

## Why Michigan Should Compact for a Federal Balanced Budget Amendment

By Nick Dranias

### Introduction

Article V of the U.S. Constitution authorizes Congress to call a convention for proposing amendments “on the Application of the Legislatures of two thirds of the several States.”<sup>1</sup> Gov. Rick Snyder and the Michigan Legislature have expressed interest in using this state-led mechanism to require Congress to balance the federal budget and passed a resolution calling for such a constitutional amendment in 2014.<sup>2</sup>

The problem is that the states have never successfully used Article V to amend the Constitution since they ratified it 227 years ago. One reason for this is that the process of using Article V, as it has been traditionally envisioned, requires numerous legislative and congressional actions — all of which could derail the effort. For example, Gov. Snyder and the Legislature could not agree on the next legislative step — the appointment of delegates to the convention — and Michigan’s attempt to amend the U.S. Constitution via Article V has stopped dead in its tracks.<sup>3</sup>

As the Michigan example demonstrates, amending the Constitution via a state-initiated convention is by no means a quick or certain means of obtaining redress for constitutional problems. The passage of an Article V application by an individual state is just

the first step in a long series of contingent legislative steps towards successfully generating an amendment. These steps raise many questions:

- Can substantively different applications from individual states be aggregated?
- Will Congress fulfill its constitutional duty to call the convention?
- Will Congress stand back, as it should, and allow the applying states to conduct the convention by their own standards?
- Can one state effectively enforce a limited convention agenda against another state?
- Will the convention ever actually generate an amendment?
- Will the convention ever adjourn?
- Will the amendment be good public policy?
- Will Congress sabotage the ratification process?
- Will 38 states ratify the amendment?

These questions illustrate that the “legacy approach” to amending the Constitution via Article V involves a large legislative investment towards a speculative result. Fortunately, there is an alternative: the “Compact approach” to using Article V.

The Compact for a Balanced Budget is an example of such an approach. It is a formal interstate agreement that advances, proposes and ratifies a federal Balanced Budget Amendment in one bill — a single legislative

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action — passed by 38 state legislatures. The Compact commits these states (three-quarters of the total, which is the amount needed for ratification) to the entire constitutional amendment process in advance, so that a specific, pre-drafted federal Balanced Budget Amendment is voted up or down within 24 hours at the convention it organizes. The convention is set in motion by a single congressional resolution, passed with simple majorities and with no presidential signature, which both calls the 24-hour convention and selects legislative ratification in advance.

Additionally, recent research shows that the Founders meant for the Article V convention to be used by the states to propose specific constitutional amendments.<sup>\*</sup> By targeting an Article V convention and securing ratification of its proposed amendments by three-fourths of the states, state legislatures could conceivably remedy the entire spectrum of perceived federal error, abuse, overreach and incompetence.

The Compact approach is truly “Article V 2.0.” This paper will describe the four main advantages of using the Compact approach to pass a federal Balanced Budget Amendment via Article V. These advantages are 1) certainty, 2) safety, 3) synergy and 4) speed.

## **Certainty**

All efforts to originate constitutional amendments from the states require the organization of a convention for proposing amendments under Article V of the U.S. Constitution. The Compact for a Balanced Budget ensures that states know precisely how the convention will operate and what the convention will produce before it is called.

The necessary agreement among the states (the actual “Compact”) and the compact-activating congressional resolution predetermine all of the following:

- The application to Congress<sup>4</sup>
- The identity and exact instruction of the convention delegates<sup>5</sup>
- The convention agenda<sup>6</sup>
- A pre-commitment to considering the proposal of a specific federal Balanced Budget Amendment and no other amendment<sup>7</sup>
- The convention rules and logistics<sup>8</sup>
- A pre-commitment to ratifying the contemplated Balanced Budget Amendment if it is proposed<sup>9</sup>

The most important of these elements is the pre-commitment to a specific federal Balanced Budget Amendment. Unlike the legacy approach, the Compact allows legislators to read, assess and vet the only amendment that will be proposed at the convention — instead of delegating this authority to a body of yet-to-be-determined delegates.

Appendix A includes a detailed sectional analysis of the amendment advanced by the Compact for a Balanced Budget. The Compact approach to Article V is backed by recent research on the original interpretation of the U.S. Constitution (discussed in Appendix B). That research shows that the Article V application was originally meant to advance the specific text of one or more amendments to be proposed by the convention.

The Compact for a Balanced Budget also maintains a reasonable degree of certainty by organizing a commission to oversee the amendment process, enforce the Compact, manage logistics and confer with Congress and other states to keep everything on track. In fact, the Compact for a Balanced Budget Commission is already up and running.<sup>10</sup> The only question left open by the Compact is whether the convention it organizes will propose the contemplated federal Balanced Budget Amendment.

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\* See “Appendix B: Research on the Original Meaning of Article V.”

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## Safety

A Compact approach to Article V allows for four political and legal safeguards, which, in combination with the ratification requirement for any proposed amendment, makes it implausible that the convention will disregard the states' mandate and propose rogue amendments instead.

First, the legacy approach to Article V faces the risk of Congress hijacking or sabotaging the amendment process by claiming the power to determine convention rules and logistics in its call on the front end. On the back end of the process, Congress could also set an unreasonably short sunset date for ratification referral. That risk is avoided by the currently drafted congressional resolution that is part of the Compact for a Balanced Budget.

The congressional resolution needed to activate the Compact for a Balanced Budget contemplates Congress calling the convention expressly “in accordance with the Compact,” and further selects, in advance, legislative ratification for the contemplated amendment if it is proposed by the convention.<sup>11</sup> This creates an opportunity to secure congressional cooperation and implied consent to the Compact with the support of simple majorities of each House.\*

But if Congress were nevertheless to refuse to call the convention in accordance with the Compact, and if the judiciary refused to intervene, every member state would be prohibited from attending the convention, which would deprive the convention of a quorum of states, as well as from ratifying anything it might attempt to generate without a quorum.<sup>12</sup> That prohibition on attendance and ratification would continue until the Congress yielded to the Compact or the Compact self-repealed on April 12, 2021, which

would expressly render the entire amendment process void *ab initio*, which means “as if it never existed.”<sup>13</sup> Thus, congressional interference with the Compact-organized amendment effort would function as a kill switch, preventing Congress from hijacking the amendment process.

Second, the Compact layers on numerous legal safeguards to keep the process on track and to function as additional kill switches in case of a rogue convention. It requires delegates from all member states to vote the Compact's limited agenda rules into place as the first order of business at the convention. It automatically forfeits the legal authority and disqualifies any rogue delegate or state. It bars all member states from attending a rogue convention or ratifying rogue amendments. Finally, the Compact declares all rogue actions of the convention and its participants void *ab initio*.<sup>14</sup>

Third, the Compact empowers every member state's attorney general to enforce the Compact against every other member state in the federal and state courts located in the Northern District of Texas, a centrally-located jurisdiction.<sup>15</sup> It thus imposes the legal obligation on one state to recognize the authority of another state's attorney general to enforce the obligation to hew to a limited convention agenda. By contrast, the legacy approach relies exclusively on the willingness of a given state to enforce its own laws, which may or may not instruct delegates to respect a limited convention agenda. If delegates go rogue at a legacy-organized Article V convention, other states have little recourse other than to rely on the state that sent the rogue delegates to enforce its own laws.

Fourth and finally, the Compact approach includes a “sunset” provision that automatically repeals the

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\* The Supreme Court ruled in *Hollingsworth v. Virginia* that Congress's role in the Article V amendment process does not implicate presidential presentment. *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 this ruling was applied specifically to the congressional proposal of amendments, there is reason to believe that Congress's convention call and ratification referral powers

would be treated the same way, even if exercised by way of a resolution giving implied consent to an interstate compact. Simply put, the contemplated congressional resolution's exercise of Congress's Article V call and ratification referral power is similar in legal effect to the direct proposal of constitutional amendments. In both cases, Congress is merely channeling a legislative proposal for further action by other bodies — it is not, itself, making federal law of the sort that alters legal rights and obligations.

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Compact in seven years from its original enactment date.<sup>16</sup> As a result, the Compact masses supermajority state support behind a specific, fully defined and known-in-advance political product. It does so in a period of time that is short enough to ensure that the political reputations that underpinned the Compact’s passage are at stake in any decision to follow or abandon the terms of the Compact. This will create incentives for convention delegates to stick to the limited agenda of the Compact purely out of political self-preservation. This is especially the case if states retain the default setting of sending their sitting governor, who would have signed the Compact into law, to the convention as their sole delegate.

Taken together, the Compact clearly limits the activity at the convention it organizes to a straight up-or-down vote on the amendment it specifies. Rogue delegates and rogue actions would be identified and delegitimized for any deviation from the Compact’s specified agenda.

## Synergy

Some proponents of the legacy approach to Article V believe that the states are only eight or nine applications away from triggering the two-thirds convention call for a Balanced Budget Amendment convention.<sup>17</sup> One concern is that a state’s legislative “bandwidth” would be wasted by adopting the Compact for a Balanced Budget when it has already applied for such a convention. The following explains how the Compact approach can work in conjunction with any other Article V effort already underway.

The Compact for a Balanced Budget is not redundant because it rolls up into one legislative action all of the state-enacted stages of the Article V process — including the appointment of delegates, the specification of convention rules and logistics, and the recommitment to ratifying a specified amendment. Therefore, the Compact requires less overall legislative bandwidth to achieve its ultimate goal of a ratified

federal Balanced Budget Amendment than continuing with the legacy approach to Article V, *even in states that have already passed an application*. If legislative bandwidth is a concern, the Compact approach is the more legislatively efficient amendment vehicle.

But there is no need for a binary choice to be made between the legacy approach and the Compact approach to Article V, because the successful passage of the Compact works well together with any legacy effort already undertaken.

Each state that adopts the Compact pre-commits to ratifying the federal Balanced Budget Amendment it advances.<sup>18</sup> If a legacy approach somehow succeeded in convening a convention before the Compact approach did, then the passage of the Compact bill would immediately supply that convention with a vetted federal Balanced Budget Amendment that is not only ready to be proposed, but which is already ratified in numerous states. The Compact approach thus enhances the efficiency and value of legacy Article V efforts, even if the legacy approach were to organize a convention first.

## Speed

The Compact approach can deliver a ratified amendment in as little as one session year. It transforms the amendment process into the rough equivalent of a ballot measure voted on by simple majorities of Congress and supermajorities of governors and state legislatures. Originating an amendment from the states becomes achievable in short order with adequate resources.

As discussed previously, the Compact approach works by consolidating into one interstate agreement all the legislative steps that are needed for states to use Article V to amend the U.S. Constitution. It also consolidates into one congressional resolution (a “concurrent resolution”) all the legislative steps that Congress controls in the process (the convention call and the selection of mode of ratification). Once these actions are

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completed, the only thing left is for the convention to meet and vote up or down the specific amendment contemplated in the compact and resolution.

The Compact approach achieves in three legislative stages and 39 total legislative actions (38 state laws plus one congressional resolution) what would otherwise take at least six legislative stages and over 100 total legislative actions using the legacy approach.

## **Conclusion**

Taken together, the Compact approach to Article V has the unique advantages of certainty, safety, synergy and speed compared to the legacy approach.

Combined, these advantages make it the most plausible vehicle for constitutional reform derived from the collective action of the states. Because of its streamlined and consolidated nature, the Compact for a Balanced Budget is closer to generating a ratified Balanced Budget Amendment than any other effort.

Four states have already adopted the Compact for a Balanced Budget, meaning that it is only 34 state enactments, one congressional resolution, and one 24-hour convention away from achieving a ratified amendment to the U.S. Constitution. In fact, it is twice as far along as the various legacy approaches underway, because they require at least 68 more state enactments, two congressional resolutions and one convention to achieve a ratified amendment (the nature of which is currently unknown).

History shows the plausibility of surmounting the thresholds needed for the Compact approach to generate a limited-government constitutional amendment. The National Center for Interstate Compacts maintained by the Council of State Governments lists existing interstate compacts in every state. Thirty-eight states have joined an interstate compact at least seven times before.<sup>19</sup> Simple majorities of Congress have repeatedly voted in favor of a Balanced Budget Amendment proposal on the floor, only failing to reach the two-thirds threshold

required for a congressionally proposed amendment.<sup>20</sup> By contrast, so far, no legacy “convention of the states” approach to Article V has resulted in an amendment in over 227 years.

With the national debt rocketing to \$20 trillion and beyond, baby-boomers retiring en masse, and the present value of unfunded entitlement programs enabled by the federal government’s unlimited borrowing capacity estimated as high as \$210 trillion, Michigan, and other states, should give full consideration to the Compact for a Balanced Budget.<sup>21</sup>

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## Appendix A: The Balanced Budget Amendment and Analysis\*

*Section 1. Total outlays of the government of the United States shall not exceed total receipts of the government of the United States at any point in time unless the excess of outlays over receipts is financed exclusively by debt issued in strict conformity with this article.*

*Section 2. Outstanding debt shall not exceed authorized debt, which initially shall be an amount equal to 105 percent of the outstanding debt on the effective date of this article. Authorized debt shall not be increased above its aforesaid initial amount unless such increase is first approved by the legislatures of the several states as provided in Section 3.*

For example, if there is \$20 trillion in outstanding federal debt on ratification of the amendment, the federal government will have a revolving line of credit limited to \$21 trillion. The extra \$1 trillion (5 percent of \$20 trillion) allows for a debt cushion to handle cash flow volatility and current borrowing rates for one to two years.

Congress, preparing for the impending ratification of the amendment, may sell enough bonds to set the initial debt limit high enough upon ratification to allow for a longer-term budget to be implemented. For instance, Congress could agree to a 10- to 70-year plan for reaching a balanced budget. Congress could add various measures to the proposed budget to make it credible and durable enough for the bonding market to absorb an otherwise extremely large issuance of bonding to carry the entire plan into effect.

By the time the amendment was ratified, the initial debt limit would be fixed at 105 percent of whatever bonding had been sold at that point, which would then simply give new credibility to that budget plan by constitutionally limiting borrowing capacity to the sum total of bonds previously issued to implement that

plan plus a 5 percent cushion to allow for unforeseen contingencies. There may never be a need for further borrowing capacity under this scenario.

*Section 3. From time to time, Congress may increase authorized debt to an amount in excess of its initial amount set by Section 2 only if it first publicly refers to the legislatures of the several states an unconditional, single subject measure proposing the amount of such increase, in such form as provided by law, and the measure is thereafter publicly and unconditionally approved by a simple majority of the legislatures of the several states, in such form as provided respectively by state law; provided that no inducement requiring an expenditure or tax levy shall be demanded, offered or accepted as a quid pro quo for such approval. If such approval is not obtained within sixty (60) calendar days after referral then the measure shall be deemed disapproved and the authorized debt shall thereby remain unchanged.*

This section provides:

- ◆ States a seat at the table in determining national debt policy.
- ◆ Flexibility for national emergencies and to accommodate reasonable plans for more debt, such as what might be developed during the one-to two-year transitional phase allowed by the initial debt limit.
- ◆ State legislators the ability to judge the wisdom of borrowing beyond the debt limit. These policymakers are familiar with budgeting and state debt limits, closer to the American people and have no control over the underlying federal appropriations. National debt policy judgments will thereby become more impartial, more resistant to special interest influence, and more transparent as the public policy debate occurs in 50 state capitols.

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\* Italicized text is the model language.

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- ♦ Restoration of a small portion of the power the states once held to check and balance Washington before the 17th Amendment removed them from a position of control over the U.S. Senate. Washington will have a new incentive to respect the states and to restrain the abuse of debt. At the same time, to prevent corruption and the abuse of the referendum process, any proposal to increase the debt must be an unconditional, single-subject measure, which is free from taxing or spending quid pro quos, or it will not be legally effective.

States will begin preparation for their new role in anticipation of the ratification of the amendment and can adopt state law measures to streamline approval, perhaps even adopting automatic approval of new borrowing measures if certain emergency criteria are met (or perhaps automatic disapproval of new borrowing measures that are referred without an underlying budget plan).

*Section 4. Whenever the outstanding debt exceeds 98 percent of the debt limit set by Section 2, the President shall enforce said limit by publicly designating specific expenditures for impoundment in an amount sufficient to ensure outstanding debt shall not exceed the authorized debt. Said impoundment shall become effective thirty (30) days thereafter, unless Congress first designates an alternate impoundment of the same or greater amount by concurrent resolution, which shall become immediately effective. The failure of the President to designate or enforce the required impoundment is an impeachable misdemeanor. Any purported issuance or incurrence of any debt in excess of the debt limit set by Section 2 is void.*

The President or Congress are required to enforce the debt limit by designating necessary spending delays when a red zone (98 percent of the debt limit) is reached. For instance, if the debt limit were \$21 trillion, the impoundment requirement would be triggered at \$20.58 trillion, which would be roughly 10

months before hitting the debt limit at current borrowing rates.

The provision prevents impoundments from being abused by the President (as they usually are during debt ceiling debates) by giving Congress a simple majority override (no presidential signature required). It also forces transparency on spending priorities and trade-offs long before the debt limit runs out, which is the starting point for real budget negotiations.

If neither the President nor Congress acts, spending will be limited to tax cash flow (per Section 1) when the debt limit is reached. Illegal debt is deemed void, which is the ultimate enforcement mechanism against violating the debt limit. This is because bond markets usually will not purchase void bonds.

*Section 5. No bill that provides for a new or increased general revenue tax shall become law unless approved by a two-thirds roll call vote of the whole number of each House of Congress. However, this requirement shall not apply to any bill that provides for a new end user sales tax which would completely replace every existing income tax levied by the government of the United States; or for the reduction or elimination of an exemption, deduction, or credit allowed under an existing general revenue tax.*

This provision keeps all fiscal options on the table, but the provision will cause spending reductions to look relatively more attractive as an initial means of closing deficits. It requires a supermajority for new or increased income or sales taxes, while preserving the current rule of simple majority approval for new or increased taxes arising from: 1) the replacement of all income taxes with a non-VAT sales tax; 2) the elimination of tax loopholes; and 3) new or increased revenue measures that are not subject to the supermajority approval requirement, such as tariffs and user fees. These tax limits protect current generations from being sacrificed to future generations, just as the debt limit protects future generations from being sacrificed to current generations.

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*Section 6. For purposes of this article, “debt” means any obligation backed by the full faith and credit of the government of the United States; “outstanding debt” means all debt held in any account and by any entity at a given point in time; “authorized debt” means the maximum total amount of debt that may be lawfully issued and outstanding at any single point in time under this article; “total outlays of the government of the United States” means all expenditures of the government of the United States from any source; “total receipts of the government of the United States” means all tax receipts and other income of the government of the United States, excluding proceeds from its issuance or incurrence of debt or any type of liability; “impoundment” means a proposal not to spend all or part of a sum of money appropriated by Congress; and “general revenue tax” means any income tax, sales tax, or value-added tax levied by the government of the United States excluding imposts and duties.*

These definitions maximize transparency and eliminate or strongly deter all known tactics used to circumvent constitutional debt limits. Abusive monetary policy, exotic borrowing vehicles, or financial games are prohibited or strongly deterred because total spending by every federal entity is limited by these definitions to cash-on-hand originating from taxes and other income (excluding proceeds from raiding trust funds or printing money) and full faith and credit borrowing.

*Section 7. This article is immediately operative upon ratification, self-enforcing, and Congress may enact conforming legislation to facilitate enforcement.*

This section ensures the amendment is effective as soon as it is ratified. It also allows Congress to fill any necessary procedural gaps, such as new Treasury Department budgetary controls, that will be necessary to enforce the amendment. For instance, Congress could pass a law requiring the Treasury to set aside a portion of the federal government’s authorized borrowing capacity specifically for designated national

emergencies or to handle cash-flow volatility, and then parcel out portions of that reserved borrowing capacity to agencies to help them manage the new “pay as you go” limit on spending.



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## Appendix B: Research on the Original Meaning of Article V

Recent research justifies the conclusion that the Founders regarded the Article V convention to be an instrument of the states to propose specific amendments in the “Application” that triggers the convention call.<sup>\*</sup> The notion that an Article V convention would ordinarily be an autonomous sovereign body free to draft any amendment it wished is inconsistent with this evidence.

The Compact for a Balanced Budget and its activating congressional resolution are the practical means to ensure the Founders’ vision for Article V is actually enforced. The Compact approach to Article V ensures all legal and political disputes are settled before the untested process of convening a convention is initiated.

A key piece of evidence concerning the Founder’s intent is the next-to-final draft of Article V and the edits made to it to produce the final draft. This is available in the Records of the Federal Convention of 1787. The next-to-final draft of Article V placed the power to propose amendments in the *hands of Congress* on “application” of the state legislatures.<sup>22</sup> Because this mode of amending the Constitution was meant to allow the states to propose the amendments they desired, it is clear that Congress was not supposed to draft the amendments. (Congress already had the parallel power to draft and propose amendments by a two-thirds vote of each house.)

Thus, the only source of the amendments that Congress could propose under this next-to-final formulation of Article V would have been applications that the states advanced. Of course, the final draft of Article V replaced Congress with a “Convention for proposing

amendments” as the proposing body; but nothing in the Records of the Federal Convention of 1787 suggests that the Founders meant for the application to stop furnishing the text of desired amendments.<sup>23</sup>

In fact, applications were a common way of petitioning Congress for specific relief of all kinds during the Founding era.<sup>24</sup> There is nothing in this custom and usage to suggest that the application for an Article V convention could not also propose specific relief in the form of one or more amendments to be placed before a convention. It would be odd to suggest that the Founders intended to deviate from this common and contemporaneous understanding of the nature and power of an application to Congress.

Taken together, this evidence of the drafting history and public understanding of application at the time of the founding supports the conclusion that the states retained the ability to specify amendments in their application (as in the next-to-final version of Article V), notwithstanding the replacement of Congress with a convention as the proposing body triggered by that application.

Consider additional evidence:

- ◆ During the ratification debates over the Constitution, Tench Coxe said, “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” [emphasis in the original]. Coxe further explained,

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<sup>\*</sup> For similar research and analysis, see: Michael B. Rappaport, “The Constitutionality of a Limited Convention: An Originalist Analysis,” *Constitutional Commentary* 81 (Apr. 6, 2012): 53, <http://perma.cc/5YSM-M8HZ>; Michael L. Stern, “Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention,” *Tennessee Law Review* 78, no. 3 (Aug. 3, 2011), <http://perma.cc/D4L7-3ZS8>; James Kenneth Rogers, “The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process,” *Harvard Journal of Law & Public Policy* 30, no. 3 (2007), <http://perma.cc/Z5VQ-93PX>.

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"Three fourths of the states concurring will ensure *any amendments*, after the adoption of nine or more" [emphasis in the original].<sup>25</sup>

- ♦ Writing in Federalist No. 43, James Madison says the power of the states to originate amendments is equal to that of Congress.<sup>26</sup> This could only be true if the Article V application specified amendments and if the Article V convention were an instrumentality of the states in proposing the specified amendments.
- ♦ Writing in Federalist No. 85, Alexander Hamilton emphasizes how two-thirds of the states (then "nine") would seek "alterations" and "set on foot the measure" and that the people could rely on "State legislatures to erect barriers against the encroachments of the national authority."<sup>27</sup> Obviously, an amendment is the "alteration" or "measure" of which Hamilton writes. This confirms the amendment-specifying power of an Article V application, which alone is entirely controlled by two-thirds of the states through their legislatures.
- ♦ Writing to John Armstrong on April 25, 1788, George Washington says "nine states" can get the amendments they desire, yet again in reference to the two-thirds threshold for calling an Article V convention.<sup>28</sup>
- ♦ In a statement to the Virginia convention on June 16, 1788, George Nicholas wrote that state legislatures would apply for an Article V convention confined to a "few points;" and that "it is natural to conclude that those States who will apply for calling the convention will concur in the ratification of the proposed amendments."<sup>29</sup> Nicholas's conclusion is only "natural" on the assumption that the states would typically organize a convention after first

agreeing on the amendments, presumably specified in their Article V application.

- ♦ In a 1799 report on the Virginia resolutions concerning the Alien and Sedition laws, James Madison 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 that states could ask their senators to propose an "explanatory amendment" to clarify that the Alien and Sedition Acts were unconstitutional, and that two-thirds of state legislatures "might, by an application to Congress, have obtained a Convention for the same object."<sup>30</sup> Again, the application is the stated source of the desired amendment.

The bottom line is that those Founders who addressed the issue assumed or represented the view that the states' Article V "application" would advance the specific amendments desired by the states for proposal by the Article V convention. This is consistent with the conclusion that the Article V application used to trigger the convention call would ordinarily include the text of one or more desired amendments, and the convention would have the instrumental role of ensuring the desired amendment or amendment were actually proposed. To this author's knowledge, there is no evidence suggesting otherwise, despite frequent recurrence by Article V opponents to the letter written by James Madison to George Lee Turberville on Nov. 2, 1788.\*

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\* Madison's letter to Turberville does not oppose the targeted use of Article V for one or more amendments specified in advance by the states in their Article V application. Madison was clear in Federalist No. 43 and in his Report on the Virginia Resolutions that he expected the Article V convention to be targeted to specific amendments by the states. The Turberville letter establishes only that Madison

opposed efforts by New York to organize a convention that could draft virtually anything it wanted. J.C.A. Stagg, ed., *The Papers of James Madison Digital Edition* (Charlottesville: University of Virginia Press, 2010), 330–332, <http://perma.cc/L3QG-ZHNB>.

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In fact, the idea that a “convention” necessarily has autonomous sovereign drafting power is inconsistent with 18th-century usage. The word “convention” was used as a synonym for an assembly. You can see this by reviewing the term in 18th century dictionaries.<sup>31</sup> Given such usage, the original intent of Article V was not necessarily to give the convention exclusive amendment drafting power.

As to the claim that there would be no need for a proposing convention if it did not possess autonomous drafting powers, or that a proposing convention must necessarily have more deliberative authority than a ratifying convention, this argument is specious. The proposing convention was made necessary by the limitations of 18th century technology. There was no modern instantaneous communication. Some coordinated means of ensuring that the amendment specified in the application would actually be proposed had to exist. It is perfectly sensible that a proposing convention was introduced into the language of Article V simply to ensure the necessary coordination occurred among the states, represented by their agents (delegates) at the convention, so that what was proposed actually was what the states asked-for in their application.

Indeed, that is the entire reason why the next-to-final version of Article V, which had Congress proposing amendments on application of the states, was replaced with a “convention for proposing amendments.” Most of the Founders, and especially George Mason, did not trust Congress to propose the amendment or amendments that would otherwise have been advanced in the states’ application under the next-to-final formulation.

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## Endnotes

- 1 U.S. Const. art. V; For example, see Emma Roller and David Weigel, “Give Me Amendments or Give Me Death” (Slate, Dec. 10, 2013), <http://perma.cc/T7RV-JGUU>.
- 2 Jonathan Oosting, “Michigan Petitions Congress for Federal Balanced Budget Amendment, Constitutional Convention,” *MLive.com*, March 26, 2014, <http://perma.cc/S3XJ-TKG7>.
- 3 Jonathan Oosting, “Michigan Gov. Rick Snyder Vetoes Delegate Plan for Constitutional Convention,” *MLive.com*, Dec. 29, 2014, <http://perma.cc/2V3C-7U4A>.
- 4 For example, “House Bill 1109 of 2015” (State of Texas, Feb. 3, 2015), art. V, <http://perma.cc/9T4C-P9YM>.
- 5 *Ibid.*, Art. VI.
- 6 *Ibid.*, Art. II, sec. 7; Art. VII, sec. 2.
- 7 *Ibid.*, Art. II, sec. 7; Art. VII, sec. 1.
- 8 *Ibid.*, Art. IV, VII, X.
- 9 *Ibid.*, Art. IX.
- 10 “The Compact for a Balanced Budget Commission Public Record,” 2015, <http://perma.cc/N9EK-NPF7>.
- 11 “H. Con. Res. 26: Effectuating the Compact for a Balanced Budget” (U.S. House of Representatives, March 19, 2015), sec. 102, <http://perma.cc/24LR-77EB>.
- 12 “House Bill 1109 of 2015” (State of Texas, Feb. 3, 2015), Art. VIII, sec. 1-2, <http://perma.cc/9T4C-P9YM>.
- 13 *Ibid.*, Art. X, sec. 5, 7.
- 14 *Ibid.*, Art. VI, sec. 6-10; Art. VIII, sec. 2.
- 15 *Ibid.*, Art. X, sec. 4.
- 16 *Ibid.*, Art. X, sec. 7.
- 17 For example, see: “The Balanced Budget Amendment in the States: Road Map to Ratification” (Balanced Budget Amendment Task Force, 2015), <http://perma.cc/C83D-QRDV>.
- 18 “House Bill 1109 of 2015” (State of Texas, Feb. 3, 2015), Art. IX, <http://perma.cc/9T4C-P9YM>.
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