article V's ratification convention process itself recognizes that there is nothing about legislative deliberation in the context of a “convention” that requires more than an up or down vote on a specific amendment proposal.²⁰ Moreover, Alexander Hamilton expressly distinguished the Article V amendment process from the sort of wide-ranging legislative deliberation that characterized the Philadelphia Convention.

In Federalist No. 85, Hamilton wrote: “But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There

²⁰ 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 (Spring 2011).

would then be no necessity for management or compromise, in relation to any other point no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue.”²¹ Significantly, Hamilton made the foregoing representation with regard to “every amendment,” including those brought forward by the States through an Article V convention, which implies that an Article V convention could be limited to an up or down vote on proposing a single amendment. This conclusion is further supported by the repeated representations of Framers and Federalists, discussed above, that state legislatures could use the Article V amendment process to apply for and ratify amendments they desired—representations that would be rendered false if an Article V convention could not be constrained to consider and propose only those amendments.

The foregoing analysis is not cast into doubt by any modern case striking down state laws or ballot initiatives seeking to compel the proposal of constitutional amendments or Article V applications by congressional candidates or legislative representatives.²² This is because the Compact does not compel anyone or anything to propose any amendment, nor does it place any power conferred by Article V to a designated body in the hands of anyone or anything that is not designated to exercise such power. The legislature of each member state has full deliberative authority to enact, amend or refuse to enact the Compact, including the Article V application, the contemplated balanced budget amendment, and prospective ratification contained therein. The delegates to the convention organized by the Compact also have deliberative authority to propose or reject proposing the constitutional amendment the Compact contemplates.

5. But can the States limit the Article V convention to considering a specific amendment?

Yes. The idea that the States cannot control the Article V convention process is entirely anachronistic. 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 not meant to be controlled by the States. All of the available Founding-era and near-Founding-era evidence shows that it was the public understanding of the

²¹ 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

²² See, e.g., *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999); *Barker v. Hazeltine*, 3 F.Supp.2d 1088 (D.S.D. 1998); *League of Women Voters of Me. v. Gwadosky*, 966 F. Supp. 52 (D.Me. 1997); *Bramberg v. Jones*, 20 Cal.4th 1045, 86 Cal.Rptr.2d 319, 978 P.2d 1240 (1999); *Morrissey v. State*, 951 P.2d 911 (Colo. 1998); *Simpson v. Cenarrusa*, 130 Idaho 609, 944 P.2d 1372 (1997); *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996); *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996).

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."²³ 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."²⁴ On June 6, 1788, 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."²⁵ 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.²⁶

These representations about how the states would organize and target the Article V convention process did not occur in a vacuum. They reflected 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. Delegates were regarded as "servants" of the states that sent them. None of these conventions—not even the Philadelphia

²³ 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

²⁴ *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

²⁵ 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

²⁶ 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

Convention²⁷—strayed from their state-determined agendas.²⁸ Naturally, the Founders repeatedly represented to the public that an Article V convention would operate in the same way. In fact, for decades after the Constitution’s ratification, it was an uncontroversial proposition that the states could organize the Article V convention process to consider desired amendment proposals.

²⁷ The Philadelphia Convention stayed well within (1) the congressional resolution for the convention, and (2) the commissions of nearly all state delegates. The congressional resolution for the Philadelphia Convention contemplated a broad purpose for the meeting—to establish “in these states a firm national government ... [and] render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.” Resolution of Feb. 21, 1787, 32 J. Continental Cong. 1774-1789, at 74 (Roscoe R. Hill ed., reprint ed. 1968). It also contemplated “revising” the Articles with “alterations and provisions.” *Id.* Equally broad language was reflected in the state-issued credentials of nearly all delegates to the convention (with New Jersey’s delegates being an arguable exception). 3 Records of the Federal Convention of 1787 706-36 (M. Farrand ed., 1911). This was not an agenda contemplating only tweaks to the Articles. Indeed, contemporaneous legal usage indicates that “revision” had a broader meaning than “amendment,” and indicated a total or substantial rewrite of an original document. *See, e.g., Cases of Judges of Court of Appeals*, 1788 Va. LEXIS 3, *27 (1788) (using “revisal” to describe total rewrite of state laws); *Respublica v. Dallas*, 1801 Pa. LEXIS 56, **18 (Pa. 1801) (referring to a committee creating new state constitution as charged with “revising” the old constitution); *Waters v. Stewart*, 1 Cai. Cas. 47, 65-72 (N.Y. 1805) (using “revision” in the context of describing a total rewrite of state statutes); *Commonwealth v. Daniel Messenger*, 4 Mass. 462, 467, 469-70 (1808) (describing statutes as a “revision” of prior provincial laws and “revised” statute as replacing “former statute”); *Lessee of Ludlow’s Heirs v. Culbertson Park*, 1829 Ohio LEXIS 36, **24-26 (Ohio 1829) (using “revision” to describe total rewrite and consolidation into one act all prior statutes); *see generally Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009) (holding that “[w]hile both constitutional amendments and revisions require a majority of voters approval, a revision—which substantially alters the entire Constitution, the basic framework of the governmental structure or the powers held by one or more governmental branches—requires prior approval of two-thirds of each house of the California State Legislature”) (citing Cal. Const. art. X (1849) (“Mode of Amending and Revising the Constitution”); Browne, Rep. of the Debates in Convention of Cal. on Formation of State Const. 354-61 (1850); *Livermore v. Waite*, 102 Cal. 113 (1894); Dodd, The Revision and Amendment of State Constitutions 118-120 (1910); Jameson, A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding §§ 530-532, 550-552 (4th ed. 1887) (citing Constitutions of Maine (1820), New Jersey (1844), New York (1846), Michigan (1850)); William B. Fisch, Constitutional Referendum in the United States of America, 54 Am. J. Comp. L. 485, 493 (2006) (noting that “the preferred vehicle for major revisions of existing state constitutions and creation of new ones has been the popularly elected convention, which has often been called by a state legislature without explicit authority in the existing governing document”). Translated with the usage of the times, the legal instruments organizing the Philadelphia Convention thus essentially declared, “The convention is being organized for the ‘sole’ purpose of considering a total rewrite of the Articles of Confederation with such alterations and new provisions as might establish a firm national government and make it adequate to governance.”

²⁸ *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).

For example, on February 7, 1799, James Madison's Report on the Virginia Resolutions observed that the states could organize an Article V convention for the "object" of declaring the Alien and Sedition Acts unconstitutional.²⁹ 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." Correspondingly, more than thirty years later, the U.S. Supreme Court in *Smith v. Union Bank*, 30 U.S. 518, 528 (1831), suggested that a "convention of the states" could even be targeted to propose a different choice of law rule for assets held in one state that are allegedly owing to a plaintiff in another.

As the Article V convention process was meant to be a "convention of the states"—not of the people or of Congress—it follows that states are not somehow preempted or otherwise disabled in exercising their reserved sovereign power under the Tenth Amendment to 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.

Even apart from explicit reliance on Tenth Amendment principles, courts have repeatedly construed the Article V process in light of historical custom and practice surrounding the Philadelphia Convention, which should further bolster the conclusion that the States have the power to target the Article V convention to the proposal of desired amendments based on the foregoing evidence of public understanding at the Founding and near-Founding era.³⁰ That public understanding was undoubtedly rooted in the text of Article V, which requires Congress to call an Article V convention upon "application" of state legislatures.

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

²⁹ 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

³⁰ See generally *Hawke v. Smith*, 253 U.S. 221 (1920); *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981); *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975); *Opinion of the Justices*, 132 Me. 491, 167 A. 176, 179 (1933); *Barlotti v. Lyons*, 182 Cal. 575, 189 P. 282 (1920).

Congress by various states with very specific requests on a regular basis.³¹ 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.³² 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 was³³—naturally understood as adopting that specific agenda.

These principles allow for laser-targeting of the Article V convention by the States through agenda limitations specified in the Article V application and delegate instructions. The also allow for numerous enforcement mechanisms to ensure delegates stay on target.

First, the Compact’s limitations on delegate authority are enforced by automatic forfeiture of the appointment of all delegates for that Member State if any delegate violates such limitations (*see* Article VI, section 10). Second, the legislature of the respective member state could also immediately recall and replace the runaway delegate (*see* Article VI, 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* 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 Article X, section 3, with Articles VI, sections 6, 7, 10).

These delegate-specific direct enforcement mechanisms are in addition to the following backstop enforcement mechanisms (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 (Article VIII, section 1(b));

³¹ *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>

³² *See, e.g., id.*

³³ 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).

2) the prohibition on transmission of any amendment proposal from the Convention other than the contemplated amendment (Article VII, section 9); 3) the nullification of any Convention proposal other than the contemplated amendment (*Compare* Article VIII, section 2(a), *with* Articles VI, sections 6, 7, 10, and Article VII, section 2); and 4) the disapproval of ratification of any amendment by all Member States other than the contemplated amendment (Article VIII, section 3).

Still, it must be acknowledged that modern legal precedent could be utilized to deny the claim that states have any power to control the Article V convention process. The fractured ruling in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995), for example, held that the states retain no Tenth Amendment authority over federal representatives because the Tenth Amendment “could only ‘reserve’ that which existed before.” If the delegates to an Article V convention were somehow deemed “federal representatives,” or if the Article V Convention were itself deemed entirely a construct of the Constitution, rather than a codification of interstate convention custom and practice, then this ruling could be utilized by clever attorneys to deny that the states retained power under the Tenth Amendment to target an Article V convention to considering the proposal of a specific amendment.

Likewise, if the Article V application and convention process were somehow analogized to the ratification referral process under Article V, a number of court decisions would allow opponents of the Compact to deny that Tenth Amendment principles support the proposition that the States retained the power to target and control the Article V convention.³⁴

Even with respect to claims of state control over the Article V process that are premised entirely on construing Article V in light of historical custom and practice, rather than Tenth Amendment principles, similar trouble could arise from *Cook v. Gralike*, 531 U.S. 510, 520-21 (2001), in which the Supreme Court observed that evidence presented in that case of the role that “instructions played in the Second Continental Congress” and “the Constitutional Convention” fell “short of demonstrating that the people or the States had a right to give legally binding, i.e. nonadvisory instructions to their representatives.”

Finally, post-New Deal precedent could be utilized to support the claim that Congress has a role to play in organizing and regulating the convention, which may include the designation of delegates, the convention agenda, and convention logistics, based on Congress’s power to call the convention and an expansive interpretation of the implied power authorized by the Necessary and Proper Clause.

³⁴ See, e.g., *United States v. Sprague*, 282 U.S. 716, 733 (1931); *United States v. Thibault*, 47 F.2d 169 (2d Cir. 1931); *Opinion of the Justices to the Senate*, 366 N.E.2d 1226 (Mass. 1977); *Dyer*, 390 F. Supp. at 1307.

This is not to say that the foregoing legal arguments should or would prevail. *Gralike's* observation is pure dicta about the persuasiveness of evidence advanced in a particular case, which has been superseded by the latest research into the field.³⁵ The various cases rejecting the application of Tenth Amendment principles in the context of the ratification referral process are not controlling because, unlike the application and convention process of Article V, the ratification referral process of Article V is indeed entirely a construct of the federal constitution, over which Congress was delegated discretionary control.

Likewise, *U.S. Term Limits* is distinguishable because, unlike the process of electing congressional candidates, an Article V convention was not meant to be a mere construct of the federal constitution—it was meant to adopt, codify, and regulate the states' pre-constitutional custom and practice of utilizing interstate conventions to propose legal reforms, as exemplified by the Mount Vernon Conference and the Annapolis Convention.

Finally, the Supreme Court's repeated and recent rulings that the principle of state sovereignty, together with the "letter and spirit" of the Constitution, limit the reach of Congress' implied power under the Necessary and Proper Clause,³⁶ should allow the foregoing arguments to rebut expansive claims of implied congressional "call" authority to regulate the Article V convention. Indeed, it would violate the superfluity canon of construction to construe Article V as impliedly delegating to Congress essentially the same degree of control over the proposal of amendments via the state-initiated convention process as Congress enjoys through its own direct amendment proposal power.

Nevertheless, despite its lack of merit, the view that Congress, not the states, has the power to regulate an Article V convention poses a real litigation risk. Fortunately, the Compact is designed to be fully compatible with even this view. This is because all of its terms and conditions relating to the Article V convention it organizes are adopted and consented to by the counterpart congressional resolution, which bestows upon them the status of federal law under current precedent.³⁷ Moreover, we can take solace in the fact that the only Supreme Court authority on congressionally-set Article V logistics is a

³⁵ See, e.g., Robert Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Goldwater Institute Policy Report No. 241 (Sept. 16, 2010); Robert Natelson, *Learning from Experience: How the States Used Article V Applications in America's First Century*, Goldwater Institute Policy Brief No. 10-06 (Nov. 4, 2010).

³⁶ See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2601-03 (2012).

³⁷ 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).

plurality opinion that ruled such issues raise non-justifiable political questions, which federal courts will not engage.³⁸ Of course, it is possible that a lawsuit would be brought before congressional consent is obtained. But it is unlikely such a lawsuit would be ripe enough for judicial resolution. This is because it would be incredibly speculative for anyone to claim a concrete injury from the limited agenda and voting rules of the Compact which do not become before Congress actually calls the convention in accordance with the Compact.

6. Are the States prohibited from joining the Compact before Congress impliedly consents to it in the counterpart congressional resolution?

No. Although Article I, Section 10, of the U.S. Constitution provides that states may not enter into compacts without the “consent” of Congress, 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.³⁹

While it is true that the Compact Commission is meant to go live after two states join the Compact (Article IV, section 9), the Compact Commission is purely a logistical entity with no substantive powers whatsoever until Congress consents to the compact in its call. Furthermore, the compact is designed through conditional enactments and express provisions to prevent member states from taking any action in the Article V process that they do not have the inherent power to control independently of Congress, prior to receiving implied congressional consent. For example, the pre-ratification is made subject to a conditional enactment that makes its effectiveness entirely contingent on: a) the convention proposing the balanced budget amendment; and b) Congress selecting legislative ratification of that proposed amendment (see Article IX, section 2). These contingencies obviously may never occur, and if they do not occur, the pre-ratification will never be effective. If the pre-ratification is never effective, the amendment can’t trench on Congress’ exclusive role in the ratification process or federal budgetary powers. Indeed, because of the foregoing conditional enactment, the ratification will go live (if it ever goes live) only in the precise sequence required by the text of Article V. Moreover, member states are prohibited from participating in the convention organized by the compact before the convention is called by Congress “in accordance with the Compact” (see Article VIII, section 1(a)). Accordingly, there is no reason to conclude that States would be prohibited from joining the Compact before Congress impliedly consents to it in the counterpart congressional resolution.

³⁸ See *Coleman v. Miller*, 307 U.S. 433 (1939).

³⁹ *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).

7. Can the Compact Commission and Administrator organized by the Compact operate before Congress impliedly consents to the compact in the counterpart congressional resolution?

Yes. Prior to Congress consenting to the Compact in its convention call, the Compact Commission and Compact Administrator have only notification, lobbying and litigation defense functions that could otherwise be exercised by each member state separately without a compact. The Supreme Court ruled in *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452, 459 (1978), that congressional consent is only required for an interstate compact that attempts to enhance “states power quoad [relative to] the federal government.” This means that congressional consent is not required for compacts that merely exercise the sovereign powers of the states without purporting to augment those powers relative to those of the federal government. The fact that the Compact Commission or Compact Administrator might bring “strength in numbers” and unity to the States in exercising their powers under Article V that may enhance the political chances of successfully lobbying Congress to fulfill its role in the Article V amendment process is not sufficient to render the compact a threat to federal supremacy, which would trigger the need for congressional consent for them to operate.⁴⁰ Consequently, the Compact Commission and Compact Administrator may operate so long as neither purports to exercise any authority infringing on congressional prerogatives, such as convening the Article V convention before the Congressional call is received.

In any event, if a court mistakenly believed the Compact Commission, which is purely a logistical entity exercising sovereign powers that could be independently exercised by member states, required congressional consent to become operative, it would be difficult to see how a court would be able to do more than delay the operations of the Commission until congressional consent was received. This is because, as provided in Article X, section 5, the effective date of any provision in the Compact is the latter of the specified effective date or the earliest date the provision is permitted to become effective by law. At the absolute worst, a court would only have authority to sever the Article creating the Commission, and related contractual provisions, if it followed its obligation under the severance clause of Article X, section 6, to construe the Compact as reciprocal legislation. This is because the remaining articles could all be enacted jointly or independently as free-standing legislation without a compact.

⁴⁰ *U.S. Steel*, 434 U.S. at 479 n. 33.

8. Is the President required to appoint with the advice and consent of the U.S. Senate the Compact Administrator and the members of the Compact Commission, which are organized by the Compact?

No. The Compact Commission is populated by appointees of the first three member states, and it may be expanded to include appointees of all member states. It thus constitutes an agency *of the compacting states*, not of the federal government.⁴¹

9. Is the President required to sign and approve the counterpart congressional resolution calling the Article V convention in accordance with the Compact?

Good question, but no. Presidential presentment is not required for the passage of the counterpart congressional resolution because the president has no role in the proposal of amendments under Article V, which exercises power textually conferred only on state legislatures, state conventions and Congress.⁴² Although statutes giving consent to interstate compacts have been presented to the president for signature, this fact should not alter the foregoing conclusion. As with the exercise of power under Article V, the text of the Compact Clause (Article I, Section 10, of the U.S. Constitution) articulates no role for the president in granting consent to interstate compacts, and no case actually holds that congressional consent to an interstate compact requires presidential approval.

Significantly, the Supreme Court has long held congressional consent to interstate compacts can be implied both before and after the underlying agreement is reached.⁴³ This rule of law treats the consent of Congress very differently from the normal lawmaking process, insofar as laws obviously cannot be enacted by mere implication. It also compels the conclusion that presidential presentment is unnecessary to garner the requisite consent of Congress for an interstate compact. After all, if an actual vote on specific legislation approving a specific interstate compact is not necessary to secure the requisite consent of Congress, it follows that presidential presentment is not necessary.

Prevailing precedent thus justifies concluding that the Compact Clause confers an exclusive power upon Congress to approve interstate compacts that can be exercised without presidential presentment. Moreover, especially with regard to an interstate compact that solely directs and regulates the exercise of amendment powers under Article V, the structure and purpose of the Constitution does not require the president to have the power to veto congressional consent for that compact. This is because the president's role in presentment is to protect the reserved powers of the states as well as

⁴¹ *Seattle Master Builders v. Pacific Northwest Electric*, 786 F.2d 1359, 1371 (9th Cir. 1986).

⁴² *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).

⁴³ *Virginia*, 148 U.S. at 521.

to defend the executive and judicial branches from incursions by the federal legislative branch and to act as the representative of people of the nation as a whole.⁴⁴ Fulfilling this role does not require the president to have the power to veto an interstate compact originated by the States that regulates the Article V amendment proposal process.

10. Does the Compact violate the rule against entrenchment by refusing to allow the withdrawal of member states after 38 states join it?

No. After 38 states join the Compact, no member state may withdraw without unanimous consent of all member states. In effect, the membership of the compacting state will be entrenched from repeal by future legislatures until the Compact's proposed amendment is ratified. The goal of such entrenchment is to ensure the laser-focus of the Compact on advancing a specific amendment is maintained throughout the amendment process and to guarantee its safeguards remain state law during the entire Article V convention process.

Ordinarily, one legislative body may not entrench its legislation against repeal or modification by future legislative bodies in the same government. However, so long as they are entered into voluntarily and for a discrete purpose that does not substantially impair a state's sovereign power, compacts (like contracts) can and do entrench the decisions of the adopting legislative body under the supremacy of the U.S. Constitution's Contracts Clause, which guarantees contractual obligations against state legislative impairment. As a result, "a state can impose state law on a compact organization only if the compact specifically reserves its right to do so."⁴⁵ This has been the law for over 100 years.⁴⁶ In the unlikely event that such entrenchment violates a member state's constitution, the Compact's severance clause provides constructional rules that a final judgment should have the effect of severing the offensive provision or causing that member state to withdraw from the Compact.

11. Does it violate separation of powers doctrine for governors to serve as delegates to the Convention organized by the Compact?

No. An Article V convention is not a branch of government, it is a gathering point for representatives of the States—and the governor is the quintessential representative of an entire State. The Compact's default selection of governors as delegates is based on the precedent of Benjamin Franklin, William Livingston and Edmund J. Randolph attending

⁴⁴ *Ins v. Chadha*, 462 U.S. 919, 951 (1983); *Myers v. United States*, 272 U.S. 52, 123 (1926).

⁴⁵ *Seattle Master Builders*, 786 F.2d at 1371.

⁴⁶ *Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between states by those who alone have political authority to speak for a state can be unilaterally nullified, or given final meaning by an organ of one of the contracting States"); *Kentucky v. Indiana*, 281 U.S. 163, 178 (1930); *Green*, 21 U.S. at 39-42.

the Philadelphia Convention while serving as governors of Pennsylvania, New Jersey, and Virginia. Significantly, governors are required to take a temporary leave of absence while attending the Convention and to not exercise any gubernatorial powers during the Convention. This limitation is intended to avoid any possible separation of powers issue with executive branch officials exercising what might be construed as legislative powers during the Convention, as well as to furnish a political safeguard of having the governor's likely political rival in charge of the state during the convention and able to direct enforcement of the Compact's provisions, which should incentivize governor-delegates to respect the Compact. With respect to governors who leave their home states to attend the convention, this provision is fully consistent with state constitutional provisions providing that when a governor leaves the state, another executive branch official (typically either the Secretary of State or Lieutenant Governor) shall exercise all gubernatorial powers. With respect to any governor who attends the convention in his or her home state, all states allow governors to take a temporary leave of absence due to temporary disability; and most states allow for other grounds for temporary leaves of absence. What constitutes disability or justification for a temporary leave of absence can be defined by state law, and the Compact's requirement that governor-delegates not exercise gubernatorial powers and take a leave of absence while attending the convention would supply an adequate legal definition of disability. As a failsafe to ensure that every member state is represented if their governor is otherwise unable to attend the convention, the Compact allows for the legislative replacement of the governor-delegate for good cause. Finally, the Compact allows member states to modify the provisions appointing governors as delegates if so desired.

12. Is the Compact a prohibited treaty, alliance or confederation?

No. The Compact cannot be classified as a prohibited treaty, alliance or confederation under Article I, Section 10, of the U.S. Constitution because it is a temporary agreement among the states organized to achieve a specific policy objective, using powers retained by or conferred upon its member states under the U.S. Constitution, without displacing or threatening to displace the federal government in any of its assigned functions.

Treaties, alliances and confederations are all types of compacts in the broadest sense of an agreement among sovereigns. But not all compacts are treaties, alliances or confederations. Although Joseph Story, in *Commentaries on the Constitution of the United States*, professed confusion over the difference between compacts and treaties, alliances and confederations in regard to what was permitted or prohibited among the states, suggesting permissible compacts deal with sovereign proprietary rights, and prohibited compacts deal with political issues, courts have subsequently rejected Story's notion that compacts are restricted to sovereign proprietary rights, and there are a number of clear

dividing lines between a permissible compact and a prohibited treaty, alliance and confederation. The Compact does not cross any of those lines.⁴⁷

Most importantly, the Supreme Court has repeatedly emphasized that the prohibition on treaties, alliances and confederations was intended “to restrain state legislation on subjects entrusted to the government of the union, in which the citizens of all the states are interested.”⁴⁸ As a result, courts have ruled that *only* those compacts “which might limit, or infringe upon a full and complete execution by the General Government, of the powers intended to be delegated by the Federal Constitution” can possibly fall within the

⁴⁷ A compact that concerns purely internal (interstate, not international) matters, like the Compact for a Balanced Budget, is clearly not a prohibited “treaty.” The Constitution delegates the power to make treaties exclusively to the President with the advice and consent of the Senate. Nothing in the prohibition on State’s power to make treaties suggests a different meaning was to be ascribed to the word “treaty” in the Compact Clause. Further, it is readily apparent from a variety of founding-era sources that the word “treaty” meant and was understood exclusively as an agreement concerning external international matters with foreign nations; these sources include, but are not limited to, Farrand’s and Elliot’s Reports of Proceedings at the Philadelphia Convention and Federalist Nos. 15, 17, 20, 22, 64, 69, 76, and 80, all of which evidence usage of the term “treaty” to mean a compact of a very specific type—a compact among independent “nations” addressing external, international affairs, like war, peace or free trade. The Constitution’s prohibition on States making treaties should therefore be construed as a corollary to the provision delegating such power exclusively to the President and the Senate. There is no case law even remotely suggesting that a compact concerning internal national and interstate matters would ever be construed as a prohibited “treaty.”

Furthermore, a compact that is temporary in duration, primarily aimed at a specific policy objective, and executable on its own terms upon formation is simply not what the Founders would have regarded as a prohibited “treaty,” “alliance” or “confederation.” This conclusion stems from the fact that the distinction between permissible and prohibited compacts, stems from Emmerich de Vattel’s distinction in the Law of Nations between those sovereign agreements, which have temporary specific policy matters for their objective, “called agreements, conventions, and pactions,” which are executable upon their own terms, and those sovereign agreements, called “in Latin foedus,” that are indefinite or perpetual in duration and primarily aimed at securing political goals, which are prohibited. *U.S. Steel*, 434 U.S. at 462 n.12. Like a “paction” and unlike a “foedus,” the Compact is not a perpetual political organization that aims at advancing the public welfare. The Compact is an agreement among the states to advance the specific policy objective of originating and ratifying a constitutional amendment. As could be replicated entirely by reciprocal legislation, it consolidates the necessary state legislation to accomplish this objective and organizes an interstate agency to handle logistics in a single bill, which is fully executable on its own terms. Any member state can withdraw from the compact at any time through appropriate legislation until 38 states join the compact; at which time, the compact is designed to quickly accomplish its goal of amending the constitution within one year. The compact commission sunsets and the Compact itself terminates when the proposed constitutional amendment is ratified. And in the event the contemplated amendment is not ratified within seven years after the first state joins the Compact, the Compact will terminate on its own terms. In short, the compact shares all of the essential features of a “paction” and none of a “foedus.”

⁴⁸ *Barron v. Baltimore*, 32 U.S. 243, 249 (1833).

class of prohibited treaties, alliances and confederations.⁴⁹ In other words, compacts that reach agreement on the exercise of powers that States are entitled to exercise independently from the federal government, which are neither expressly prohibited to the States nor exclusively reserved to the federal government, are definitely *not* prohibited treaties, alliances or confederations.⁵⁰ At most, such a compact might trigger the need for congressional consent if they “tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their control.”⁵¹

Because the Constitution preserves and confirms the States’ pre-existing sovereign power to organize interstate conventions, such as a convention for proposing amendments under Article V, there is nothing impermissible about the States utilizing an interstate compact to reach agreement on the exercise of such power.⁵² Moreover, to the extent that the provisions of the Compact presuppose congressional action in calling the convention it organizes and referring for ratification the balanced budget amendment it contemplates, the effectiveness of those provisions is made wholly contingent on Congress first calling the convention in accordance with the Compact and prospectively referring the contemplated balanced budget amendment out for legislative ratification. The Compact for a Balanced Budget is therefore clearly differentiated from prohibited treaties, alliances and confederations in so far as the Compact does not displace the federal government in any of its assigned functions; and simply wields powers either exclusively or concurrently committed to the States under the U.S. Constitution, in precisely the manner the Founders intended, with all requisite congressional consent.

⁴⁹ See, e.g., *Union Branch R. Co. v. East Tennessee & G. R. Co.*, 14 Ga. 327, 339 (1853).

⁵⁰ See *State of Rhode Island v. Com. of Massachusetts*, 37 U.S. 657 (1838); *Poole v. Fleege’s Lessee*, 36 U.S. 185 (1837) (Baldwin, J., concurring).

⁵¹ *Virginia*, 148 U.S. at 518.

⁵² Although other states and the federal government may have an “interest” in the subject matter of the compact, such an interest does not render the compact a prohibited treaty, alliance or confederation when the compact simply effectuates powers retained by or conferred on the member states, which could be exercised in precisely the same way independently. *U.S. Steel*, 434 U.S. at 479 n. 33.