

# Policy Brief

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COMPACT FOR AMERICA

## Clearly Constitutional: The Article V Compact

*A Vindication of the Principle of State Sovereignty Against Natelson's Attack*

By Judge Harold R. DeMoss, Jr. (ret.); Nick Dranias, JD; Dr. John Eastman, JD, PhD; Dr. Kevin Gutzman, JD, PhD; Ilya Shapiro, JD; and Hon. Gregory Snowden, JD

*"[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."*

- Federalist No. 43 (James Madison)

### Introduction

Compact for America Educational Foundation is proud of educating the American public about the power and promise of using an agreement among the states—an interstate "compact"—to advance and ratify constitutional amendments under Article V of the U.S. Constitution. But we are far from alone in this educational mission.

More than 20 esteemed policy organizations have vetted or lent educational support to the Balanced Budget Compact effort by furnishing letters of endorsement, supportive testimony, and venues for lectures, debates, and publications. These organizations have included such leading institutions as the Cato Institute, the Federalist Society, the Goldwater Institute, the Heartland Institute, Texas Public Policy Foundation, the Mississippi Center for Public Poli-

cy, the John Locke Foundation, the Georgia Public Policy Foundation, the Alaska Policy Forum, the Mackinac Center for Public Policy, and many others. Additionally, Judge Andrew Napolitano, Grover Norquist, George Will, Professor Lawrence Lessig, Stephen Moore, and many other luminaries from across the ideological spectrum have endorsed or vouched for the constitutionality of the effort.

With the support of our policy allies, this initiative has resulted in four states joining the Balanced Budget Compact. Seven chambers in seven more states have passed the Compact as well. The constitutionality of the Compact approach was vetted and sustained by rules committees and their attorneys in at least one chamber of 11 state legislatures. We have successfully organized the first functioning interstate agency to oversee the Article V amendment process—the Compact Commission of the Compact for a Balanced Budget—consisting of gubernatorial appointees from the states of Alaska, Georgia and Mississippi. And on May 25, 2016, the Compact Commission held its historic first full meeting in the Rayburn House Office Building at the invitation of members of Congress.

### ABOUT THE AUTHORS

**The extensive credentials of each author are detailed in the body of this policy brief.**

But not everyone is celebrating such progress. In the spring of 2016 and in a "corrected" version in early summer 2016, retired law professor Robert Natelson published a report posing the question, "Is the Compact for America Plan to Amend the Constitution

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Constitutional?” In those reports, Natelson rather aggressively declares the answer to his question is “unfortunately not.”<sup>1</sup>

Significantly, Natelson published his critique of the Compact approach to Article V more than 3 years after it was vetted and approved as a model policy by the American Legislative Exchange Council—despite the fact he served as an advisor to ALEC during the same period of time. Natelson’s unexplained lengthy delay in publishing his critique is curious to say the least. It is made more curious by virtue of the

fact that **neither the Constitution nor a single case**

on which he relies even remotely supports his position. As discussed below, both the plain text of Article V and all relevant case law sustain the

conclusion that the Compact approach to Article V is clearly constitutional. Natelson’s claims to the contrary are utterly without merit; even worse, they threaten the whole idea of a “convention of states” by repudiating the principle of state sovereignty in the state-initiated amendment process.

### **Unsurpassed Expertise Backs the Constitutionality of the Compact Approach**

Natelson begins his original and revised reports with a recitation of his credentials. We assume that this was not meant to intimidate the reader with an implied argument from authority. Nevertheless, to neutralize any such unintended effect, it is important to include an overview of the vetting process behind the Compact approach and the credentials of those joining in this policy brief. Our intention is to give readers comfort in applying their own judgment, not to induce genuflection. We hope each reader will feel completely comfortable assessing the merits of our refutation of Natelson’s opinions based on the strength of the arguments presented within the four

corners of our respective publications.

During the Spring of 2014, all known major objections to the constitutionality of the Compact approach were addressed in a detailed analysis jointly published with the Goldwater Institute: Using a Compact for Article V Amendments: Experts Answer FAQs (Goldwater Institute/Compact for America Jan. 24, 2014, rev. ed. March 24, 2014).<sup>2</sup> The report was joined by then-Fifth Circuit Court of Appeals Senior Judge Harold DeMoss (in a personal capacity), Cato Institute constitutional scholar Ilya Shapiro,

***“I am now even more confident in the ability of the states to use the Compact approach to making the Article V process safe and certain so that necessary structural constitutional reforms can be achieved on a timely basis.”***

***Judge Harold R. DeMoss, Jr. (ret.)  
U.S. Court of Appeals, Fifth Circuit***

Western Connecticut State University History Department Chairman Dr. Kevin Gutzman, and then-Goldwater Institute Constitutional Policy Director Nick Dranias. In July 2014, Dranias further described

the constitutionality of the Compact approach in his peer-reviewed “Article V 2.0” report published by the Heartland Institute<sup>3</sup> and the Federalist Society (in an abridged version).<sup>4</sup> Since the summer of 2015, eight peer-reviewed policy briefs have also addressed all aspects of the constitutionality of the Compact approach.<sup>5</sup> Dozens of blogposts and online articles publicly addressing every conceivable legal issue are available online.<sup>6</sup> These include our Article V Legislative Guidebook, which was joined by Chapman University Law Professor and former Dean Dr. John Eastman, Dr. Gutzman, Judge DeMoss, Ilya Shapiro, and Nick Dranias.<sup>7</sup> This policy brief is joined by the same team of experts, in addition to Compact Commissioner and Mississippi Speaker Pro Tempore Gregory Snowden. Our credentials are detailed below.

**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 grad-

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uated 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 known as Bracewell), 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, made 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 citi-

zens 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.

**Nick Dranias** currently serves as the President and Executive Director in the Office of the President of the Foundation. Nick also serves as Policy Advisor and Research Fellow with the Heartland Institute and an expert with the Federalist Society, as well as an Advisory Council member for Our America Initiative. Over a legal career spanning nearly two decades, Dranias has litigated well over one hundred cases. Dranias has appeared as a constitutional expert on Fox News, MSN-NBC, NPR, and many other local and regional media outlets. He has written and published over fifty articles in law and public policy, including law review articles, public policy reports,

***"Nothing in the text, drafting history, or the-  
ory underlying the option for state-proposed  
constitutional amendments suggests that the  
Compact approach to Article V is anything but  
perfectly constitutional. I regret to say that  
Professor Natelson's own opinion to the con-  
trary is based on a misreading of relatively  
sparse case law that is not even directly on  
point. But the fact of the matter is that every  
aspect of the constitutional amendments pro-  
cess mandated by the Constitution is given full  
effect by the Compact, and there is no court  
decision holding that anything in the Consti-  
tution prohibits the States from exercising its  
express powers in this fashion."***

**John C. Eastman, JD, PhD  
Henry Salvatori Professor of Law  
& Community Service  
Dale E. Fowler School of Law  
Chapman University**

and opinion editorials. Previously, Dranias served as General Counsel, Policy Development Director and Constitutional Policy Director at the Goldwater Institute, where he commissioned and edited Robert Natelson's original three part series on the Article V amendment process. Dranias led the Goldwater Institute's successful challenge to Arizona's system of government campaign financing to the U.S. Supreme Court. Prior to that, Nick was an attorney with the

Institute for Justice for three years and an attorney in private practice in Chicago for eight years, where he served as Young Lawyers Section co-editor of the Chicago Bar Association Record and earned the Oliver Wendell Holmes Award for his service. At the Loyola University Chicago School of Law, where he

earned his JD, Nick served on the Loyola University Chicago Law Review, competed on Loyola's National Labor Law Moot Court Team, and received various academic awards. He graduated cum laude from Boston University with a B.A. in Economics and Philosophy. Apart from his numerous Compact for America Educational Foundation publications, Dranias' published work in the field of the Article V amendment process includes: Why Michigan Should Compact for a Federal Balanced Budget Amendment (Mackinac Center for Public Policy April 23, 2015), So What Are the D.C. Insiders Really Afraid of? (National Constitution Center, November 2, 2014), Introducing "Article V 2.0:" The Compact for a Balanced Budget, Federalist Society Engage, Federalism & Separation of Powers, Vol. 15, Issue 2 (July 2014), Did George Washington Tell a Lie About State Control Over Article V Amendments? (National Constitution Center, February 26, 2014), Fulfilling the Promise of Article V with an Interstate Compact (National Constitution Center, December 6, 2013), States Can Fix the National Debt: Reforming Washington with the Compact for America Balanced Budget Amendment (Goldwater Institute, April 23, 2013), Use it or Lose it: Why States Should Not Hesitate to Wield their Article V Powers (Library of Law and Liberty January 2, 2012), and Federalism DIY: 10 Ways for States to Check and Balance Washington (Goldwater Institute June 1, 2011).

**John C. Eastman** is the Henry Salvatori Professor of Law & Community Service at Chapman University Fowler School of Law, and also served as the

School's Dean from June 2007 to January 2010, when he stepped down to pursue a bid for California Attorney General. He is the Founding Director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute. Prior to joining the Fowler School of Law faculty in August 1999, he served as a law clerk with Justice Clarence Thomas at the Supreme Court of the United States and with Judge J. Michael Luttig at the United States Court of Appeals for the Fourth Circuit. After his clerkships, Dr. Eastman practiced with the national law firm of Kirkland & Ellis, specializing in major civil and constitutional litigation at both the trial and appellate levels. He earned his JD from the University of Chicago Law School, where he graduated with high honors in 1995. He was selected for membership in the Order

of the Coif and was a member of the Law Review, a Bradley Fellow for Research in Constitutional History and an Olin Fellow in Law & Economics. Dr. Eastman also has a PhD and MA in Government from the Claremont Graduate School, with fields of concentration in Political Philosophy, American Government, Con-

stitutional Law, and International Relations. He has a B.A. in Politics and Economics from the University of Dallas. Prior to law school, he served as the Director of Congressional & Public Affairs at the United States Commission on Civil Rights during the Reagan administration and was the 1990 Republican Nominee for Congress in California's 34th District.

**Kevin R. C. Gutzman** is the New York Times best-selling author of five books, including the forth-

***"This thorough refutation of Natelson's attack on the CFA project exposes Natelson's arguments as lacking foundation in legal precedent, in constitutional text, and in Founding-era constitutional materials. I am proud to be part of the most promising effort to deal with America's most pressing government problem: the burgeoning federal debt. With four states already on board, the Compact for America amendment project is on its way to merited success."***

**Dr. Kevin Gutzman**  
**Chairman, Department of History**  
**Western Connecticut State University**

coming Thomas Jefferson—Revolutionary: A Radical's Struggle to Remake America. Gutzman is Professor and Chairman in the Department of History at Western Connecticut State University, and he holds a bachelor's degree, a master of public affairs degree, and a law degree from the University of Texas at Austin, as well as an MA and a PhD in American history from the University of Virginia. He is also a faculty member at LibertyClassroom.com. Dr. Gutzman's first book was the New York Times best-seller *The Politically Incorrect Guide to the Constitution*, which is still selling consistently nearly ten years since its initial publication. It is unique in joining the fruits of the latest scholarship and a very readable presentation to a distinctly Jeffersonian point of view. It was a Main Selection of the Conservative Book Club. 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 book *James Madison and the Making of America*, was a Main Selection of the History Book Club, and it received positive reviews from *The Wall Street Journal*, *The Washington Times*, and numerous other publications. His new book, *Thomas Jefferson—Revolutionary: A Radical's Struggle to Remake America*, promises to be his biggest hit yet. Gutzman's essay "Lincoln as Jeffersonian: The Colonization Chimera" appeared in *Lincoln Emancipated: The President and the Politics of Race*, and his "James Madison and Ratification: A Triumph Over Adversity" appeared in *A Companion to*

James Madison and James Monroe. Gutzman has appeared on hundreds of radio programs, as well as twice on C-SPAN 2's "BookTV," once on CNN's "Lou Dobbs Tonight," eight times on Fox News's "The Glenn Beck Program" (four with Beck and four with Judge Andrew Napolitano), and on NewsMax TV. He has also been interviewed by reporters from major outlets such as the AP, *The Washington Times*, *The Philadelphia Enquirer*, *The Washington Post*, *The Hartford Business Journal*, *The Houston Chronicle* online, *Investor's Business Daily*, *Money Magazine*, *Connecticut Magazine*, and *The New York Times*, among others. Kevin Gutzman was a featured expert in the documentary movies "John Marshall: Citizen, Statesman, Jurist" and "Nullification: The Rightful Remedy."

**Ilya Shapiro** is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the *Cato Supreme Court Review*. Before joining Cato, he was a special assistant/adviser to the Multi-National Force in Iraq on rule-of-law issues and practiced at Patton Boggs and Cleary Gottlieb. Shapiro is the co-author of *Religious Liberties for Corporations? Hobby Lobby, the Affordable Care Act, and the Constitution* (2014). He has contributed to a variety of academic, popular, and professional publications, including the *Wall Street Journal*,

*Harvard Journal of Law & Public Policy*, *Los Angeles Times*, *USA Today*, *Weekly Standard*, *New York Times Online*, and *National Review Online*. He also regularly provides commentary for various media outlets, including CNN, Fox

News, ABC, CBS, NBC, Univision and Telemundo, the *Colbert Report*, and NPR. Shapiro has testified before Congress and state legislatures and, as co-

***"While it is unfortunate that Prof. Natelson has chosen to attack, with little basis, the compact approach to constitutional amendment, I remain convinced that it is the safest, fastest, and most legally secure method of achieving a Balanced Budget Amendment (or any other Article V goal)."***

***Ilya Shapiro***  
***Senior Fellow in Constitutional Studies***  
***Cato Institute***

ordinator of Cato’s amicus brief program, filed more than 200 “friend of the court” briefs in the Supreme Court, including one The Green Bag selected for its “Exemplary 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).

**Hon. Gregory Snowden** has joined Representative Paulette Rakestraw, Chairperson from Georgia, and Lt. Gov. Mead Treadwell (ret.), Vice Chair from Alaska, to lead the first interstate agency ever formed to coordinate a state-based push for a federal Balanced Budget Amendment. Snowden is the second highest-ranking officer of the Mississippi House of Representatives. Snowden’s duties as Speaker Pro Tempore include chairing the House Management Committee, which oversees

all business, personnel and financial operations of the body. Snowden also serves as Chairman of the

Mississippi House Republican Caucus, and is the current chair of the Mississippi Republican Elected Officials Association. Recognized nationally for his leadership, Greg serves on the Executive committees of both the National Conference of State Legislatures (NCSL) and the Southern Legislative Conference (SLC). Speaker Pro Tem Snowden graduated in 1976 from The University of Alabama with a B.A., magna cum laude, where he was inducted into Phi Beta Kappa. He went on to Vanderbilt Law School, where he

earned a J.D. in 1979, serving on the editorial staff of The Vanderbilt Law Review. After two years of legal practice in Florida, the Commissioner returned home to Meridian in 1981, where he has been a practicing attorney ever since.

### **Correcting Natelson’s Confusion about the Compact Approach to Article V**

Before refuting Natelson, it is important to underscore that he does not appear to understand how the Compact approach to Article V works. His report includes patently inaccurate statements that the Compact seeks to alter, conflate or contradict the plain text of Article V. In particular, Natelson contends that the Compact empowers some other “assembly” than state legislatures to initiate the amendment process, and that the Compact does not allow

***“Informed Americans realize that our nation is on the brink of a national debt crisis of unthinkable proportions. Yet, the Federal government has demonstrated a chronic inability to even admit, let alone actually address, the vast dimensions of the problem. With the Compact for a Balanced Budget, the several States possess the means to lead our nation back from the abyss before it is too late. Of all the Article V approaches, many of which have merit, the Compact model stands alone as the safest, surest and quickest constitutional remedy to recover America’s future. The States can, and must, lead the way.”***

**Rep. Greg Snowden  
Speaker Pro Tempore**

**Mississippi State House of Representatives**

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for state legislatures to deliberate. Nothing could be further from the truth.

Stated succinctly, the Compact approach to Article V involves using a legally binding agreement among the states (necessarily including their legislatures) to commit the number of states needed to ratify an amendment to the entire amendment proposal and ratification process in advance. It is passed as a single bill that includes the necessary Article V application, a specification of the amendment to be proposed, all convention logistics (including the appointment of delegates and the specification of rules), and a prospective (conditional) ratification of the specified amendment if it is proposed by the convention.<sup>8</sup> The amendment process specified in the Compact is activated when (1) the agreement is joined by at least three-fourths of the states through their legislatures; and (2) Congress passes a resolution both calling the necessary Article V proposing convention in accordance with the Compact and pre-selecting legislative ratification for the compact-specified amendment, if it is proposed.

Consequently, the “assemblies” authorized by the plain text of Article V to initiate and consummate the amendment process, namely Congress and state legislatures, are the same “assemblies” exercising such power in the Compact approach to Article V. The Compact approach does not yield an amendment to the U.S. Constitution until an application for a proposing convention is passed by at least two-thirds of the legislatures of the several states, Congress calls the proposing convention, the convention proposes the amendment, Congress refers the amendment to state legislatures for ratification, and at least three-fourths of the legislatures ratify the amendment. The only assemblies wielding amendment power are the assemblies designated by Article V. It just so happens that the Compact approach consolidates into a single, legally binding interstate agreement all of the amendment mechanics that state legislatures control and also seeks to consolidate into a single resolution all of the amendment mechanics that Congress controls.

It is true the Compact approach will result in having the same legislature that initiates the amendment process also serving as the ratifier of the contemplated amendment (if it is effectively referred by Congress for legislative ratification); and the same Congress that calls the proposing convention is also committing, in advance, to a specific mode of ratification. But such consolidation does not contradict the text of Article V because the Compact uses conditional enactments to ensure all constitutional thresholds are met before any of its terms are legally effective.

The mechanism of using conditional enactments to achieve such consolidation is consistent with the overwhelming rule in existing case law sustaining the use of conditional enactments in nearly every conceivable legislative or quasi-legislative context.<sup>9</sup> Furthermore, such consolidation is consistent with the spirit of Article V as articulated by the Founders. George Nicholas, for example, explained during the Virginia ratification convention that the states would agree on the amendment process from beginning to end, which implies that the outcome of the amendment process would be largely settled by the states at the outset of the process.<sup>10</sup> And it is consistent with the Supreme Court’s observation that the goal of amendment process is to reflect contemporaneous political will.

As observed by the Supreme Court in *Dillon v. Gloss*, 265 U.S. 368 (1921), which sustained a sunset provision placed by Congress on ratification referral of a proposed amendment:

*We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only*

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*when there is deemed to be a necessity there-  
for that amendments are to be proposed, the  
reasonable implication being that when pro-  
posed they are to be considered and disposed  
of presently. Thirdly, as ratification is but the  
expression of the approbation of the people  
and is to be effective when had in three-fourths  
of the States, there is a fair implication that it  
must be sufficiently contemporaneous in that  
number of States to reflect the will of the peo-  
ple in all sections at relatively the same period,  
which of course ratification scattered through a  
long series of years would not do.*

*Id.* at 375.

Furthermore, nothing in the Compact approach usurps, limits or alters the deliberative power or authority of any assembly designated by Article V. There is no direct or indirect sanction imposed on any legislature for rejecting the compact and its embedded application and ratification resolutions. Indeed, when considering the adoption of the Compact, each legislature is fully in control and free to deliberate over whether to make application to Congress for a proposing convention and whether it wishes to ratify the application's contemplated amendment (if it is effectively referred by Congress for legislative ratification). Congress is likewise free to fully deliberate over whether to enact a resolution that selects legislative ratification of the contemplated amendment. Both assemblies could amend their respective model compact legislation in any manner they desire before passing or rejecting it.

Of course, it is true that an Article V proposing convention organized as a consequence of the compact's application is not free to disregard the limited agenda specified in that application; and convention delegates from compacting states are not free to disregard their compact-embedded instructions to adopt and enforce convention rules to maintain that limited agenda. In fact, compacting states through their legislatures designate and instruct their delegates to vote convention rules into place that limit the agenda to a 24-hour up-or-down vote on proposing

a specific balanced budget amendment. Moreover, compacting states have already agreed to deem "ultra vires" and agree to refuse to participate in a proposing convention that would expand the agenda and propose an amendment not contemplated by the application that triggered the convention call. Furthermore, compacting states agree to a common litigation venue for all enforcement efforts to ensure the application's agenda is followed. But none of these provisions usurp, limit, or obstruct the plain text of Article V. As discussed below, they implement and enforce Article V's text by filling in the gaps that must be filled to ensure that the convention actually does what the application requests and its call entails. This is entirely constitutional.

### **The Compact Approach is Clearly Constitutional—So Say We All.**

Despite his report's provocative conclusion, Natelson does not actually answer the question his report poses; namely, whether the Compact approach to Article V is "constitutional." Instead, Natelson offers his opinion of Article V case law without any assessment of the plain meaning of the Constitution itself.

We will show in subsequent sections of this policy brief why Natelson's case law assessment is flawed; but it should not be forgotten that case law also requires courts to review constitutional questions by resort to first principles. This is because, whatever the asserted state of current case law, the possibility of reconsideration always exists—especially when case law diverges from the plain meaning of the Constitution. Case law at the highest level is overturned almost annually. By focusing on case law instead of the Constitution itself, Natelson never actually answers the question that frames his report. For this reason, we commence our rebuttal by squarely addressing the question of constitutionality that Natelson sidesteps.

The following discussion reveals that the authority of the Article V proposing convention is determined by the application, which renders the convention an instrumentality of the states and naturally subject

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to supplemental state legislation—such as an interstate agreement—to enforce and fill the gaps of the amendment process. How do we know this?

The short answer is that nothing in Article V gives Congress any power to determine the content of the call independently from the application. Instead, the grammar and structure of Article V yields the content of the call to the application, which in turn is an exertion of state sovereignty. The longer answer follows from a close reading of Article V's application and call clauses, the legislative history of Article V, and by everything the Founders ever said about the process. A textual analysis confirms that states as states are in the driver's seat when it comes to amending the Constitution by application and convention. For this reason, the normal default rule that states enjoy autonomous governing power applies to the state-initiated Article V amendment process under the Tenth Amendment. In short, the plain text of the Constitution confirms the constitutionality of the Compact approach to Article V.

### **The Application Properly Requests a Convention Targeted to a Specific Amendment**

The Compact approach to Article V is supported by the principal legal theory that: (a) the authority of the proposing convention is determined by the application that triggers the call; and (b) the states are free under Article V to exert their default sovereign powers, including the power to enter into legally binding agreements, to ensure the proposing convention does not stray from the application. Therefore, the principal defense of the Compact approach begins with our interpretation of the application clause as determining the proposing convention's authority. This analysis begins with an assessment of the function of the application.

The application clause of Article V states in relevant part: "on the Application of the legislatures of two thirds of the several states, [Congress] shall call a convention for proposing amendments." Contempo-

## **The Top Six Article V Constitutional Questions and Answers**

- 1. Do States Have the Power to Furnish the Mechanics of the Amendment Process Where Article V is Silent? Yes.**
- 2. Do States Have the Power to Make an Article V Application Requesting Congress to Call a Convention with an Agenda Limited to Proposing One or More Specified Amendments? Yes.**
- 3. Do States Have the Power to Determine When their Actions in the Amendment Process are Effective before the Amendment is Consummated? Yes.**
- 4. Do States Have the Power to Enforce Compliance with the Constitution, including Article V? Yes.**
- 5. Do States Have the Power to Compel, Coerce or Override the Mode of Application for an Article V Convention? No.**
- 6. Do States Have the Power to Limit, Prohibit or Override the Mode of Ratification Specified by Congress? No.**

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aneous usage establishes that “application” simply means “petition.”<sup>11</sup> A “petition” is a formal means of requesting something. What is the “something” being requested in Article V by way of the application? Given that the application clause states “on the Application” Congress “shall call a convention,” the text of Article V indicates that the “something” being requested by the application is the calling by Congress of a convention for proposing amendments. Is there any textual limit on the “something” that may be requested in the application? There is no express textual restriction on the content of an application. Article V simply states that the convention call shall be “on the Application.” Implicitly, because it is aimed at triggering a convention call, to be recognized as an “Article V application,” the application must contain a request that is relevant to calling a proposing convention and not something irrelevant like requesting a pepperoni pizza. This is the only necessary content requirement that can be gleaned from the text of Article V. No other textual guidance or restriction is provided on the content of the application.

Of course, some contend that the use of the plural “amendments” in “convention for proposing amendments” indicates that the application must ask for a convention to consider more than one amendment. Some latch onto this claim the further assertion that a proposing convention must range widely without regard to the application and that any attempt to limit the convention to the application violates Article V. But context proves this contention wrong. Context shows the plural form was meant to include the singular, not exclude it. How do we know this?

Because Congress’s direct amendment proposal power also speaks of proposing “amendments” in the plural. And yet, Congress has typically proposed amendments one-at-a-time. No one has ever contended seriously that Congress may only propose multiple amendments or none at all. There are also many other instances of the plural including the singular, not excluding it throughout the Constitution. Notice also that the convention called in response to the application is textually limited to one “for pro-

posing amendments.” It does not say “for drafting amendments.”

Consequently, as in the Compact approach to Article V, there is absolutely no textual reason why the state legislatures could not ask in their application for the calling of a convention limited to a binary choice over proposing a specific amendment. After all, this degree of specificity is certainly how the like application process for securing federal help in suppressing domestic violence in Article IV, section IV is interpreted. Nobody claims that states can only apply for a help topic or subject matter and then sit back and hope the feds figure out where to send the National Guard. Nobody claims that states must wait for congressional enabling legislation to craft the contents of an Article IV application. Everyone understands that states have the reserved or implied sovereign power to specify in their Article IV application where help is needed and what help is desired. There is no textual reason to treat an Article V application differently and to assume that states are somehow incapable of making a specific request for the calling of a proposing convention for an agenda strictly limited to proposing a specific amendment. Further, our extensive historical analysis in Policy Brief No. 9 shows that states during the founding era traditionally had the power to make extensive and very specific requests in their applications—even in regard to conventions.<sup>12</sup> There is every reason to believe that this traditional sovereign power was meant to be leveraged by Article V to the very extent that the content of an “application” is not expressly defined.

### **Congress’s Call Yields to the Application’s Request**

Article V provides that Congress “shall call” a proposing convention when the necessary constitutional threshold of at least two-thirds of the legislatures joining in the application is met. The call clause is not a conferral of power on Congress; it is a mandatory duty imposed on Congress to call a proposing convention “on the Application.” Nothing in the call clause replicates the phraseology of power grants

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in other phrases in the Constitution, such as Article I, section 8, which states “Congress shall have Power,” or Article II, section 2, which states, “[t]he President shall have Power to fill up all Vacancies,” or Article III, section 3, which states, “Congress shall have Power to declare the Punishment of Treason.” In the absence of a grant of power to Congress to displace, modify or supplement the application’s request, the call is best construed as embracing the request of the application for no other reason than Congress’s lack of any conferred power to do otherwise. It is thus fully consistent with the text of Article V and the Constitution itself that both the call and the convention’s authority would be limited to the application’s request, as it is in the Compact approach to Article V.

### **Legislative History Sustains the Determinative Role of the Application**

The legislative history of Article V further indicates that the content of the Article V application was ordinarily expected both to determine the authority of the proposing convention and to request the proposal of one or more specified amendments. Why? Because the next-to-last version of Article V had Congress proposing amendments on application of two thirds of the legislatures of the several states.<sup>13</sup> The most reasonable interpretation of this version is that the application would determine the authority of Congress to propose amendments and also specify the amendments to be proposed by Congress. Otherwise, if the application were only to trigger an obligation for Congress to both draft and propose amendments, the contemplated state-initiated amendment process would have been redundant of Congress’s authority to draft and propose amendments.

While it is true that, at the insistence of George Mason and others, the final version of Article V replaced Congress with a convention as the formal proposing body, the sole reason for this change was to better secure the proposal of desired amendments. The application itself otherwise remained the same.

How do we know that the application remained the same in the final version of Article V as in the immediately preceding version of Article V? Because Madison objected to the reconfiguration of Article V by questioning why Congress would call a convention for proposing amendments more reliably than directly proposing the required amendments on “the like application.”<sup>14</sup> In other words, Madison questioned the patent inconsistency in the convention’s mistrust of Congress, but he did not question whether “the like application” would be involved in prompting action by Congress. Moreover, although he briefly mused about problem of determining a quorum for the convention, Madison did not express any concern about whether “the like application” would continue to specify desired amendments for proposal. No controversy was expressed over the role of “the like application” whatsoever. This confirms “the like application” in the final version of Article V would be exactly that—it would continue to specify each amendment to be proposed just like the application in the next-to-last version of Article V.

In sum, a close analysis of the text, context, and legislative history of Article V validates the principal premise of the Compact approach—that the application determines the legal authority of the proposing convention, and that such authority can be finely tuned by state legislatures to exclusively proposing or not proposing a specific amendment. This interpretation is confirmed by public understanding of Article V during the Founding Era, as evidenced by repeated and prominent statements by the Founders discussed extensively in our Policy Brief Nos. 7 and 9.<sup>15</sup>

### **The Founders Publicly Confirmed the Determinative Role of the Application**

Significantly, the Chair of the Philadelphia Convention, George Washington, confirmed in his April 25, 1788 letter to John Armstrong that “nine states” can get the amendments they desire, which indicates that two-thirds of the states would specify the desired amendments in their Article V application and target the convention agenda accordingly.<sup>16</sup> Alexander

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Hamilton's representations in Federalist No. 85 confirm that "nine" states [two-thirds] would effect "alterations," that "nine" states would effect "subsequent amendment" by setting "on foot the measure," and that we can rely on state "legislatures" to erect barriers.<sup>17</sup> Years later, Hamilton's representations were confirmed by James Madison's 1799 Report on the Virginia Resolutions, which observed that the states could organize an Article V convention for the "object" of declaring the Alien and Sedition Acts unconstitutional. 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."<sup>18</sup>

These public statements all anticipate and confirm the amendment-specifying power of an Article V application, which alone is entirely controlled by two-thirds of the states through their legislatures; as well as a narrow and preset agenda for an Article V convention determined by the application. Indeed, James Madison's representation in Federalist No. 43 that the power of state governments to originate amendments is equal to that of Congress could only be true if the Article V application had the power to specify and target the convention to desired amendments.<sup>19</sup>

But we must highlight one public statement in particular which has no other possible interpretation than that the application was meant to specify desired amendments and determine the authority of the convention. It is Tench Coxe's June 11, 1788 statement in a pamphlet advocating ratification of the Constitution, which observed plainly that: "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."<sup>20</sup>

Notice that both of these statements clearly indicate that two-thirds of the states would specify and agree on the desired amendments in their Article V application before any convention was called. There is no other explanation for Coxe referring to the "adoption" of "amendments" by "nine or more" states except in reference to the two-thirds threshold for the application (then nine) and thus confirming the application was expected to request the proposal of amendments, not just request a convention. There is no other way to interpret Coxe's statement that Congress might dislike "the proposed amendments" before calling the convention. The only possible explanation of Coxe's statement is that he recognized what our textual and legislative history analysis shows: the application would specify the proposed amendments in its request for a convention and the call and the convention would be bound to its request. These statements also plainly regard the role of the convention as simply that of a handmaiden or instrumentality for proposing the desired amendments specified in the application.

Although Natelson has occasionally acknowledged the fact that Coxe thought the application would specify the amendments to be proposed, Natelson still contends that "the design [of Article V] was not for the states to dictate particular language in their applications, thereby requiring the convention to vote merely 'yes' or 'no.'"<sup>21</sup> To support this claim, Natelson cites to his own work, which contains no convincing evidence justifying his conclusion. Nevertheless, Natelson contends that the foregoing statements were meant to be only hopeful predictions that an otherwise inherently freewheeling or merely topic-limited convention would do what the states wanted.

In fact, contrary to Natelson's assertions, there is

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nothing inherent about conventions that they all must range with greater deliberation than debate and decision over a binary choice—as the existence of ratifying convention proves on the face of Article V. Indeed, Hamilton made this exact point about the Article V amendment process in Federalist No. 85, stating that all amendment proposals under Article V would be brought forth with “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. And consequently, whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place.”<sup>22</sup>

Viewed together with the statements of Hamilton, Madison, Washington, as well as the text and legislative history of Article V, it is clear that Coxe’s statements were not metaphorical or aspirational. They were meant as yet another literal description about how the convention would deliver the specific amendments requested by at least two-thirds of the states in their application. Thus, the notion that the proposing convention must have deliberative authority to range over a “subject matter” or otherwise to add or subtract to the agenda requested by the application, contrary to the Compact approach to Article V, has no more support than the notion that a ratifying convention would have authority to add or subtract to the agenda of ratifying a specific amendment referred by Congress.

### **The Proposing Convention Is An Instrumentality of the States**

A close textual analysis also confirms that the power to apply for a proposing convention can only be viewed as originating from state sovereignty, further confirming the propriety of invoking Tenth Amendment principles to sustain the Compact approach. The application power is not conferred by Article V itself because the prepositional phrase “on the Application” cannot be so interpreted. It is nothing like the phraseology of express power grants in other phrases in the Constitution, such as Article I, section

8, which states “Congress shall have Power,” or Article II, section 2, which states, “[t]he President shall have Power to fill up all Vacancies,” or Article III, section 3, which states, “Congress shall have Power to declare the Punishment of Treason.” Nor is the prepositional phrase “on the Application” anything like the phraseology of implied power grants in other phrases in the Constitution, such as Article I, section 4, which states “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,” or Article II, section 1, which states “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct.”

Instead, the prepositional phrase “on the Application” grammatically and semantically presumes the existence of an unspecified extra-constitutional source of power for state legislatures to make the requisite application. Because state sovereignty is the only extra-constitutional source of power for state legislatures to do anything in our system of federalism, it follows that state legislatures must be exercising state sovereignty when they apply for a proposing convention. Indeed, as explained in our Policy Brief No. 4, the Founders referred repeatedly to states as states exercising the power to propose amendments.<sup>23</sup> Again, James Madison very clearly wrote in Federalist 43 that Article V “equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.”<sup>24</sup>

State legislatures are acting as branches of state governments when they originate the amendment process through their application. There is no other source of power to make the application that is evident from the plain text of Article V. Because the content of the application is a function of state sovereignty, and the call and the proposing convention is constituted by the application; it follows that the proposing convention is an instrumentality of the states. It follows naturally that the states enjoy incidental sovereign power under the Tenth Amendment to ensure the application indeed governs the proposing

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convention through whatever mechanics are conducive to that end and consistent with the text of Article V; including, but not limited to, through the adoption of an enforceable interstate agreement that details and safeguards everything involved in the amendment process, as in the Compact approach.

Natelson does not address the foregoing textual

Compact approach solely on the basis of his assessment of Article V case law. Despite being labeled a “constitutional” analysis of the Compact approach to Article V, Natelson’s report is, in fact, nothing more than his personal opinion of the litigation risks associated with the approach. As discussed below, Natelson’s lack of expertise in litigation is revealed by his meritless case law analysis.

***“Our Founders recognized that the national government might abuse the powers granted to it, but they wisely provided for a remedy outside the institutions of that government itself. They gave to the States the power to call a convention for proposing amendments as an explicit alternative to the power of Congress to propose amendments. The federal Constitution also expressly gives to the States the power to enter into multi-state compacts. The beauty of the Compact approach to Article V is that it combines these two explicit constitutional provisions so that the States’ convention call cannot be hijacked or thwarted.”***

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and contextual constitutional analysis of Article V in attacking the Compact approach to Article V, other than to wave his hand by claiming the foregoing Founding-era quotes are somehow presented out-of-context. The original sources are hyperlinked in the endnotes, so the reader can decide for himself or herself as to whether waving hands in this way is a credible argument.

In fact, Natelson’s resort to hand waving is deafening because the foregoing analysis has been advanced in numerous policy reports explaining the legal basis of the Compact approach to Article V for over three years. Without any rebuttal or alternative interpretation being advanced of the foregoing evidence, one must assume that Natelson concedes the forgoing analysis in choosing, instead, to attack the

### **Article V Case Law Overwhelmingly Sustains the Compact Approach**

Notwithstanding his assertions to the contrary, numerous court decisions cited by Natelson have recognized the power of state legislatures to fill the gaps of Article V with the mechanics of the amendment process by both legislative rule and enforceable legislative enactment, much like the Compact approach does. See, e.g., *Idaho v. Freeman*, 529 F. Supp. 1107, 1112 (D. Idaho 1981) (upholding passage of legislative resolution rescinding prior ratification); *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (upholding adoption and enforcement of legislative rule requiring 3/5th majority for legislative ratification); *State v. Myers*, 127 Oh.St. 104, 105-06 (Ohio 1933) (upholding legislative enactment

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“setting up the machinery by which a convention may be assembled”); *Opinion of the Justices*, 148 So. 107 (Ala. 1933) (upholding legislative enactment requiring convention delegates to pledge to vote in accordance with results of state referendum).

In *Dyer v. Blair*, for example, a federal district court considered whether the Illinois legislature had the power to adopt and enforce a three-fifths vote requirement for ratifying a constitutional amendment similar in effect to a like provision in the state’s constitution. Without reaching the constitutionality of the similar state constitutional provision, the three judge panel led by future Justice John Paul Stevens ruled that the Illinois legislature indeed had such power. In reaching his ruling sustaining a supermajority requirement for the Illinois state legislature to ratify a constitutional amendment, the future Justice Stevens in *Dyer* clearly invoked Tenth Amendment principles.

The Court first observed that a gap existed in the ratifying clause Article V that needed to be filled:

*The difficulty presented by the cases before us, however, results from the fact that neither the Constitution itself, nor the record of the deliberations of the constitutional convention which drafted it, contains any unambiguous description or definition of what the state legislature must do in order to perform its federal ratifying function.*

*Id.* at 1304. In view of this gap, the Court favorably adopted the following scholarly opinion:

*Although the state may not provide any other method of ratification or impose limitations upon the power to ratify, it does seem to be clearly within the power of the state through its constitution or otherwise to determine what shall be the organization of the state’s representative legislative body, and what shall be the quorum for action by that body. It, of course, also rests within the power of the state itself as to when regular or special sessions of the state’s representative body shall meet, and*

*as to how that representative body shall be organized.*

*Id.* at 1305. Given that “the Constitution is totally silent with respect to the procedure which each state convention or each state legislature, as the case may be, should follow in performing its ratifying function,” the Court ruled that the Illinois legislature had the power to require a supermajority vote to ratify a constitutional amendment. In so ruling, the Court expressly embraced a first principle of federalism guaranteed by the Tenth Amendment:

*This conclusion is consistent with — though by no means compelled by — the underlying philosophy of the framers with regard to the respective roles of the central government and the several state governments. Madison expressed the thought in urging ratification of the Constitution in *The Federalist* No. 45: The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.*

*Id.* at 1307.

Similarly, *Freeman*, 529 F. Supp. at 1112, held that state legislatures possessed the implied power to rescind their earlier ratification of a constitutional amendment before the amendment was fully ratified. The Court reasoned there was no reason why the legislature would lack such control over its own resolution. Likewise, in *Opinion of the Justices*, 148 So. 107, the Alabama Supreme Court sustained a duly-enacted state law requiring delegates to a ratifying convention to pledge to vote in accordance with the will of the people as revealed by a referendum on the ratification question. The Court reasoned that the pledging process facilitated the purpose of the convention mode of ratification by ensuring the will of the people was followed at the convention. Another example is *Myers*, 127 Oh. at 105-06, in which the Ohio Supreme Court specifically ruled, like the Alabama Supreme Court, that the state legislature was authorized to pass legislation “setting

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up the machinery by which a convention may be assembled.”

*Freeman, Dyer, Myers and Justices* affirm the proposition that state legislatures have autonomous power to fill the gaps of Article V to ensure that the amendment process is implemented and proceeds in an orderly fashion—even with respect to the ratification power. A quick case analysis illustrates how *Freeman, Dyer, Myers and Justices* support the constitutionality of the Compact approach.

The key to the Compact approach is the use of conditional enactments to allow the consolidation of all amendment mechanics in a single bill passed once in each state legislature and a single resolution passed once in Congress. For example, a conditional enactment ensures the Balanced Budget Compact’s embedded applying resolution is not legally effective until three-fourths of the states join the compact, even though the Constitution’s application threshold is two thirds of the states, because the Compact is designed to also meet the higher, three-fourths threshold required for ratification; and the Balanced Budget Compact’s embedded ratification resolution is not legally effective until Congress refers its contemplated constitutional amendment to the state legislatures for ratification. The exercise of such control over the effectiveness of an applying or ratifying resolution is directly supported by analogy to *Freeman*, 529 F. Supp. at 1112, and *Dyer*, 390 F. Supp. at 1295, which respectively sustained the rescission of a ratifying resolution and a supermajority vote requirement to pass a ratifying resolution. These cases essentially hold that a state legislature may constitutionally determine when its actions have legal effect in the Article V amendment process (at least before the process is consummated). This is also the underlying premise of the conditional enactments used by the Balanced Budget Compact.

Likewise, to the extent that the application and ratification clauses of Article V are legally analogous, the constitutional authority for the Compact approach to use conditional enactments is also supported by *Myers*, 127 Oh.St. at 105-06, and *Justices*, 148 So. at

109. After all, requiring three-fourths of the states to join the Compact before the embedded applying resolution is legally effective makes it exceedingly likely that member states will represent both a majority of the states and a majority of the population. This will ensure that member states control any conception of a quorum at the resulting proposing convention; and control over the quorum by member states, in turn, gives practical assurance that the convention will follow the agenda requested by the application.

Likewise, a pre-commitment by these same member states to ratifying the contemplated amendment will dissuade those who might otherwise be tempted to deviate from the application’s requested amendment agenda. Such instrumental value to maintaining the integrity of the application’s request renders the Compact’s conditional enactments analogous to furnishing the mechanics needed to organize a ratification convention, including enforceable pledges by delegates, which *Myers* and *Justices* sustained as impliedly authorized by Article V by virtue of their instrumental value.

By way of another example, consider that to ensure the convention stays on track, the Balanced Budget Compact designates known individuals to serve as delegates and instructs them to vote rules into place limiting the convention to a 24-hour affair that can only vote up or down the contemplated amendment (or else they lose their legal authority to act). The exercise of such detailed control over proposing convention delegates and logistics is directly supported by analogy to *Justices* and *Myers*, which upheld the power of states not only to furnish the straightforward mechanics of a convention, but also to bind convention delegates to pledge their vote in accordance with the results of a popular referendum.

In short, like the legislative acts sustained in *Freeman, Dyer, Myers and Justices*, the Compact approach constitutionally fills the gaps of Article V with the mechanics of the amendment process. If anything, given the creativity of the legislative acts upheld in *Freeman, Dyer, Myers and Justices*, the outcome of these cases proves the novelty of the Compact approach is no bar to its constitutionality.

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## Tenth Amendment Case Law Overwhelmingly Sustains the Compact Approach

Contrary to Natelson, the future Justice Stevens correctly invoked the Tenth Amendment principles of Federalist No. 45 when reaching the outcome in *Dyer*. As recognized in *United States v. Thibault*, 47 F.2d 169 (2nd Cir. 1931), “the national government is not concerned in the control or the method whereby the elections of members of the legislature or members of the constitutional convention may be conducted.” *Id.* at 170-71. Under governing case law, the Tenth Amendment does more than guarantee the preservation of reserved powers in the sense of protecting specific governing powers enjoyed by the states prior to the Constitution’s ratification. It also guarantees the federalist structure of the Constitution and the principle that states are autonomous sovereigns with default governing authority. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601-03 (2012); *Alden v. Maine*, 527 U.S. 706, 713-14 (1999); *Printz v. U.S.*, 521 U.S. 898, 933 (1997); *New York v. U.S.*, 505 U.S.

144, 174-75 (1992). Such authority naturally supports legislation ensuring that the proposing convention conforms to the application to the very extent that the convention is an instrumentality of the states. Even apart from a state’s inherent sovereign power to control its instrumentalities, the default governing authority of the states under the Tenth Amendment generally extends to enforcing the United States Constitution. See, e.g., *Pennsylvania v. Porter*, 659 F.2d 306, 317 (3rd Cir. 1981) (“[T]he Commonwealth has the same interest in compliance with the standard of conduct laid down in the Fourteenth Amendment as it has in compliance with standards of conduct enacted by the Pennsylvania legislature.”).

No Supreme Court decision has ever barred a state, through its legislature, from exercising their autonomous sovereign powers in a supplementary fashion to enforce or implement the Constitution

where its plain text does not preclude them from doing so and Congress had been silent. Instead, in such contexts, the Supreme Court has long upheld the exertion of state executive, legislative and judicial power to implement, enforce or supplement the U.S. Constitution. See, e.g., *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 135 S. Ct. 2652 (2015); *Ray v. Blair*, 343 U.S. 214 (1952); *United States v. Di Re*, 332 U.S. 581, 589 (1948). Although the Supreme Court recently barred states from enacting laws to enforce certain federal immigration laws, it has only done so only when Congress passed legislation intending to occupy the field and thereby preempted state laws in an area clearly delegated to Congress. Compare *Arizona v. United States*, 132 S. Ct. 2492 (2012) with *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). Moreover, in rejecting the asserted Tenth Amendment authority of states to impose term limits as a supplemental qualification to run for federal office, the Court in *U.S. Term Limits, Inc. v. Thornton*, 514

U.S. 779, 804-05 (1995), was very careful to emphasize both “[w]ith respect

to setting qualifications for service in Congress, no such right existed before the Constitution was ratified,” and “the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution.”

As a matter of legal principle, the Compact legislation is no different than legislation supplementing the Electoral College clause by requiring electors running in a primary to pledge to vote for a certain candidate (*Ray*, 343 U.S. 21). Tenth Amendment principles are not being invoked to concoct some bizarre theory that the plain text of Article V does not mean what it says, as in *United States v. Sprague*, 282 U.S. 716 (1931) (rejecting claim that ratification by convention is somehow mandated by the Tenth Amendment). Rather, the same principles of federalism articulated in *Dyer* are being invoked to sustain the Compact approach to Article V—that the states

## No governing precedent actually stands against the Compact approach or the constitutional analysis underpinning it.

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enjoy the reserved or implied autonomous sovereign power to furnish the governing mechanics of the amendment process where Article V and Congress are silent.

### **Natelson's Contrary Interpretation of Article V Case Law is Clearly Wrong**

Not surprisingly, no governing precedent actually stands against the Compact approach or the constitutional analysis underpinning it. No case has ever ruled that the proposing convention is not an instrumentality of the states; in fact, at least one case has referred to the proposing convention as a "convention of the states." *Smith v. Union Bank*, 30 U.S. 518, 528 (1831). Further, no case has ever actually held that the Tenth Amendment does not sustain state legislative power to enforce Article V or fill its gaps, as the compact approach does. No case has ever ruled that Article V preempts and prohibits all exercises of state sovereignty. Finally, no case has ever held that an interstate compact cannot address the Article V amendment process.

Additionally, as summarized in the appendix, the vast majority of supposedly adverse cases cited by Natelson are not binding outside of their particular state or federal circuit (having been issued by a state supreme court or federal court of appeals), not binding because they represent the opinions of a federal district court, not binding because they are merely non-precedential advisory opinions issued by state supreme courts, or not binding because the perceived ruling is actually dicta because it was not necessary to outcome of the case. Such cases cannot possibly constitute governing, much less "settled" law. Neither are they persuasive support for Natelson's ultimate assertion that the Compact approach is "clearly" unconstitutional.

Furthermore, Natelson unjustifiably places significance on cases that deem legal questions under Article V "federal." These cases are only stating the obvious—that the interpretation of the Constitution involves a federal question. This jurisdictional and jurisprudential observation in no way precludes

application of Tenth Amendment principles in the Article V context. The Tenth Amendment, after all, is a part of the Constitution. It merely makes explicit what is implicit in every constitutional provision. Therefore, every Tenth Amendment question is federal. This descriptive fact carries no weight when it comes to assessing the constitutionality of the Compact approach under governing case law.

In the final analysis, Natelson's critique of the Compact approach under governing case law actually boils down to two categories of irrelevant cases. The first of these categories includes cases that reject efforts to limit or obstruct the otherwise proper ratification of amendments. These cases typically involve efforts to use popular referenda or state constitutional provisions to prevent or overturn the state ratification of amendments by the state legislatures or state conventions. The second category encompasses cases that reject efforts to usurp Article V authority by compelling or coercing the initiation of the amendment process. These cases typically involve popular initiatives to establish laws or constitutional amendments that compel or coerce the state legislative passage of an application for a convention or the congressional proposal of an amendment. On their face, neither of these categories of cases have the least relevancy to the Compact approach.

The leading example representing the majority of cases falling into the first category is *Hawke v. Smith*, 253 U.S. 221 (1920), which rejected the notion that a popular referendum could override the legislative ratification of a congressionally proposed amendment. The holding of *Hawke* is simply that a popular referendum cannot overturn the ratification of an amendment by a state legislature when Congress chooses ratification by state legislature. In rejecting a role for the popular referendum, the Court ruled:

*The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is*

## Categories of Irrelevant Cases Cited by Natelson

<b>Category 1: Cases that reject state-based efforts to limit or obstruct the otherwise proper ratification of amendments</b>		<b>Category 2: Cases that reject state-based efforts to compel the <i>initiation</i> of amendments</b>	
<b>Rejecting popular referenda</b>	<b>Rejecting state constitutional provisions</b>	<b>Rejecting compulsory initiation</b>	<b>Rejecting coercive initiation</b>
<i>Hawke v. Smith</i> (SCOTUS-1920)	<i>Leser v. Garnett</i> (SCOTUS-1922)	<i>AFL-CIO v. Eu</i> (CA Sup. Ct. 1984)	<i>Miller v. Moore</i> (8th Cir. 1999)
<i>Opinion of the Justices</i> (ME Sup. Ct. 1919)	<i>Trombetta v. Florida</i> (DC Fla 1973)	<i>State ex. Rel. Harper v. Waltermire</i> (MT Sup. Ct. 1984)	<i>Barker v. Hazeltine</i> (DC SD 1998)
<i>Herbring v. Brown</i> (OR Sup. Ct. 1919)			<i>Morrissey v. Colorado</i> (Col. Sup. Ct. 1998)
<i>Barlotti v. Lyons</i> (CA Sup. Ct. 1920)			<i>League of Women Voters of Maine v. Gwadnosky</i> (DC ME 1997)
<i>Prior v. Norland</i> (CO Sup. Ct. 1920)			<i>Donovan v. Priest</i> (AR Sup. Ct. 1996)
<i>State ex. Re. Tate v. Sevier</i> (MO Sup. Ct. 1933)			<i>Initiative Petition No. 364</i> (Ok Sup. Ct. 1996)
<i>Opinion of the Justices</i> (NC Sup. Ct. 1933)			

*not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.*

*Id.* at 227.

On its face, the ruling in *Hawke* enforced the plain meaning of the Article V text against an effort to use a state constitution's referendum process to override that text. *Hawke* obviously has no negative impact

on the Compact approach to Article V because nothing in the Compact approach attempts to override Congress's selection of a state legislature as the ratifying body in the amendment process. Likewise, the rejection of state constitutional provisions purporting to restrict the ratification process in cases such as *Leser v. Garnett* is completely irrelevant to the Compact approach.

In fact, the Compact approach affirmatively pro-

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ffects Congress’s power to select state legislatures as the ratifying body by including a specific provision ensuring that its embedded legislative ratification “does not take effect until Congress effectively refers the Balanced Budget Amendment to the States for ratification by three-fourths of the Legislatures of the several States under Article V of the Constitution of the United States.” This precludes any claim that the Compact approach is analogous to any of legislative acts rejected in the first category of cases that are relied upon by Natelson.

The leading example of cases falling into the second category of cases cited by Natelson as standing against the Compact approach is *AFL-CIO v. Eu*, 36 Cal.3d 687, 686 P.2d 609 (1984), which blocked a popular initiative that would have compelled state legislators to apply for a proposing convention. There, the California Supreme Court rejected the initiative principally on technical state law grounds as failing to qualify for the ballot because it sought to advance a resolution rather than a statute. In rejecting a stay, the Supreme Court yielded to this technical state law issue as determinative. *Id.*, 468 U.S. 1310 (1984). Nevertheless, Natelson focuses on the fact that the California Supreme Court also ruled alternatively that the popular initiative violated Article V by attempting to usurp the role specified for the state legislature by forcing it to act as a “rubber stamp” in applying for a convention desired by the people of the state. Other state and lower federal courts subsequently expanded this ruling by analogy to a wide range of popular initiatives that directly or indirectly sought to coerce the initiation of the amendment process either by state legislatures or members of Congress. None of these rulings have any relevance to the Compact approach to Article V.

Unlike the popular initiatives rejected in *Eu* and sister cases in the second category, the Compact’s amendment process is appropriately initiated by the body authorized to do so by Article V. The Compact, which includes an embedded applying resolution, must be enacted by a state legislature. Moreover, unlike in *Eu* and its sister cases, state legislatures are completely free to refuse to enact the Compact,

including its embedded applying resolution, with full and unlimited deliberation. Nothing compels or coerces directly or indirectly any legislative action to take place.

Nevertheless, Natelson perceives in these two categories of cases a “settled” legal landscape that somehow precludes the Compact approach. Specifically, Natelson dramatically claims that the universal binding rationale upheld by every single case in the field of Article V law declares the Tenth Amendment “irrelevant” to Article V by precluding any exercise of state sovereignty in connection with the amendment process. But not one of the cases cited by Natelson actually says this. In reality, Natelson’s opinion about the constitutionality of the Compact approach to Article V is built entirely on inference, not express holdings—and his reasoning is illogical.

### **Natelson’s Attack on the Compact Approach Arises from a Non Sequitur**

To concoct his legal theory against the Compact approach, Natelson focuses on the rejection of arguments by the losing parties in *Hawke* and *Eu* that the reference to state legislatures in Article V should have been construed to include the electorate acting through the initiative and referendum process. He places great significance on *Hawke*’s observation that the reference to state legislatures does not include the electorate voting by popular referendum. Natelson also places great significance on the rationale for this observation—that state legislatures are not exercising a legislative power when ratifying an amendment, but instead are merely manifesting consent to a proposed amendment. Natelson further underscores that *Eu* and its sister cases ruled that Article V’s reference to state legislatures in the context of applying for a convention has the same literal meaning as in the ratification process; i.e. that actual state legislatures must apply for a proposing convention. Because state legislatures are acting in non-legislative capacity in the course of applying for a convention or ratifying amendments, Natelson somehow concludes that this entails a principle of law that completely preempts and prohibits any role

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for state sovereignty in the Article V process. He also contends that this conclusion is supported by dicta in *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652 (2015), which observed that constitutional references to state legislatures acting in a non-legislative “consenting” or “ratifying” capacity literally referred to state legislatures, whereas references to state legislatures acting in a legislative capacity referred to any state-constituted body wielding legislative power.

Natelson’s reasoning is a complete non sequitur. *Hawke, Eu, Arizona State Legislature* and their sister cases merely reached rulings on what class of state-constituted entities exercised a specified power based on whether the power involved consenting, applying, ratifying or redistricting. None addresses whether states possess supplemental sovereign power to enforce or effectuate that specified power, assuming it is exercised by the constitutionally correct body.

As discussed above, there is robust precedent establishing the default governing authority of states with respect to enforcing the Constitution. There is no evidence that Article V deviates from this general rule of law. If anything, Article V reinforces this general rule to the very extent that the proposing convention is an instrumentality of state sovereignty, i.e. a “convention of states.” Moreover, the notion that *Hawke* stands for some sort of unprecedented general preemption principle that completely disables state legislatures from acting as branches of autonomous sovereigns in the Article V amendment process has already been rejected by at least one case.

Specifically, in *Spriggs v Clark*, 45 Wyo. 62 (Wyo. 1932), the Court sustained the legislative referral of a referendum on the question of whether to ratify the repeal of prohibition. In rejecting the claim that such power was somehow preempted by the ruling of *Hawke*, the Court invoked Tenth Amendment principles, stating:

*The familiar principle of constitutional law that ‘the legislature of this state possesses all leg-*

*islative authority except as restricted by the State or Federal Constitution, either expressly or by clear implication, has repeatedly been relied on and announced by this court. The controlling force of this principle of law has, so far as we know, never been seriously questioned. It is quite evident there is no language in either the fundamental law of our state or of the nation which either expressly or impliedly operates to deprive the Wyoming Legislature of the right to pass such a resolution as has in this case been drawn in question. There being no restriction of this character, it would seem that the right of the lawmaking body to so act necessarily follows.*

*Id.* at 71.

Consistently with the ruling in *Spriggs*, recall that the Founders never spoke of state legislatures acting under Article V to the exclusion of state sovereign power; rather, they referred to state legislatures representing states in the origination of amendments. In light of *Spriggs*, Natelson cannot credibly wave off such Founding Era evidence as somehow immaterial to his litigation risk assessment. Such evidence is extremely important in a case law analysis.

Significantly, to justify the conclusion that the reference to state legislatures in the Elections Clause included any state-constituted body exercising legislative power, in *Ariz. State Legislature*, 135 S.Ct. at 2671 n.26, the Supreme Court emphasized the importance of Founding Era evidence that “[p]articipants in the debates over the Elections Clause used the word ‘legislature’ interchangeably with ‘state’ and ‘state government.’” Far more such evidence exists in regard to the role of state legislatures in originating amendments by convention. Following *Ariz. State Legislature*, such evidence underscores that state legislatures are acting in a sovereign capacity when originating amendments through their Article V application. This is true even if, as held in *Hawke* and *Eu*, the application and ratification processes are not themselves legislative in nature, and even if a state legislature must literally

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be the body applying or ratifying under Article V.

A state legislature can act in a sovereign capacity even while acting in a non-legislative capacity. Just because two discrete elements of the amendment process—applying for a convention and ratifying an amendment—are deemed non-legislative and restricted to actual state legislatures, it does not follow that Article V preempts and prohibits states from otherwise exercising sovereignty through their legislatures in the same field of law. Indeed, given that state legislatures are acting on behalf of their respective state governments in applying for a convention, it would be unreasonable for a court to rule that Article V nevertheless somehow preempts and prohibits the supplemental exercises of state sovereignty to ensure the convention hews to the application. The better bet is that courts will recognize that James Madison was not using words loosely in *Federalist No. 43* when he spoke of “state governments” enjoying an equal authority to originate amendments as with the national government; and that states enjoy broad sovereign power to ensure that the proposing convention conforms to the originating application, as an instrumentality of the states.

### **The Supremacy Clause Is a Friend of the Compact Approach**

Taken together, the Compact approach to Article V is nothing like any of the legislative efforts held invalid in either category of supposedly adverse case law cited by Natelson. The cases cited by Natelson hold only that there is no reserved state or popular power under the Tenth Amendment to usurp, limit, or obstruct the plain text of Article V. Hence, because Article V plainly gives Congress the power to determine the mode of ratification, courts have deemed unconstitutional state constitutional provisions requiring only the convention mode of ratifying amendments. Hence, because Article V only articulates a role for legislatures and conventions in the ratification process, courts have deemed unconstitutional state referenda that involve the people directly exercising sovereign power to overturn the legislative ratification of an amendment. Hence, because

Article V only articulates a role for legislatures and Congress in initiating the amendment process, courts have ruled that the people directly exercising sovereign power via popular initiative cannot compel or coerce the initiation of the amendment process.

These holdings represent nothing more than an application of lessons from “Supremacy Clause 101”: that the states and the people must yield to the plain text of the Constitution. They do not threaten the Compact approach in the least because the Compact approach neither disregards, limits nor obstructs the plain text of Article V. The Compact approach enforces Article V by implementing it in a convenient, safe and orderly fashion. No case has ever held that states are prohibited from enacting supplemental legislation that is consistent with the text of Article V.

### **There is Nothing Wrong with Embedding Resolutions in Legislation**

Finally, no case has ever held that that the Constitution preempts and prohibits states from embedding applying or ratifying resolutions in legislation. Indeed, it is illogical for Natelson to contend that a state legislature is prohibited from embedding resolutions that reflect the intention of the state legislature into statutory acts, such as legislation adopting an Article V compact. The same majorities needed to pass such resolutions are also involved in passing the compact legislation. Even if embedding resolutions in statutory legislation gave the executive branch an opportunity to weigh in on matters that did not implicate executive power, there is no possible separation of powers injury so long as the executive branch does not veto the legislation. Not surprisingly, non-statutory acts, such as legislative rules, have been embedded in statutes since the Founding Era.<sup>25</sup> Despite at least one clear opportunity to do so,<sup>26</sup> this practice has not been overturned by the Supreme Court or by any other court.

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## The Article V Movement Must Vindicate the Principle of State Sovereignty

In sum, both the plain text of Article V and all relevant case law supports the Compact approach to Article V. But this is not necessarily cause for celebration. However meritless, Natelson's strong opposition to recognizing the principle of state sovereignty as governing the state-initiated amendment process threatens the cohesion and credibility of the Article V movement. To put it bluntly, the Article V movement's claim that a convention for proposing amendments is a "convention of states" would be a fraud if, as claimed by Natelson, state sovereignty has nothing to do with Article V. The Article V movement's claim that the agenda of the convention for proposing amendments can be reliably limited would also be a fraud, if as claimed by Natelson, states have no sovereign power to enforce those limits.

Natelson cannot credibly claim that historical interstate convention custom and practice somehow directly defines the state-initiated Article V amendment process *independently from the sovereign power of the states*. As demonstrated above, this articulation is alien to everything the Founders said about the process—they plainly referred to "states" and "state governments" controlling the Article V application and convention mode of proposing amendments. Moreover, the Supreme Court has already rejected the argument that the pre-constitutional custom of state legislatures exercising control over convention delegates in and of itself proved a legally binding power or right to do so as a matter of constitutional law.

Specifically, in *Cook v. Gralike*, 531 U.S. 510, 520-21 (2001), the Supreme Court observed that historical evidence of the role that state legislature-issued "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." This observation was in one in the series of cases dealing with

congressional term limits efforts that Natelson cites as supposedly precluding the Compact for America approach to Article V. Ironically, such case law actually condemns Natelson's notion that pre-constitutional historical custom and practice, shorn free of any linkage to constitutionally-protected sovereign rights or power, gives rise to constitutional law.

Contrary to Natelson, history is not law. Of course, this does not mean history is irrelevant to law. It simply underscores that historical custom and practice must be linked to constitutionally-protected sovereign rights or power to have the status of constitutional law. In other words, the Tenth Amendment must have a role in the interpretation of Article V in order for historical interstate convention custom and practice to attain the status of constitutional law. And yet, in his attack on the Compact for America approach, Natelson illogically disavows any role for sovereign power in the Article V application and convention process. In so doing, Natelson has cut himself off at the knees from logically reaching his desired conclusions about Article V based on pre-constitutional historical interstate convention custom and practice.

No doubt Natelson believes himself forced into such radical surgery because of his mistaken diagnosis that "settled" Article V case law rejects a role for state sovereignty in the amendment process. But Natelson is not and never has been an experienced litigator. His mistaken diagnosis of the state of Article V case law and even worse prescription to discard the principle of state sovereignty reflects this fact.

If states totally lack sovereign power in connection with the Article V amendment process, as Natelson contends, then there would be absolutely no reason why pre-constitutional customs and practices, which derive from the exercise of state sovereign power, would govern the Article V amendment process with the force of constitutional law.

If the day comes when the Article V movement discards the principle of state sovereignty, as urged by Natelson, that day will signal the beginning of

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the end of the Article V movement. Opponents will shred Natelson’s quaint, if laudable, notion that honor, custom and practice are sufficient to bind the process to desired outcomes as a matter of law. Both the paranoid and the reasonable will see Natelson’s notion of a “convention of honor-bound delegates” as oxymoronic in today’s political culture.

And if the Article V movement somehow succeeded in reaching the call threshold under Natelson’s leadership, no doubt Congress will feel obliged and empowered to fill the void of state sovereignty and “protect” (i.e. assume control over) the process—as it has tried to do repeatedly in the past. See Thomas H. Neale, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*, R42589, 36 (C.R.S., April 11, 2014) (“Between 1973 and 1992, 22 bills were introduced in the House and 19 in the Senate that sought to establish a procedural framework that would apply to an Article V Convention . . . The Senate, in fact, passed constitutional convention procedures bills, the “Federal Constitutional Convention Procedures Act,” on two separate occasions: as S. 215 in 1971 in the 92nd Congress, and as S. 1272 in 1983, in the 98th Congress”).

Such congressional intervention would predictably dash the prospects of meaningful reform of the federal government. If the Article V movement discards the principle of state sovereignty, then Article V will cease being a viable reform option.

The principle of state sovereignty is the glue that holds the Article V movement together. Therefore, the Article V movement in all of its varieties must unite around that principle—rather than discarding it, as demanded by Natelson’s attack on the Compact approach to Article V. Further, the wider Article V movement should support the Compact approach alongside more confrontational approaches because it is the only approach that allows the states to partner with Congress in organizing a proposing convention while maintaining state control over the process.

## Conclusion

The best interpretation of the application clause of Article V is that it does not confer a power, authority, or duty on state legislatures out of whole constitutional cloth and to the exclusion of state sovereignty. Instead, the application clause of Article V leverages the exercise of the pre-existing sovereign power of the states as states to determine the contents of their application and thereby determine the authority of the proposing convention. Because the application controls the call and the convention’s authority, it follows that a proposing convention is an instrumentality of the states; and that the states may constitutionally exert sovereign power to fill the gaps of Article V to ensure the amendment process hews to the application. Because it does precisely that, the Compact approach to Article V is clearly constitutional. This conclusion is supported by the plain text of Article V and all relevant case law notwithstanding Professor Natelson’s opinions to the contrary.

***“I am honored to be part of this significant effort to reign in, by constitutional means, the abuses and excesses of our federal government that has for far too long simply ignored the Constitution’s express limits on its power.”***

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## Endnotes

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***Appendix Assessing Significance of Every  
Article V Case Cited by Natelson***

Ref	Year	Case	Court Level	Court	Main Finding(s)	Impact on CFA Approach
1	1798	Hollingsworth v. Virginia	1	SCOTUS	President has no formal role in the Article V process	None
2	1890	Fitzgerald v. Green	1	SCOTUS	Although the electors are appointed and act under and pursuant to the constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the states when acting as electors of representatives in congress	None
3	1920	Hawke v. Smith No. 1	1	SCOTUS	Power to ratify an amendment has its source in the federal constitution and states do not have the authority to require the submission of the ratification to a referendum.	None
4	1920	Hawke v. Smith No. 2	1	SCOTUS	Upheld Hawke v Smith No. 1 in relation to the 19th amendment and women's right of suffrage	None
5	1921	Dillon v. Gloss	1	SCOTUS	Congress can set the period for ratification	Confirms

Ref	Year	Case	Court Level	Court	Main Finding(s)	Impact on CFA Approach
6	1922	Leser v. Garnett	1	SCOTUS	1) Suffrage of women is a valid amendment topic; 2) function of state legislatures in ratification is a federal power and transcends any limitations sought to be imposed by the people of a state; 3) Certification of ratification by a qualified state official is conclusive	None
7	1931	United States v. Sprague	1	SCOTUS	18th Amendment was lawfully proposed and ratified	None
8	1931	United States v. Thibault	1	SCOTUS	Congress has the choice to choose the mode of ratification and the Tenth Amendment cannot be utilized to change this; although states can fill gaps of Article V	Confirms
9	1932	Atlantic Cleaners & Dyers, Inc. v. United States	1	SCOTUS	Function of the "legislature" in the constitution differs according to the power to be exercised.	None
10	1934	Burroughs v. United States	1	SCOTUS	While presidential electors are not officers of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by the U.S. Constitution.	None

Ref	Year	Case	Court Level	Court	Main Finding(s)	Impact on CFA Approach
11	1939	Coleman v. Miller	1	SCOTUS	1) Notice by state official of ratification of amendment is conclusive; and 2) Congress has the authority to set the time length for ratification.	None
12	1952	Ray v. Blair	1	SCOTUS	States can limit authority of delegates to Electoral Clge	Confirms
13	1982	Carmen v. Idaho	1	SCOTUS	Ruled moot 3 - Idaho v Freeman	None
14	1984	Uhler v. AFL-CIO	1	SCOTUS	Upheld stay in 4 - AFL-CIO v Eu	None
15	1995	U.S. Term Limits v. Thornton	1	SCOTUS	Qualifications of members of Congress cannot be changed by state legislatures	None
16	2001	Cook v. Gralike	1	SCOTUS	State term limit ballot labels associated with congressional elections are not authorized by the Elections Clause	None
17	2015	Arizona State Legislature v. Arizona Independent Redistricting Commission	1	SCOTUS	Vesting of redistricting power in newly created AIRC by citizen initiatives does not violate the Elections Clause in the federal Constitution	Confirms
18	1999	Miller v. Moore	2	USCA - 8th Circuit	Nebraska's Article XVIII Constitutional provision represents a clear attempt to coerce or bind legislators into exercising their Article V powers to pass a term limits amendment. The language of Article XVIII is mandatory, and thus is unconstitutional.	None

Ref	Year	Case	Court Level	Court	Main Finding(s)	Impact on CFA Approach
19	1954	United States v. Gugel	3	USDC - Kentucky	History of judicial reliance on the 14th Amendment as evidence that it was validly adopted	None
20	1973	Trombetta v. Florida	3	USDC - Florida	Application of Leser and Hawke to case in Florida, ruling that Florida constitutional requirement that members of ratification legislature or convention be elected after submittal of the proposed amendment ruled invalid	None
21	1975	Dyer v. Blair	3	USDC - Illinois	Article V delegates to the state legislatures—or the state conventions depending upon the mode of ratification selected by Congress—the power to determine their own voting requirements.	Confirms
22	1981	Idaho v. Freeman	3	USDC - Idaho	State ratifying bodies may determine their own rules and rescind its ratification vote as long as the amendment has not acquired the 3/4 ratification vote	Confirms
23	1997	League of Women Voters of Maine v. Gwadosky	3	USDC - Maine	The state's Congressional Term Limits Act of 1996 effectively coerces Maine's elected officials through its ballot labeling provisions. Given this coercion, State legislators cannot act in the deliberative manner required by Article V. The Act is,	None

Ref	Year	Case	Court Level	Court	Main Finding(s)	Impact on CFA Approach
					therefore, unconstitutional	
24	1998	Barker v. Hazeltine	3	USDC - South Dakota	Initiated Measure *1090 1, adopted by majority vote, directs the South Dakota Secretary of State to place labels on the primary and general election ballots to identify those candidates for United States Senator and United States Representative who do not support the particular term limits provision advocated in Initiated Measure 1. As discussed more fully below, the Court declares Initiated Measure 1 unconstitutional and permanently enjoins its enforcement.	None

Ref	Year	Case	Court Level	Court	Main Finding(s)	Impact on CFA Approach
25	1919	Opinion of the Justices	4	State - Maine	The state legislature's ratification of the proposed 18th amendment to the Constitution of the United States was complete, final and conclusive so far as the State of Maine was concerned, when the Legislature passed this resolve. It is not appropriate to for the state to submit the question of ratification to the people by referendum. Similar to Herbring v. Brown	None
26	1919	Herbring v. Brown	4	State - Oregon	Article V delegated to the legislature independently and ratification was not an "act" in the sense of being a law.	None
27	1920	Barlotti v. Lyons	4	State - California	Opinion the same as the Opinion of the Justice (Maine) - the state legislature's ratification of the proposed 18th amendment to the Constitution of the United States was complete, final and conclusive so far as the State of Maine was concerned, when the Legislature passed this resolve. It is not appropriate to for the state to submit the question of ratification to the people by referendum.	None

Ref	Year	Case	Court Level	Court	Main Finding(s)	Impact on CFA Approach
28	1920	Prior v. Noland	4	State - Colorado	Ratification is not a lawmaking legislation for the state, and thus is not subject to approval or rejection by referendum	None
29	1928	Opinion of Justices	4	State - Massachusetts	Amendment of the Constitution of the United States and repeal of amendments thereof constitute federal functions derived in every particular entirely from the Constitution of the United States. That instrument transcends all provisions sought to be enacted by the people or by the legislative authority of any state.	None
30	1932	Spriggs v. Clark	4	State - Wyoming	Court ruled that a non-binding referendum of the electorate to determine the sentiment of the people as to whether the 18th Amendment should be repealed is permissible if it undertakes to supply the political body whose duty it is to initiate proceedings to change the National Charter with reliable information concerning the attitude of the people of this commonwealth on a question admittedly of serious interest and importance to them from both state and national standpoints	Confirms

Ref	Year	Case	Court Level	Court	Main Finding(s)	Impact on CFA Approach
31	1933	Opinion of the Justices	4	State - Alabama	Article V grant is to state legislative authority - state law controls and could provide for voter instruction of delegates.	Confirms
32	1933	State ex. Re. Tate v. Sevier	4	State - Missouri	The state had previously passed a law that detailed how delegates were to be elected in the event Congress determined that a proposed amendment would be ratified by individual state conventions. A referendum petition was tendered to have the people of the state approve or reject to previous law. The court ruled that the determination of Article V procedures in a state is to be determined the legislature and is not subject to a referendum of the people.	None
33	1933	Opinion of the Justices	4	State - North Carolina	Convention call is not subject to referendum	None
34	1933	Donnelly v. Myers	4	State - Ohio	Legislature can supplement Article V	Confirms
35	1977	Opinion of Justices to the Senate	4	State - Massachusetts	Since the word "Legislatures" in the ratification clause of art. V does not mean the whole legislative process of the State, as defined in our State Constitution, we are of opinion that the word "Legislatures" in the application clause, likewise, does not mean the whole legislative process.	None

Ref	Year	Case	Court Level	Court	Main Finding(s)	Impact on CFA Approach
36	1980	Opinion of the Justices	4	State - Delaware	Article V is federal law	None
37	1984	AFL-CIO v. Eu	4	State - California	The California court undertook to decide two clearly federal questions relating to the meaning of the word "Legislatures" in the above clause: (1) whether that word encompasses the voters of a State who have power to enact laws by initiative, and (2) whether it includes a legislature not acting as an independent body, but forced to act by exercise of the initiative power. The court answered each of these questions in the negative, concluding that the word "Legislatures" means the State's lawmaking body of elected representatives, acting independently of restrictions imposed by state law	None
38	1984	State ex. Rel. Harper v. Waltermire	4	State - Montana	The people through initiative cannot affect the deliberative process	None
39	1996	Donovan v. Priest	4	State - Arkansas	All proposals of amendments to that Constitution must come either from Congress or state legislatures —not from the people	None
40	1996	Initiative Petition No. 364	4	State - Oklahoma	The people through initiative cannot instruct the state legislature to make specific	None

Ref	Year	Case	Court Level	Court	Main Finding(s)	Impact on CFA Approach
					application under Article V	
41	1998	Morrissey v. State of Colorado	4	State - Colorado	Legislators are free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled	None
42	1999	Bramberg v. Jones	4	State - California	<p>We agree with the numerous out-of-state decisions that have addressed similar initiative measures, and conclude that the challenged term limits proposition is unconstitutional.</p> <p>Past decisions of both the United States Supreme Court and this court clearly hold that Article V of the United States Constitution vests the power to propose and ratify amendments of the U.S. Constitution solely in deliberative representative bodies-Congress, state legislatures, or constitutional conventions-and does not authorize such amendments either to be mandated or defeated by a direct vote of a state's electorate through an initiative or referendum</p>	None



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***This Policy Brief is Dedicated to Kyle McAlister.***