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COMPACT FOR AMERICA



A Guidebook for Deploying Article V as the Founders *Actually* Intended: *The Application & Convention Mode of Proposing Amendments*

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Introduction

With regard to the state-initiated mode of proposing amendments under Article V of the U.S. Constitution, Compact for America Educational Foundation agrees with the Supreme Court's declaration in *Hawke v. Smith* (1920) that "the language of the article is plain, and admits of no doubt in its interpretation." Specifically, the most natural reading of Article V is that it delegates no power to Congress relative to the state-initiated mode for proposing amendments; it simply imposes a mandatory duty on Congress to call a convention "on the Application of the Legislatures of two thirds of the several States." It is equally clear that "Legislatures" are acting on behalf of their respective state governments in submitting their "Application;" the convention call by Congress must embrace the terms of the "Application;" and nothing in Article V prohibits the states from deploying their plenary legislative power in parallel to ensure that convention-goers actually heed the "Application."

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The authors are recognized and published experts in constitutional history and/or law.

In other words, the plain text of Article V neither immunizes convention-goers from state legislative power nor deputizes the "Legislatures of two thirds of the several States" to serve as federal bodies that are somehow independent of their underlying state governments.

That being said, questions still arise as to the nature of an "Application;" how to aggregate Article V applying resolutions towards the requisite "Application;" and what is properly contained in the congressional call triggered by the "Application." This guidebook furnishes the necessary guidance on these and related issues. It also explains why an interstate agreement—or Compact—is a superior vehicle for resolving these issues.

Guidance on the Nature of an Article V Application

Article V requires Congress to call an amendment-proposing convention "on Application" of two-thirds of the legislatures of the several states. This requires sufficient numbers of states to pass resolutions applying for amendments to be proposed at a meeting of the states in what is termed a "convention for proposing

amendments.” The singular use of the term “Application” naturally implies that the process was meant to be a unified effort among the states. The lack of express substantive content as to the nature of the “convention for proposing amendments” combined with Congress’s purely ministerial duty in calling the convention logically and grammatically yields the convention agenda to whatever is requested in the “Application.” Accordingly, as discussed below, in order to be aggregated as the “Application of two-thirds of the legislatures of the several states,” applying resolutions should concur in one or more specific requests that are relevant to organizing a proposing convention, such as the same amendment agenda.

The Plain Meaning of “Application”

When the states made “applications” to the Continental Congress during the Founding Era, they could and customarily did petition for very specific things; such as requesting financial aid or military support.¹ Any “application,” including an Article V application, is simply a petition that seeks specific relief of some kind. Moreover, given that “applications” were routinely used by the states in the pre-constitutional era to request various things in fine detail, there is every reason to infer that an Article V application was likewise meant to be a petition that would request a specific amendment agenda in fine detail, including the actual text of the amendment to be proposed, if desired.

Guidance from Article IV

The power of states to set the agenda of the Article V convention, including the requested proposal of desired amendments, in their “Ap-

plication” is entirely consistent with and parallel to the role of the “Application” in the only other part of the Constitution in which an application is mentioned—namely, Article IV, section 4, which provides: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)

Any “application,” including an Article V application, is simply a petition that seeks specific relief of some kind.

against domestic Violence.”² The most natural reading of this provision is that the “Application” would specify the domes-

tic violence to be addressed and how it should be addressed. In other words, the content of an Article IV application was meant to set the federal government’s “agenda” for protecting the states from domestic violence. Likewise, Article V is most naturally read as providing that the content of the application sets the agenda of the resulting amendment-proposing convention.

Guidance from the Drafting History

Perhaps the best supporting evidence for interpreting the Article V application as synonymous with “petition” and ordinarily meant to request a specific amendment agenda, including the proposal of one or more desired amendments by convention, is the drafting history of Article V.³ Significantly, the next-to-final draft of Article V placed the power to propose amendments in the hands of Congress “on Application” of two-thirds of the state legislatures. It is clear that Congress was not supposed to draft the amendments for the states in response to their application because this penultimate version of Article V already contemplated Congress having the parallel power to draft and propose amendments by a two-thirds vote of each house. It would be redundant to construe the application

“Application” means a petition to Congress for specific relief, as evidenced by Founding-era usage, and such specific relief includes the designation of desired amendments as evidenced by the Founders’ expressed understanding.

“Shall Call” imposes a “peremptory” or mandatory, ministerial duty on Congress to call the convention in response to the states’ “Application,” which implies granting the specific relief requested in the application triggering the call, i.e. calling a convention for the purpose specified in the application.

STATES CAN LEAD

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, ON the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;

“Convention” means nothing more than an assembly, as evidenced by Founding-era usage, and it was publicly understood during such time as referring to an assembly of states.

Underscores that the Article V amendment process only generates amendments that are “part” of the Constitution, precluding any claim the proposing convention possesses original sovereign authority to replace the Constitution.

in this version of Article V as simply giving Congress a second opportunity to draft the amendment proposals it preferred. Instead, the “Application” of two-thirds of the states was meant to be the source of the amendments that Congress would be required to propose under this next-to-final formulation of Article V. Thus, the states’ traditional power to make specific amendment proposal requests in their application is implicit in the drafting history of Article V.

refuse to propose desired amendments. The introduction of a proposing convention in the final version of Article V was meant to enhance the ability of states to obtain the proposal of desired amendments, not to obstruct it. There is no textual indication that the final version of Article V was meant to reject the states’ traditional power to make very specific requests in their application, including the requested proposal of one or more specific amendments.

The states’ traditional power to make specific amendment proposal requests in their application is implicit in the drafting history of Article V.

Although the final draft of Article V replaced Congress with a “convention for proposing amendments” as the formal proposing body, nothing in the Report of Proceedings suggests that the Founders meant for the states’ application to cease requesting the proposal of specific amendments, as before. Instead, the final version of Article V eliminated the proposing role of Congress solely because delegates to the Philadelphia Convention feared that Congress would

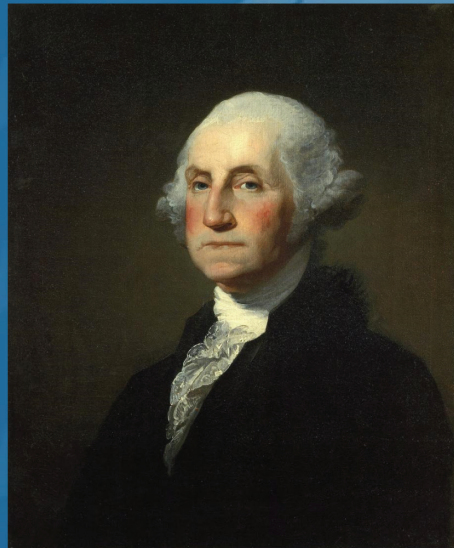
In light of such evidence, to constitute a singular petition of two-thirds of the state legislatures, the most natural interpretation of Article V is that the underlying applying resolutions must concur in requesting specific relief that is relevant to calling a proposing convention, such as the same amendment agenda, including, if desired, specific amendment proposals. The Founders’ public representations about how the states would obtain desired amendments through the

convention process confirm the accuracy of this interpretation.

Guidance from the Founders

Writing in Federalist No. 85, Hamilton observed that “whenever nine States concur,” Congress’s role in calling a convention would be “peremptory.”⁴ “Nine states” referred to the number of states then-needed to constitute the two-thirds majority required to unite in an Article V “Application.” That Hamilton intended to underscore that the states’ applying resolutions would “concur” in the same amendment agenda to trigger the convention

“It should be remembered that a constitutional door is open for **such amendments as shall be thought necessary by nine States.**”



call is evident in the following sentence: “Here, then, the chances are as thirteen to nine in favor of subsequent amendment, rather than of the original adoption of an entire system.” Significantly, Hamilton footnoted the number “nine,” explaining: “It may rather be said TEN, for though two thirds may set on foot the measure, three fourths must ratify.” The colorful phrase that “two thirds may set on foot the measure” indicates “two thirds” of the states would have to unite on the same amendment (“the measure”) in their applying resolution to trigger the convention call.

This public understanding is further established in Federalist No. 85, where Hamilton observes, “Nor 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.” Again, Hamilton explicitly con-

templated that the states would “unite” on the same “amendments” in their applying resolutions, further evidencing the public understanding that two-thirds of the states would advance the same amendment agenda in their

applying resolutions to constitute the call-triggering “Application.”⁵

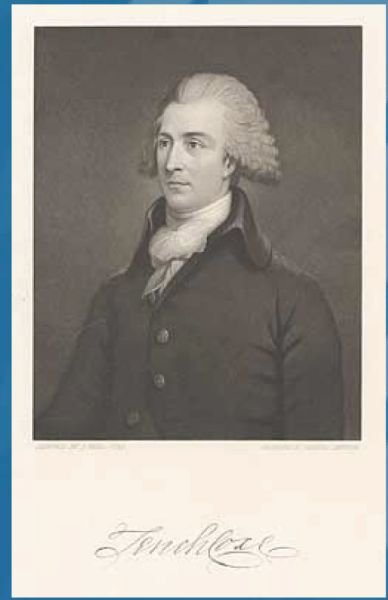
A convention call was meant to be triggered when at least two-thirds of the states were united or “concurred” in an “Application” consisting of applying resolutions that uniformly request the same amendment agenda.

The fact that Hamilton’s statements evidence the public understanding of Article V is further supported by George Washington’s correspondence with John Armstrong in April 25, 1788. There, Washington underscores that the “constitutional door is open for such amendments as shall be thought necessary by nine

States.”⁶

Likewise, in a statement to the Virginia ratification convention on June 6, 1788, George Nicholas,

"If two thirds of those legislatures require it, Congress must call a general convention, even though they dislike the proposed amendments, and if three fourths of the state legislatures or conventions approve such proposed amendments, they become an actual and binding part of the constitution, without any possible interference of Congress." Coxe further explained, "[t]hree fourths of the states concurring will ensure any amendments, after the adoption of nine or more."



the first professor of law at Transylvania University and a member of the Virginia House of Delegates, declared that state legislatures would 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."⁷ Nicholas's conclusion is only "natural" on the assumption that a convention call would be triggered only after two-thirds of the state legislatures reached agreement on one or more desired amendments in their applying resolutions.

Similarly, on June 11, 1788, political economist and Pennsylvania delegate to the Continental

Congress Tench Coxe said, "Three fourths of the states concurring will ensure any amendments, after the adoption of nine or more."⁸ Notice that this statement indicates that "nine" states (then the Application threshold of two-thirds of the states) would adopt the same specific amendments prior to the calling of a convention—presumably in reference to the contents of their Article V application.

An Article V proposing convention was ordinarily not meant to have wide-ranging deliberative autonomy to negotiate and draft proposed amendments.

Finally, in his 1799 Report on the Virginia Resolutions, James Madison echoed Hamilton's earlier representations that a convention call would be triggered when two-thirds of the state legislatures "concurred" in the same amendment. 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."⁹

In sum, our research shows that a convention call was meant to be triggered when two-thirds of the states were united or "concurred" in an "Application" consisting of applying resolutions that uniformly request the same amendment agenda, including the same amendment proposals. There

In Federalist No. 85, Alexander Hamilton said all amendment proposals under Article V, logically including even those originated by the states, would be brought forth without “giving or taking” and “singly,” that “nine” states [two-thirds] would effect “alterations,” that “nine” states would effect “subsequent amendment” by setting “on foot the measure,” and he promised, “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.



is no evidence to our knowledge that suggests the Founders believed a proposing convention call could be triggered by cobbling together applying resolutions seeking different amendments or amendment agendas.

Of course, even if the foregoing conclusion were accepted and uniform applying resolutions passed by the states in sufficient numbers, there is no question that significant litigation risks would continue to surround the aggregation of Article V applying resolutions. Any deviation among applying resolutions—no matter how immaterial—will create a litigation risk that an adverse party will claim the requested amendment agenda is not sufficiently similar to trigger Congress’ ministerial call duty. Additionally, applying resolutions could be viewed as going “stale” if they are not acted upon for an unreasonably long period of time. Unfortunately, we cannot assess the magnitude of these risks in the abstract because they will likely be determinable by reference to fact-specific analogies and balancing tests utilized in existing legal precedent. Only an Article V compact, discussed below, can reduce these risks to nil for all practical purposes.

Guidance on Specific Criteria for Aggregating an Article V Application

As previously discussed, an “Application of the legislatures of two thirds of the several states” only comes into existence when the requisite number of states have submitted applying resolutions that concur in the same request for specific relief that is relevant to convening a proposing convention, such as the same amendment agenda or desired amendment proposals. Therefore, the following minimum criteria should be expected for all applying resolutions.

Aggregation Requires Substantive Identity

The specific relief requested in the underlying applying resolutions should be substantively identical so that Congress can carry out its mandatory duty to call a proposing convention ministerially simply by referencing them as the requisite “Application.” When assessing whether the specific relief sought by applying resolutions is substantively identical, policy makers should ask whether a convention call that embraces the applying resolutions would coherently establish the convention agenda. If a montage of applying resolutions cannot establish a coherent convention agenda, they should not be aggregated. No doubt this will disappoint some in the Article V movement.

On June 6, 1788, leading Federalist, George Nicholas, observed 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.”



Although it is tempting for some to urge Congress to call an Article V convention by disregarding differences among applying resolutions to reach the two-thirds threshold, to do so would be a Pyrrhic victory for state sovereignty. If Congress were to call a convention based on an aggregated montage of applying resolutions all seeking different amendments or amendment agendas, the resulting convention would be a creature of Congress, not the applying states. The precedent set would undoubtedly deter future use of Article V by the states because they would not be able to anticipate how Congress might choose to aggregate their applying resolutions. Fortunately, there is no legal or historical basis for disregarding material differences among Article V applying resolutions.

Differences in Amendment or Procedural Requests Preclude Aggregation

When aggregating applying resolutions, policy makers should ask whether a convention call that embraces the applying resolutions would coherently establish the convention agenda. If not, then aggregation is precluded.

Policy makers should reject the erroneous notion that specific amendment or procedural requests in an applying resolution, which are relevant to convening a convention for proposing amendments, can be ignored as interfering with the deliberative authority of a proposing convention.

Such requests are indeed material. After all, as discussed above, the Founding Era evidence very clearly establishes that states have always had the traditional power to advance detailed requests in their applications and there is no evidence that their power in this regard was any different when it comes to an Article V application. Research claiming that a proposing convention must have autonomous drafting or procedural authority regardless of the specific relief requested in the states’ applying resolutions has no foundation in the usage, custom or practice surrounding applications in the Founding Era, is contrary to the drafting history of Article V, and is inconsistent with the repeated

representations of the Founders that the states would adopt or concur in specific amendments when applying under Article V.

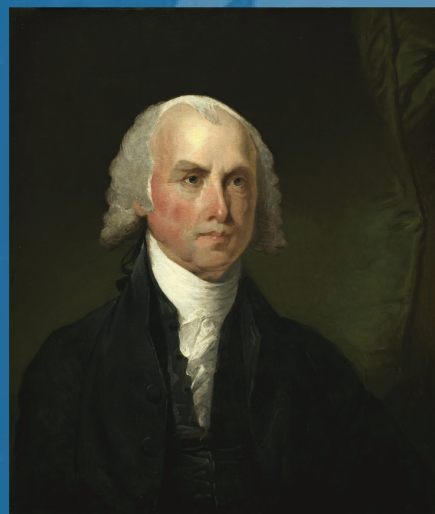
Further, the custom and practice of pre-constitutional conventions having wide-ranging deliberative authority does not logically override the limitation of an Article V proposing conventions' authority to the specific requests contained in the states' application. Indeed, it makes no more sense to look to such custom and practice to ascertain the power and authority of a proposing convention before looking to the relief requested in the states' application, than to look to such custom and practice to ascertain the power of a ratifying convention before looking to the ratification referral resolution. This does not mean such custom and practice is irrelevant to the powers of a proposing convention; pre-constitutional interstate convention customs and practices should certainly be considered when the convention is confronted with gaps in the specificity of the Article V application or congressional call.

Furthermore, Federalist No. 85 strongly supports the inference that a proposing convention was ordinarily not meant to have wide-ranging deliberative autonomy to negotiate and draft proposed amendments. Hamilton wrote, "But every amendment to the Constitution, if once estab-

lished, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point[:] no giving nor taking." We can conclude that Hamilton believed the Application would be the vehicle for bringing forth proposed amendments because he later observed, "alterations in it [the Constitution] may at any time be effected by nine States." The reference to alterations being "effected by nine States," which was then the two-thirds Application threshold, indicates that Hamilton expected a proposing convention to act at the direction of the applying states, as an instrumentality in proposing amendments specified in the Application, not as an autonomous body charged with drafting amendments from scratch.

As to the claim that there would be no need for a proposing convention if it did not possess wide-ranging autonomous drafting powers, or that a proposing convention must necessarily have more deliberative authority than a ratifying convention, this argument is specious. The proposing convention was made necessary by the limitations of 18th century technology. There was no modern instantaneous communication. There was no ability to communicate by telephone, telegraph, fax, email, or regular mail. Some coordinated means of ensuring that the

In 1799, James 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."



amendment specified in the application would actually be proposed had to exist. It is perfectly sensible that a proposing convention was introduced into the language of Article V simply to ensure the necessary coordination occurred among the states, represented by their agents (delegates) at the convention, so that what was proposed actually was what the states asked-for in their application. Indeed, that is the entire reason why the next-to-final version of Article V, which had Congress proposing amendments on application of the states, was replaced with a “convention for proposing amendments.” Most of the Founders, and especially George Mason, did not trust Congress to propose the amendment or amendments that would otherwise have been advanced in the states’ application under the next-to-final formulation of Article V.

Confirm Authenticity before Aggregation

Finally, to minimize litigation risk, the respective states that have submitted applying resolutions should officially confirm the text of the applying resolutions and their legitimacy as continuing and unrescinded applying resolutions. Confirmation can be in the form of written confirmation by appropriate state officials (governor, attorney general, secretary of state) and/or by reference to certified copies of specific codified statutes. Here, again, an Article V compact (discussed below) can furnish the desired confirmation process. For example, the existing Compact for a Balanced Budget requires that, when the 38th state joins it, the Compact Administrator shall submit to Congress certified copies of the chaptered versions of the Compact from each member state, confirming both the validity and the text of the applying resolutions contained in the Compact. The specific relief requested is the proposal of the Balanced Budget Amendment, the text of which is also contained in the Compact.

Notifying Congress that a Call Must Be Made

The states should formally empower a common agent to represent the states before Congress to assure that the Call is made “on the Application” in a timely manner and in conformance with the desires of the states. As an example, the existing Compact for a Balanced Budget empowers its Compact Commission to represent the member states before Congress on this matter.

Guidance on the Content of the Congressional Call

Ideally, the Application would furnish sufficient information for the congressional call to adopt its terms by reference. If the Application is silent on any matter that is relevant to organizing the convention, Congress does not have constitutional authority to fill any gap that involves the exercise of public policy discretion and judgment. This conclusion is compelled by Congress’s ministerial and “peremptory” duty in calling a convention for proposing amendments “on Application” of the states. In other words, it is up to the states to make sure all gaps are filled in the Application so that Congress does not have any leeway in issuing the proper call. Accordingly, we recommend that congressional call include the following information:

- *Date, time, location and duration of the proposing convention, preferably as requested by the Application;*
- *The agenda of the proposing convention, including the text of any amendment to be considered, as requested by the Application, and if not requested in the Application, then Congress should defer to ancillary state legislation or convention action on the subject matter;*

- *The delegate selection methods, convention rules and procedures that will govern the proposing convention, as requested in the Application, and if not requested in the Application, then Congress should defer to ancillary state legislation or convention action on the subject matter;*
- *The mode of ratification for any amendments that are proposed, if the states petition for a particular mode of ratification in their Application (the Supreme Court has ruled that Congress has discretion over the selection of the mode of ratification, but principles of comity recommend yielding to the applying states' preference).*

Guidance on Dispute Resolution

The states should formally designate a method for dispute resolution. For instance, the Compact for a Balanced Budget designates specific court venues for resolution of disputes among the member states. In addition, the Compact Commission is empowered: 1) to oversee the Convention's logistical operations as appropriate to ensure this Compact governs its proceedings; and 2) to oversee the defense and enforcement of the Compact in appropriate legal venues. These oversight powers include all essential implied power to carry them out, allowing for the Commission to furnish interpretive guidance to resolve disputes among member states.

Guidance on the Constitutionality of States Using an Article V Compact

As discussed above, amending the U.S. Constitution through the use of the state-initiated mode of amendment under Article V raises important questions about what constitutes a valid "Application" by two-thirds of the legislatures of

the states for purposes of triggering Congress's duty to call the convention, as well as the proper contents of the congressional call itself. Although law and history provides clear answers to those questions, Compact for America Educational Foundation nevertheless believes that such questions can be resolved far more reliably if states address them in advance through a formal and binding interstate agreement—or Compact, to which Congress would yield.

A compact can be as flexible and comprehensive (or targeted and concise) as a State Legislature desires. Like any well-drafted contract, an Article V compact can contain all sorts of provisions to hedge against just about any litigation risk. Moreover, only an Article V compact can:

- legally bind states to an indisputably identical Article V Application;
- reliably establish delegate appointments, instructions and convention rules;
- create a genuine interstate agency that can represent the interests of the states, handle convention logistics, and furnish interpretive guidance;
- furnish universal enforcement authority (by one state against another state);
- furnish contractually binding alternative dispute resolution process to avoid extensive litigation; and
- provide a vehicle to secure reliable early Congressional acquiescence in a call that yields to the agenda and convention rules desired by the applying states.

In short, states can far more efficiently and reliably achieve their goals in using the Article V convention process with a compact, than with-

out. In this regard, it is important to address and set aside various misconceptions that have been advanced about the constitutionality of states using a compact for Article V amendments.

First, Article I, Section 10 of the Constitution does not require the states to obtain consent from Congress before they can enter into a Compact. The Supreme Court has ruled repeatedly that the Clause does not apply to those compacts that merely coordinate the deployment of a sovereign power that is held by the states and which does not threaten federal supremacy in regard to any of its delegated powers.¹⁰ This interpretation is based on a robust understanding of the reserved power of the states to compact under the Tenth Amendment; specifically, that the purpose of Article I, section 10 is not to disable states from acting cooperatively, but only to protect the federal government's supremacy in exercising delegated powers from concerted interference by the states.

Accordingly, an Article V compact that settled on an identical applying resolution (avoiding the controversy over aggregation) would not require congressional consent because it would only be exercising state powers that do not interfere with federal supremacy in regard to any delegated power. Because the discretionary power of Congress to refuse to consent to such a compact under Article I, Section 10 would not be triggered, such a "compact-embedded" Article V Application would trigger Congress's mandatory convention call duty to exactly the same extent as a non-compact application.

Furthermore, a well-drafted Article V compact that comprehensively addressed convention logistics or even ratification would not require

congressional consent to be formed. This is because any portion of the compact that presumed congressional action would simply be made effective only if the requisite congressional action were first secured. For instance, compact provisions appointing and instructing delegates to vote into place specific convention rules or agreeing in advance to ratify specific amendments would provide that they are only effective if Congress first calls the convention or selects legislative ratification. In this way, "conditional enactments" would ensure that a comprehensive Article V compact, once formed, would only exercise powers held by the states until such time as the requisite congressional action was secured. Such a compact would not need congressional consent to be formed under current case law,¹¹ and the subsequent congressional action triggering the conditional enactment would necessarily furnish implied consent for the compact.

States can far more efficiently and reliably achieve their goals in using the Article V convention process with a compact, than without.

Second, the deployment of an Article V compact has the tactical advantage of allowing

for an early, cooperative approach to Congress without conceding or implying that Congress occupies a substantive position in the Article V convention process.

For example, the Compact for a Balanced Budget Commission is currently working with nearly 20 congressional co-sponsors from 13 states to pass H.Con.Res. 26. This concurrent resolution, if passed, would automatically call the compact-organized convention and select legislative ratification of the Compact's contemplated amendment if the requisite constitutional and compact-specified thresholds were met. There is nothing about the passage of H.Con.Res. 26 that implicates the need for presidential presentment because the Supreme Court has ruled the

president has no role in Article V.¹² Moreover, in substance, the resolution would not make federal law; it would merely exercise power conferred solely on Congress to usher along a state-initiated and controlled constitutional amendment process.¹³

Although Congress is not obligated to pass H.Con.Res. 26 at this point in time, no one has questioned its power to do so if simple majorities wish to vote for it. This is because H.Con.Res. 26 simply ensures that Congress follows its own call and ratification referral duties when the requisite trigger thresholds are met. As an exercise of incidental Article V power, H.Con.Res. 26 is no different in principle from the promulgation of rules to tabulate received Article V Applications or to reject amendment proposals that exceed the scope of a convention call. Congress's convention call duty has few incidental powers; but certainly it includes the power to ensure Congress performs its own mandatory constitutional obligations.

Conclusion

The Founding Era evidence clearly establishes that applying resolutions cannot be aggregated to count as the singular "Application" of two thirds of the state legislatures unless they concur in requesting the same specific relief that is relevant to calling a proposing convention, such as the same amendment agenda. However, this conclusion does not eliminate the possibility of controversy over the aggregation of applying resolutions due to discrepancies in verbiage. For that reason, state legislatures can best accomplish all of their goals in amending the Constitution by application and convention through a compact that addresses the aggregation of applying resolutions by ensuring that at least two-thirds of the state legislatures concur in an undeniably identical applying resolution seeking

the same amendment agenda. Accordingly, the Compact for America Educational Foundation—the only educational foundation with a primary focus on advancing Article V compacts—stands ready, able and willing to furnish technical advice and assistance to anyone who wishes to develop and deploy an Article V compact.

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the United States, to writing books and articles in these fields, and to public speaking on related topics. Dr. Gutzman's first book was the New York Times best-seller, *The Politically Incorrect Guide to the Constitution*, an account of American constitutional history from the pre-Revolutionary days to the present. This work is unique in joining the fruits of the latest scholarship, a very readable presentation, and a distinctly Jeffersonian point of view. His second book, *Virginia's American Revolution: From Dominion to Republic, 1776-1840*, explores the issue what the Revolutionaries made of the Revolution in Thomas Jefferson's home state. After that, he co-authored *Who Killed the Constitution? The Federal Government vs. American Liberty from World War I to Barack Obama* with New York Times best-selling author Thomas E. Woods, Jr. Gutzman's new book is *James Madison and the Making of America*, and he is already at work on *Thomas Jefferson-Revolutionary* (forthcoming). Gutzman has edited new editions of *John Taylor of Caroline's Tyranny Unmasked* and *New Views of the Constitution of the United States*.

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emplary Legal Writing” collection. He lectures regularly on behalf of the Federalist Society, is a member of the Legal Studies Institute’s board of visitors at The Fund for American Studies, was an inaugural Washington Fellow at the National Review Institute and a Lincoln Fellow at the Claremont Institute, and has been an adjunct professor at the George Washington University Law School. In 2015 National Law Journal named him to its list of 40 “rising stars” in the legal community. Before entering private practice, Shapiro clerked for Judge E. Grady Jolly of the U.S. Court of Appeals for the Fifth Circuit. He holds an AB from Princeton University, an MSc from the London School of Economics, and a JD from the University of Chicago Law School (where he became a Tony Patiño Fellow).

Judge Harold R. DeMoss, Jr. is a recently retired senior federal appellate judge and sat on the US Fifth Circuit Court of Appeals. He was appointed to the court in 1991 by President George H. W. Bush, and took senior status in 2007. Judge DeMoss graduated from Rice University in 1952 and the University of Texas Law School in 1955. After serving in the United States Army from 1955 to 1957, Judge DeMoss joined the Houston law firm of Bracewell Reynolds & Patterson (now Bracewell & Giuliani), where he became a partner and remained until his appointment to the federal bench. In 1988, he took a six-month sabbatical from the firm to work as a senior advisor to President Bush (41) during his successful campaign for President. Judge DeMoss is known as a strict constructionist and believes the words of the U.S. Constitution mean what they say and should not be “interpreted”. Over the past several years, Judge DeMoss has become frustrated with the state of affairs in our country, and believes that the uncontrolled expansion of the federal government, accompanied by the approval of the Supreme Court, is making it next to impossible for him to

apply his constitutional philosophy in many of his cases. He is also concerned with the unwillingness of Congress to operate in a fiscally responsible manner. He believes it is now time for the citizens and the states to make the determination as to whether America should continue along this path of overbearing central control and fiscal chaos, or to undertake the necessary actions to scale back the ever-expanding federal power grab that began over 80 years ago.

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Endnotes

1. 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=bookQmgFAAAAQAAJ&rdot=1>
2. U.S. Const., Article IV, section 4 (emphasis added).
3. 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://media.wix.com/ugd/e48202_1135e15a8dfe4d-36a17016cea90ad498.pdf
4. 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:

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- Liberty Fund, 2001), available at <http://www.constitution.org/fed/federa85.htm>
5. This evidence and the evidence discussed in the succeeding pages demonstrates that the Assembly of State Legislatures and others have committed a serious error in concluding that an Article V application cannot request the proposal of specific amendments.
 6. 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://media.wix.com/ugd/e48202_afa4f22939c94cb58a7bee-a7ee966a49.pdf
 7. Jonathan Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, vol. 3, pp. 102-03 (Virginia) (1827), available at http://media.wix.com/ugd/e48202_3718d94577904f-57b48c611b18403706.pdf
 8. *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://media.wix.com/ugd/e48202_87d69a52d785443584e6a2ce595c9069.pdf
 9. 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://media.wix.com/ugd/e48202_c9fb3bdabceb4d20bfe06b78ab891153.pdf
 10. See, e.g., *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452, 459 (1978); *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893).
 11. Conditional enactments, such as these, would support a strong argument that a comprehensive Article V compact cannot cause Congress to suffer any concrete injury, which is necessary for federal court jurisdiction under the "case and controversy" standard.
 12. *Hollingsworth v. Virginia*, 3 U.S. 378 (1798).
 13. See generally *id.*; *INS v. Chadha*, 462 U.S. 919, 951 (1983). Notably, while Article I, Section 10 consent would not be required for a well-drafted Article V compact, current case law would support a strong argument that Congress would have given implied consent to the compact by passing H.Con. Res. 26 (or otherwise calling a convention triggered by a compact-embedded application). Implied consent has been held to satisfy Article I, Section 10 consent requirements; thus providing a fallback position to defend an Article V compact if a rogue court should reject the foregoing legal analysis and rule that Article I consent is required for a well-drafted Article V compact. *Virginia*, 148 U.S. at 521. Another benefit of seeking early cooperation from Congress, if courts should rule wrongly that Article I, Section 10 consent is required, is the ability to leverage the rule of law that Article I, Section 10 consent renders a compact equally the "law of the Nation" as much as the law of the member states. This would enable compacting states to enforce the compact's convention logistics directly on non-member states (rather than by sheer numerical advantage). *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).
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