Legal Brief: The Compact for America's Laser-Focused Article V Convention is Clearly Constitutional

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This memorandum furnishes a scholarly explanation as to why the Compact for America's limitations on an Article V convention would be constitutional and enforceable.

Overview of the Compact for America

A legal analysis of the Compact for America ("CFA") first requires a "50,000 foot" view of its structure and the constitutional amendment process it sets in motion. The CFA is an agreement among the states to advance a single, specific, and pre-drafted Balanced Budget Amendment ("BBA") using their sovereign power under Article V of the U.S. Constitution, which authorizes states to originate constitutional amendments by applying to Congress to call a convention for proposing amendments. In the absence of the CFA approach, the ordinary "plain vanilla" amendment-by-convention process under Article V would have no fewer than five essential state and federal legislative components—an "application" for a convention that would require passage by 34 state legislatures, a convention "call" that would require passage by Congress, convention delegate appointment and instruction legislation by at least 26 states, a "referral" of any amendment proposed by the convention that would require passage by Congress, and a "ratification" that would require passage by legislatures or conventions in at least 38 states. By contrast, the CFA has only two essential legislative components—the state compact and a counterpart congressional omnibus concurrent resolution.

The states, through their legislatures and governors each of which has deliberated over the wording and impact of both the compact and BBA and subsequently signed the compact into law in their respective states, have determined in advance that they are in agreement that the BBA is necessary, and because time is of the essence, that the BBA is the only amendment that will be considered and proposed in this particular amendment effort. Accordingly, the CFA is designed to greatly simplify the otherwise unwieldy amendment-by-convention process that heretofore has been unsuccessful. It does this by consolidating into the state compact all of the legislation involved in the Article V process that states control—from the application to Congress, to delegate appointments (the state governors are the sole delegates) and delegate instructions (limit the convention agenda to the up/down vote on the BBA), to the selection of the convention location and rules, to the ultimate ratification of the BBA. It then consolidates all of the congressional legislation involved in the Article V process—both the call for the convention and the ratification referral—into a single omnibus concurrent

resolution that in itself incorporates the terms and provisions of the interstate compact. Thus, by consolidating the entire Article V process into these 2 pieces of intertwined legislation – the state legislation adopting the Compact and the federal legislation adopting the omnibus concurrent resolution - all of the stakeholders involved, including the people through their elected state legislators, the state legislature bodies, the governors who will serve as the delegates, and the U.S. Congress will have all agreed in advance as to how this particular amendment process will be conducted. No one is left out of the process.

The key to consolidating the required Article V legislation into the CFA's two overarching legislative components is the use of contingent effective dates—also known as "conditional enactments" or "tie-barring"—to ensure that each piece of consolidated legislation only goes "live" at the right time. The U.S. Supreme Court and courts in 44 states have recognized the viability of such conditional enactments.[2] Conditional enactments are common components of congressional legislation, including legislation approving interstate compacts,[3] as well as many existing interstate and federal-territorial compacts.[4] Accordingly, the CFA is designed not to go live and trigger a convention call from Congress until at least 38 states join the compact and agree to be bound by its provisions; likewise, the prospective ratification of the CFA's BBA will only go live if Congress first enacts the counterpart omnibus concurrent resolution,[5] which prospectively refers the BBA for legislative ratification if it is proposed by the convention.[6]

The CFA is also designed to prevent any reasonable possibility of a "runaway convention"—an Article V convention that would disregard the CFA's limited agenda of advancing the single, specific, pre-drafted BBA. This is because the CFA leaves no gaps in the convention process to be filled by those who might run wild. It appoints all delegates for at least 38 member states (their sitting governors[7]) and strictly instructs them to follow convention rules that limit the agenda of the convention to an up or down vote on the specific BBA proposal within 24 hours of convening. It also prohibits member states from expanding the scope of the convention or ratifying any amendment other than the BBA; deeming "ultra vires" and nullifying as "void ab initio" any action or proposal that deviates from the CFA. Finally, the Compact Commission, which the CFA establishes to enforce the CFA and manage its logistics, is empowered to relocate the convention from its default location of Dallas, Texas, if necessary, to ensure it proceeds in accordance with the CFA and the Congressional Resolution.[8]

In total, the CFA has sixteen mutually-reinforcing safeguards, consisting of both direct legislation and carefully calibrated political incentives, to keep the convention laser-focused. These safeguards are binding on all member states both as a matter of state law and as contractual obligations under the U.S. Constitution's Contracts Clause, which allows for the entrenchment of the Compact's provisions under current precedent.[9] Moreover, because no member state may attend the convention until Congress adopts the counterpart omnibus concurrent resolution, which calls the convention in accordance with the CFA, the CFA's safeguards will also have the status of the "Law of the United States" under current precedent interpreting the effect of Congressional approval of interstate compacts.[10] As is

common in many existing interstate compacts,[11] to ensure a reputable jurisdiction entertains any enforcement proceeding, the CFA includes a forum selection clause designating the federal and state courts located with the Northern District of Texas as the default choice of venue for all member states.

Legal Analysis

The following legal analysis deals with the most frequent issue surrounding the CFA: whether the Article V convention process can be limited—i.e. directed and regulated—by an interstate compact. This analysis is not meant to exhaustive of supporting precedent or legal theories. It highlights the key points showing that the CFA's limitations on the Article V convention process are entirely constitutional and legally effective.

It is important to first emphasize that whatever special legal significance attaches to it under the U.S. Constitution, an Article V convention is, in the most concrete terms, simply a gathering of people. Thus, in asking whether the CFA can constitutionally limit the Article V convention process, one is essentially asking whether states have the power to regulate the organization of a particular, albeit very special, gathering of people through an interstate compact. Viewed in this light, it is important to recall that the states do not have the burden of affirmatively proving their general governing authority by reference to specific provisions in the U.S. Constitution. The default assumption of the Constitution, as evidenced by the Tenth Amendment, is that all powers not delegated to the federal government are reserved to the states or the People. The states retain general and indefinite powers of governance subject only to such limitations as required by the Constitution's language and structure.[12]

Accordingly, absent a clash with one or more affirmative provisions of the U.S. Constitution, if a gathering of individuals that happens to be an "Article V convention" is organized from or is located within the boundaries of the states, it follows that each such state will respectively have governing authority over so much of that gathering and its organization as fall within its jurisdiction. In other words, based on the Constitution's design, the states should be assumed to have the power to direct and regulate the Article V convention process under their reserved general powers of governance with or without an interstate compact—*unless* there is a cogent reason to believe that such power was exclusively delegated to some other body or is otherwise limited by the Constitution's language or structure.

In view of this basic assumption about the relationship between states and the Constitution, the burden of proving that states lack constitutional authority to direct and regulate an Article V convention through an interstate compact should more properly be placed on the person advancing that proposition. To demand, instead, that the states shoulder that burden of proof inverts the Constitution's power structure. Nevertheless, by process of elimination we can say with certainty that there is no question the states have the power to direct and regulate the Article V convention process through the CFA. This is because there are only three possible repositories of sovereign power in our federal republic that could direct and regulate the Article V convention process: the People, Congress, as agent of the People as a Whole, and the States, as agents of the People within their respective boundaries. As discussed below, we

can exclude the possibilities that the People or Congress were meant to direct and regulate the Article V convention process, which necessarily leaves such power in the hands of the states as a reserved power under the Tenth Amendment, the exercise of which can be coordinated collectively through an interstate compact.

An Article V Convention is Not a Revolutionary Convention of the People

The text of Article V articulates no role for the People in advancing constitutional amendments whatsoever. In view of this fact, the U.S. Supreme Court specifically observed in *Dodge v. Woolsey*, 59 U.S. 331, 348 (1855), that the people of the United States, aggregately and in their separate sovereignties "have excluded themselves from any direct or immediate agency in making amendments." For this reason, an Article V convention is not analogous to a state constitutional convention, which directly exercises the People's sovereignty as a convention of the People.

But even if one were to analogize an Article V convention to a state constitutional convention, it is important to emphasize that, with respect to such conventions, state courts have long distinguished between conventions that are "revolutionary" in nature and those that are not. If a state constitution expressly authorizes the abolition or replacement of the existing state government, then the constitutional convention process it outlines has been deemed "revolutionary" and intended to directly represent the People as an independent sovereign body, which cannot be constrained by a limited agenda set by the state Legislature.[13] In contrast, if the state constitution *does not* expressly authorize the abolition or replacement of the existing state government *or* if the state constitution imposes Legislative call or ratification requirements, then the state constitutional convention process is *not* "revolutionary" and a limited agenda *can be imposed* on the convention by bodies that only indirectly represent the People, such as the Legislature.[14]

In view of this distinction between revolutionary and non-revolutionary state constitutional conventions, it is clear that an Article V convention cannot possibly be regarded as a "revolutionary" convention of the People, even if it were somehow considered analogous to a state "constitutional convention." This is because: 1) there is no textual authority given to an Article V convention to "abolish" or "replace" the U.S. Constitution, as is found in many state constitutions; and 2) the proposals of an Article V convention are subject to specific application, call and ratification requirements, all of which imply that the convention operates with the strictures of the Constitution as an extension of existing governmental bodies.

Indeed, there is abundant direct evidence that the Article V convention process was intended to operate within the strictures of the Constitution in proposing amendments, rather than directly invoke the People's revolutionary sovereignty in establishing a new form of government. This evidence includes: 1) the Report of Proceedings from the Philadelphia Convention on September 15, 1787, in which authority to hold a general convention, which could make any constitutional proposal without any ratification requirement whatsoever, like a revolutionary convention, was considered and repeatedly rejected; and 2) the textual fact

that an Article V convention's amendment power is defined and limited by the same constitutional provisions as Congress' amendment process, which indicates that both processes wield the same *non-revolutionary* amendment power.

In short, even if one were to attempt to analogize the Article V convention process to a state-level constitutional convention, no precedent deems a convention that shares the characteristics of an Article V convention to be an independently sovereign popular body that is revolutionary in nature and capable of forming a new government. Notably, both Congress' amendment power and the Article V convention's amendment power refer to proposing "amendments." In view of the fact that Congress has proposed singular amendments, it is clear that the plural use of "amendments" was not meant or understood to signify that only more than one amendment can be proposed. Rather, the plural form was used to include the singular, which is a style utilized throughout the Constitution.

The understanding that an Article V convention may propose a single amendment and is not comparable to revolutionary state constitutional convention is confirmed by Federalist No. 85, which was published in book form in May 28, 1788 and again as a newspaper column on August 16, 1788. There, Alexander Hamilton observed:

> But every Amendment to the Constitution, if once established, *would be a single proposition, and might be brought forward singly*. There would then be no necessity for management or compromise, in relation to any other point; no giving, nor taking. 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. There can, therefore, be *no comparison between the facility of effecting an amendment, and that of establishing in the first instance a complete Constitution.*[15]

For this reason, there is no merit to the theory that an Article V convention is a convention of the People that cannot be directed or regulated by the states.

An Article V Convention is Not a Convention of Congress

There is also no merit to any contention that the Article V convention process was meant to be directed and regulated by the federal government as a Convention of Congress. Investing Congress with a substantive role in directing or regulating the Article V convention process would render it redundant of Congress' existing amendment power, which is contrary to standard rules of constitutional interpretation.[16] Moreover, it would also contradict contemporaneous understandings of Article V at the time the Constitution was ratified. As discussed below, the central arguments of Federalist Nos. 43 and 85 (which were repeated by George Washington in his personal correspondence and by others at the Virginia ratification convention) underscore that the Article V convention process was meant to furnish the states with an independent and parallel means of amending the Constitution alongside Congress' amendment power.

An Article V Convention is a Convention of the States

At the time the U.S. Constitution was proposed for ratification, the Founders repeatedly represented to the public that any future Article V convention would be constituted by the states as a gathering point for their respective delegates to advance a specific state-selected constitutional amendment agenda. In particular, on January 23, 1788, Federalist No. 43 was published with James Madison's attributed observation that Article V "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other." Similarly, George Washington wrote on April 25, 1788, "[i]t should be remembered that a constitutional door is open for such amendments as shall be thought necessary by nine States." On June 6, 1788, George Nicholas reiterated the same points at the Virginia ratification convention, observing that state legislatures may apply for an Article V convention confined to a "few points;" and that "[i]t is natural to conclude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments." Finally, this public understanding of Article V was confirmed by the last of the Federalist Papers, Federalist No. 85, in which Alexander Hamilton concluded: "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority" by using their amendment power under Article V.

These representations about how the states would organize and target the Article V convention process did not occur in a vacuum. They reflected the custom and practice of the dozen or more interstate and intercolonial conventions that were organized prior to the ratification of the U.S. Constitution.[17] Simply put, it was usual and customary for states to set the agenda for any such convention and to instruct their delegates specifically on what to advance and address at the convention.[18] Delegates were regarded as "servants" of the states that sent them.[19] Naturally, the Founders repeatedly represented to the public that an Article V convention would operate in the same way. In fact, for decades after the Constitution's ratification, it was an uncontroversial proposition that the states could organize the Article V convention process to consider desired amendment proposals.[20] For example, James Madison's Report on the Virginia Resolutions observed in January 1800 that the states could organize an Article V convention for the specific "object" of repealing the Alien and Sedition Acts. Correspondingly, the U.S. Supreme Court in *Smith v. Union Bank*, 30 U.S. 518, 528 (1831), specifically referenced the Article V process as authorizing a "convention of the states" that could be directed to propose amendments to overturn authority for specific laws.

As the Article V convention process was meant to be a "convention of the states"—not of the People or of Congress—it follows that states are not somehow preempted or otherwise disabled in exercising their reserved sovereign power under the Tenth Amendment to determine who will represent them at the convention, how they will represent them, how they will run the convention, what they will propose, and how the states will respond to those proposals.[21] Accordingly, states that adopt the CFA properly limit the Article V convention process *as a logical extension of the Constitution's default assumption that they retain general and indefinite powers of governance*.[22]

An Article V Convention is Properly Organized by an Interstate Compact

Notwithstanding the textual requirement of congressional consent to interstate compacts in U.S. Const. art. I, § 19, cl. 3, the CFA properly utilizes an interstate compact to coordinate the states in the exercise of their powers under Article V and the Tenth Amendment. This is because congressional consent is not required for compacts that merely exercise the sovereign powers of the states without purporting to augment those powers relative to those of the federal government.[23] Moreover, the portion of the CFA that directly organizes the Article V convention itself will not go "live" before Congress calls the convention; member states may not attend the convention unless Congress first consents to the CFA by passing the contemplated counterpart omnibus concurrent resolution; and the CFA's prospective ratification only becomes effective if Congress first refers the CFA's BBA out for legislative ratification, and only if the convention proposes it for ratification. Therefore, even if the CFA were adopted by the states before Congress consented to it, the CFA cannot possibly trench on the federal government's role in the Article V convention process.

As unusual as the CFA may seem, there are more than 200 interstate compacts in existence today, many of which make the CFA appear rather mundane by comparison. For example, there are interstate compacts for military alliances to repel invasions, to bypass the Electoral College, and to impose cap-and-trade greenhouse gas regulation. Despite the range of novel approaches to coordinating state action found in the hundreds of interstate compacts that currently exist and that have existed in the past, *no state or federal court has ever struck down a single interstate compact*. Against this backdrop of longstanding judicial tolerance of the use of interstate compacts to enable states to solve problems of collective action, there is every reason to believe the CFA will survive any legal challenge. If anything, the problems of collective action surrounding the use of Article V make it a natural candidate for an interstate compact solution. In the final analysis, not only is there a solid originalist and precedential basis for recognizing the constitutionality of the CFA's limitations on the Article V convention process, there is also a powerful pragmatic case as well.

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Compact for America, Inc., which is urging the states to advance a Balanced Budget Amendment using an interstate compact.

[2] *See, e.g.*, *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *Opinion of the Justices*, 287 Ala. 326 (1971); *State ex rel. Murray v. Carter*, 167 Okla. 473 (1934); *Thalheimer v. Board of Supervisors of Maricopa County*, 11 Ariz. 430, 94 P. 1129 (Ariz. Terr. 1908); *Thomas v. Trice*, 145 Ark. 143 (1920); *Busch v. Turner*, 26 Cal. 2d 817 (1945); *People ex rel. Moore v. Perkins*, 56 Colo. 17 (1913); *Pratt v. Allen*, 13 Conn. 119 (1839); *Rice v. Foster*, 4 Harr. 479 (De. 1847); *Opinion to the Governor*, 239 So. 2d 1 (Fla. 1970); *Henson v. Georgia Industrial Realty Co.*, 220 Ga. 857 (1965); *Gillesby v. Board of Commissioners of Canyon County*, 17 Idaho 586 (1910); *Wirtz v. Quinn*, 953 N.E.2d 899 (Ill. 2011); *Lafayette, M&BR Co. v. Geiger*, 34 Ind. 185 (1870); *Colton v. Branstad*, 372 N.W. 2d 184 (Iowa 1985); *Phoenix Ins. Co. of N.Y. v. Welch*, 29 Kan. 672 (1883); *Walton v. Carter*, 337 S.W. 2d 674 (Ky. 1960); *City of Alexandria v. Alexandria Fire Fighters Ass'n*, Local No. 540, 220 La. 754 (1954); *Smigiel v. Franchot*, 410 Md. 302 (2009); *Howes Bros. Co. v. Mass. Unemployment Compensation Commission*, 296 Mass. 275 (1936); *Council of Orgs. & Ors. For Educ. About Parochiaid, Inc. v. Governor*, 455 Mich. 557 (1997); *State v. Cooley*, 65 Minn. 406 (1896); *Schuller v. Bordeaux*, 64 Miss. 59 (1886); *In re O'Brien*, 29 Mont. 530 (1904); *Akin v. Director of Revenue*, 934 S.W.2d 295 (Mo. 1996); *State v. Second Judicial Dist. Ct. in & for Churchill County*, 30 Nev. 225 (1908); *State v. Liedtke*, 9 Neb. 490 (1880); *State ex rel. Pearson*, 61 N.H. 264 (1881); *In re Thaxton*, 78 N.M. 668 (1968); *People v. Fire Ass'n of Philadelphia*, 92 N.Y. 311 (1883); *Fullam v. Brock*, 271 N.C. 145 (1967); *Enderson v. Hildenbrand*, 52 N.D. 533 (1925); *Gordon v. State*, 23 N.E. 63 (Ohio 1889); *Hazell v. Brown*, 242 P.3d 743 (Or. App. 2010); *Appeal of Locke*, 72 Pa. 491 (1873); *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634 (1999); *Clark v. State ex rel. Bobo*, 113 S.W.2d 374 (Tenn. 1938); *State Highway Dept. v. Gorham*, 139 Tex. 361 (1942); *Bull v. Reed*, 54 Va. 78 (1855); *State v. Baldwin*, 140 Vt. 501 (1981); *State ex rel. Zilisch v. Auer*, 197 Wis. 284 (1928); *Brower v. State*, 137 Wash. 2d 44 (1998); *Le Page v. Bailey*, 114 W. Va. 25 (1933).

[3] *See, e.g.*, Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act; Northeast Interstate Dairy Compact.

[4] *See, e.g.*, Micronesia, Marshall and Palau Implementation of Compact of Free Association Between the United States and Palau; Jennings Randolph Lake Project Compact; Interstate Compact on Licensure of Participants in Live Racing with Parimutuel Wagering; Interstate Compact on Juveniles.

[5] Presidential presentment is not required for the passage of the omnibus concurrent resolution because the President has no role in the proposal of amendments under Article V, which exercises power textually conferred on the state legislatures and Congress. *Hollingsworth v. Virginia*, 3 U.S. 378 (1798); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 460 (D.C. Cir. 1982); Special Constitutional Convention Study Committee, American Bar Association, *Amendment of the Constitution by the Convention Method under Article V* 25 (1974). Although statutes giving consent to interstate compacts have been presented to the President for signature, this fact should not alter the foregoing conclusion. As with the exercise of power under Article V, the text of the Compact Clause articulates no role for the President in granting consent to interstate compacts, and no case actually holds that congressional consent to an interstate compact requires presidential approval. Significantly, the Supreme Court has long held congressional consent to interstate compacts can be implied both before and after the underlying agreement is reached. *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893). This rule of law treats the consent of Congress very differently from the normal lawmaking process, insofar as laws obviously cannot be enacted by mere implication. It also compels the conclusion that presidential presentment is unnecessary to garner the requisite consent of Congress for an interstate compact. After all, if an actual vote on specific legislation approving a specific interstate compact is not necessary to secure the requisite consent of Congress, it follows that presidential presentment is not necessary. Prevailing precedent thus justifies concluding that the Compact Clause confers an exclusive power upon Congress to approve interstate compacts that can be exercised without presidential presentment. Moreover, the structure and purpose of the Constitution does not require the President to have the power to veto congressional consent for interstate compacts. This is because the President's role in presentment is to defend the executive branch from incursions by the federal legislative branch and to act as the representative of People of the Nation as a whole. *Ins v. Chadha*, 462 U.S. 919, 951 (1983); *Myers v. United States*, 272 U.S. 52, 123 (1926); The Federalist No. 73 (Alexander Hamilton) (Gideon ed., 1818). Fulfilling this role does not require the President to have the power to veto an interstate compact that regulates the Article V amendment proposal process, in which neither the President nor (as discussed later in the memo) the People have a role.

[6] The use of contingent effective dates to allow for prospective legislative referral and ratification of the BBA if it were to be approved by the convention is not categorically different than the use of contingent effective dates with respect to other legislative acts. It both cases, the effectiveness of a law is triggered by an uncertain future event. Accordingly, the same precedent that has overwhelmingly upheld contingent effective dates should equally apply to uphold the use of contingent effective dates for prospective legislative referral and

ratification of the CFA's BBA. Moreover, the use of a prospective effective date to allow for the referral and ratification of a constitutional amendment upon the occurrence of a certain event is not unprecedented. President Abraham Lincoln reportedly suggested the prospective ratification of the Thirteenth Amendment to the southern states, allowing them five years before it would go into effect. Howard Newcomb Morse, *A Study in the Problems Presented by the Integration into the Constitution of Certain Articles Amendatory Thereto*, 11 U. Det. L.J. 1 (1947-1948). Furthermore, ratifications of treaties have been made prospectively, subject to various contingencies. *See, e.g., U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990). Because Article V's ratification process involves a similar meeting of the minds between and among sovereign bodies, such treaty precedent should be persuasive as to the availability of prospective referral and ratification using contingent effective dates. In any event, the risk of litigation successfully challenging the foregoing referral and ratification provisions as unconstitutional is minimal under current precedent. One of the few Supreme Court cases addressing the sufficiency of an amendment ratification refused to reach the question of its constitutionality, with a plurality deeming it a question exclusively for Congress to answer. *See Coleman v. Miller*, 307 U.S. 433 (1939). Even if such a challenge were to succeed, severance of the prospective legislative referral and ratification provisions would be the most likely final outcome.

[7] The selection of governors as delegates is based on the precedent of Benjamin Franklin attending the Philadelphia Convention while serving as the equivalent of the governor of Pennsylvania. Significantly, governors are required to take a temporary leave of absence while attending the Convention and to not exercise any gubernatorial powers during the Convention. This limitation is intended to avoid any possible separation of powers issue with executive branch officials exercising what might be construed as legislative powers during the Convention, as well as to furnish a political safeguard of having the governor's likely political rival in charge of the state during the convention and able to direct enforcement of the CFA's provisions, which should incentivize governor-delegates to respect the CFA. With respect to governors that leave their home state to attend the convention, this provision is fully consistent with state constitutional provisions providing that when a governor leaves the state, another executive branch official (typically either the Secretary of State or Lieutenant Governor) shall exercise all gubernatorial powers. With respect to any governor that attends the convention in his or her home state, all states allow governors to take a temporary leave of absence due to temporary disability; and most states allow for other grounds for temporary leaves of absence. What constitutes disability or justification for a temporary leave of

absence can be defined by state law, and the Compact's requirement that governor-delegates not exercise gubernatorial powers and take a leave of absence while attending the convention would supply an adequate legal definition of disability. As a failsafe to ensure that every member state is represented if their governor is otherwise unable to attend the convention, the Compact allows for the legislative replacement of the governor-delegate for good cause.

[8] The Compact Commission is populated by appointees of the governors of the first three member states, and it may be expanded to include appointees by the governors of all member states. As such, it constitutes an agency of the compacting states, not the federal government. *Seattle Master Builders v. Pacific Northwest Electric,* 786 F.2d 1359, 1371 (9th Cir. 1986).

[9] After thirty-eight states join the Compact, no member state may withdraw absent unanimous consent of all member states. In effect, the membership of the compacting state will be entrenched from repeal by future legislatures until the CFA's BBA is ratified. The goal of such entrenchment is to ensure the laser-focus of the CFA on advancing a specific BBA is maintained throughout the amendment process and to guarantee its sixteen safeguards remain state law during the entire Article V convention process. Ordinarily, one legislative body may not entrench its legislation against repeal or modification by future legislative bodies in the same government. However, so long as they are entered into voluntarily and for a discrete purpose that does not substantially impair a state's police power, compacts (like contracts) can and do entrench the decisions of the adopting legislative body under the supremacy of the U.S. Constitution. As a result, "a state can impose state law on a compact organization only if the compact specifically reserves its right to do so." *Seattle Master Builders*, 786 F.2d at 1371 (9th Cir. 1986). This has been the law for over one hundred years. *Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States"); *Kentucky v. Indiana*, 281 U.S. 163, 178 (1930); *Green v. Biddle*, 21 U.S. 1, 39-42 (1823). In the unlikely event that such entrenchment violates a member state's constitution, the CFA's severance clause provides constructional rules that a final judgment should have the effect of severing the offensive provision or causing that member state to withdraw from the Compact.

[10] *See, e.g., New Jersey v. New York*, 523 U.S. 767, 811 (1988) (holding that congressional approval "transforms an interstate compact within [the Compact Clause] into a law of the United States"); *Bryant v. Yellen*, 447 U.S. 352, 369 (1980); *McKenna v. Washington Metropolitan Area Transit Authority*, 829 F.2d 186 (D.C. Cir. 1987). Of course, by consenting to an interstate compact, Congress is not literally enacting a new federal law;

instead, it is affirmatively yielding to the compact's subject matter, and allowing the compacting states' exercise of sovereignty to occupy the relevant field of law. Such conduct is properly binding on Congress as the functional equivalent of federal law under the doctrine of estoppel by acquiescence, or "quasi estoppel." *Cf. Simmons v. Burlington, Cedar Rapids & Northern Ry. Co.*, 159 U.S. 278, 290 (1895); *Ritter v. Ulman*, 78 F. 222, 224 (4th Cir. 1897).

[11] *See, e.g.*, Washington Metropolitan Area Transit Regulation Compact; The Texas Low-Level Radioactive Waste Disposal Compact; Central Interstate Low-level Radioactive Waste Compact. The CFA allows the Commission to waive this venue provision upon request by member states and provides that the Commission's decision is final, much like the alternative dispute resolution provisions in the Alabama-Coosa-Tallapoosa River Basin Compact and the Interstate Compact on the Placement of Children.

[12] *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citing Federalist No. 45).

[13] *See, e.g., Snow v. City of Memphis*, 527 S.W.2d 55 (Tenn. 1975).

[14] *See, e.g., State ex rel. Kvaalen v. Graybill*, 159 Mont. 190, 496 P.2d 1127 (Mont. 1972) ("There is some authoritative support for the doctrine of inherent, plenary, and sovereign power of a constitutional convention; however it is derived from early cases during the American Revolution and in the reconstruction era following the Civil War where there was no effective or established government to supervise the work of the convention. In our view, this doctrine is not applicable to present conditions where, as here, the constitutional convention is called pursuant to the provisions of an existing constitution, and by enabling legislation enacted thereunder. Even in situations where the existing constitution provided no means for calling a constitutional convention, the Pennsylvania court refused to apply this doctrine of inherent plenary power.") (citing *Woods's Appeal*, 75 Pa. 59 (1874); *Wells v. Bain*, 75 Pa. 39 (1874)); *accord Gaines v. O'Connell*, 305 Ky. 397, 204 S.W.2d 425 (Ky. 1947) (citing *Staples v. Gilmer*, 183 Va. 613, 33 S.E.2d 49 (1945)).

[15] Likewise, in his famous April 1830 letter on nullification, James Madison observed: "final resort within the purview of the Constitution, lies in *an amendment* of the Constitution, according to a process applicable by the states."

[16] Nevertheless, an argument under post-New Deal case law could be made that Congress has a significant role to play in organizing and regulating the convention, which may include the designation of delegates, the convention agenda, and convention logistics, because of Congress' power to call the convention and the implied power authorized by the Necessary

and Proper Clause. Despite its lack of merit from an originalist perspective, the view that Congress has a significant role in organizing and regulating an Article V convention thus poses a real litigation risk. Fortunately, the CFA is designed to be fully compatible with even this view because of the fact that it is designed to be blessed by Congress in the counterpart omnibus concurrent resolution, which under current case law transforms the CFA into the functional equivalent of federal law. *See, e.g., New Jersey*, 523 U.S. at 811; *Bryant*, 447 U.S. at 369. Therefore, whether one views the CFA as dealing in a subject matter that is fully controlled by the states or controlled in significant ways by Congress, the CFA will fully lock down the Article V convention as advancing solely an up or down vote on a powerful BBA as a matter of state and federal law, both under current case law and also consistently with an originalist understanding of the Constitution.

[17] Robert Natelson, *Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers*, Goldwater Institute Policy Brief No. 11-02 4 n.15 (Feb. 22, 2011)

[18] Roger Sherman Hoar, *Constitutional Conventions: The Nature, Powers, and Limitations* 127-29 (1917).

[19] 3 Op. Off. Legal Counsel 390 (1979).

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

[21] Even if an Article V convention must retain some deliberative authority, there is nothing intrinsic to the deliberative process that requires it to be a unlimited drafting convention. After all, special sessions of the legislature can be called in most states to address specific subject matters or even to consider or reconsider specific bills. These common limitations do not somehow render the resulting debate non-deliberative. Moreover, the fact that Article V expressly contemplates state-based conventions being utilized to ratify proposed constitutional amendments shows that the convention mode of deliberation is not intrinsically incompatible with an up-or-down vote. Not surprisingly, the most recent scholarship on Article V shows that restricting delegates to voting on a particular constitutional amendment proposal does not unduly interfere with convention deliberations. Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, Constitutional Commentary, Vol. 81, p. 53 (2012). In any event, the CFA's

severance clause is designed to ensure that courts construe its deliberative limitations to be as flexible as may be constitutionally required.

[22] The fractured ruling in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), that federal electoral processes created in the first instance by the U.S. Constitution may not be regulated by the states under their Tenth Amendment authority when Congress occupies the field is distinguishable because the Article V convention process was clearly meant to adopt and codify the states' pre-constitutional custom and practice of utilizing interstate conventions to propose legal reforms. Furthermore, it is also distinguishable because the Article V convention organized by the CFA may not be attended by member states before the CFA is approved by Congress in its counterpart omnibus concurrent resolution. By consenting to the CFA, Congress would waive any possible conflict between the Supremacy Clause and the exertion of state sovereignty in question, and affirmatively yield to the exclusive sovereignty of the states over the CFA's subject matter. Therefore, even if an Article V convention were regarded as entirely a creation of the U.S. Constitution, there is no clash between the CFA and any power delegated to Congress.

[23] *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 459, 472 (1978).