



Compact *for a* Balanced Budget

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Compact for America Educational Foundation



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Introducing the Compact for a Balanced Budget

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Nick Dranias is president and executive director within the Office of the President of Compact for America Educational Foundation, Inc., which is serving as compact administrator for the Compact for a Balanced Budget Commission. He is also a research fellow and policy advisor with The Heartland Institute.

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Introduction

The U.S. gross federal debt is approaching \$20 trillion.¹ That figure is:

- more than twice what was owed (\$8.6 trillion) in 2006, when the junior U.S. senator from Illinois, Barack H. Obama, opposed lifting the federal debt limit;²
- nearly as big a percentage of the American economy (103+ percent of Gross Domestic Product) as during the height of World War II;³ and
- nearly \$160,000 per taxpayer.⁴

And that is just the tip of the iceberg, with unfunded federal liabilities estimated at \$205 trillion.⁵

The burden is daunting. It's difficult to imagine the debt-addicted Congress and president doing anything to address the situation any time soon. But what if states could advance and ratify a powerful federal balanced budget amendment in only 12 months?

That could happen now that the Compact for a Balanced Budget exists between Alaska,⁶ Georgia,⁷ Mississippi,⁸ and North Dakota.⁹ The compact establishes a binding commitment to fix the national debt,¹⁰ advancing a uniquely powerful yet plausible federal balanced budget amendment.

The Amendment, Briefly Described

The compact's proposed amendment advances a powerful balanced budget amendment that would impose three critical reforms.

First, the amendment would limit the borrowing capacity of Congress to a specific amount and would otherwise restrict spending to revenue at all times. By freezing the national debt, the amendment would force Congress to live within its means.

Second, the amendment would encourage spending reductions before tax increases to close deficits, while still keeping responsible revenue options on the table. It would require supermajority approval for new or increased income or sales taxes, while retaining the current simple majority requirement for revenue increases that are politically difficult and less harmful to our economy, such as eliminating tax loopholes.

Third, the amendment would furnish three “release valves” that would allow emergency borrowing without easy evasion. Specifically, Congress could pay down the national debt and free up borrowing capacity under the limit. A novel idea! The president could delay less urgent spending when a “red zone” of borrowing capacity is reached, subject to simple majority override by Congress to prevent abuse. And if all else failed, Congress could ask a majority of state legislatures to approve an increase in its borrowing capacity. These release valves would provide Washington with the flexibility needed to deal with the uncertainties of the real world, but without the absurdity of giving a bankrupt debtor the power to borrow whatever it wants.

These reforms would focus Washington on priorities. They would force political players to show their cards. And once spending reductions were exhausted, they would encourage long overdue pro-growth tax reforms to close deficits. The days of kicking the fiscal can down the road to our kids would be over.

This powerful amendment, advanced by an interstate agency – the Compact for a Balanced Budget Commission – is already jump-starting fiscal discussions in Washington. Democrats and Republicans alike should recognize that if we want to preserve federal spending that is truly necessary, the first thing we must do is start treating debt as a limited resource.

Imposing scarcity on debt conforms fiscal policy to the reality of limited resources. Meaningful fiscal planning and prioritization could take place, making sure the necessary borrowing capacity will exist when the states and the people actually need it. If unsustainable borrowing crashes the system, there will be no more borrowing to fund desired programs.

The Compact, Briefly Described

The Compact for a Balanced Budget uses an interstate agreement to simplify the state-originated convention process outlined in Article V of the U.S. Constitution. Ordinarily, without an interstate compact, the Article V convention process would require at least 100 legislative enactments, six independent legislative stages, and five or more years of legislative sessions to generate a constitutional amendment.

The non-compact Article V approach first requires two-thirds of the state legislatures to pass resolutions applying for a convention (34 enactments). Second, a majority of states must pass laws appointing and instructing delegates (26 enactments). Third, Congress must pass a resolution calling the convention. Fourth, the convention must meet and propose an amendment. Fifth, Congress must pass another resolution to select the mode of ratification (either by state legislature or in-state convention). And sixth, three-fourths of the states must pass legislative resolutions or successfully convene in-state conventions that ratify the amendment (at least 38 enactments).

By contrast, the compact approach to Article V consolidates everything states do in the process into a single agreement among the states that is enacted once by three-fourths of the states.¹¹ Everything Congress does is consolidated in a single concurrent resolution passed just once with simple majorities and no presidential presentment.

The compact includes everything in the Article V process from the application to the ultimate legislative ratification.¹² The counterpart congressional resolution includes both the call for the convention and the selection of legislative ratification for the contemplated amendment.¹³

The compact packs both the front and back ends of the Article V convention process into just two overarching legislative vehicles by using conditional enactments. For example, using a conditional enactment, the “nested” Article V application contained in the compact goes “live” only after three-fourths of the states join the compact. Three-fourths, rather than two-thirds, is the threshold for

activating the Article V application because the compact is designed to start and complete the entire amendment process.¹⁴

Correspondingly, using conditional enactments, the nested call in the congressional counterpart resolution goes live only after three-fourths of the states join the compact.¹⁵ The nested selection of legislative ratification in the congressional resolution becomes effective only if the contemplated amendment is proposed by the Article V convention organized by the compact.¹⁶

By using an interstate agreement and conditional enactments to coordinate and simplify the state-originated Article V process, the compact approach reduces the number of necessary legislative enactments, stages, and sessions from 100+ enactments to 39 (38 states joining the compact, one congressional resolution); from six legislative stages to three (passage of compact, convention proposal of amendment, congressional passage of resolution); and from five or more session years to as few as one.

In addition, like any well-drafted contract, the compact approach eliminates all reasonable uncertainty about the process. It identifies and specifies the authority of the delegates from its member states.¹⁷ It specifies in advance all Article V convention ground rules, limiting the duration of the convention to 24 hours.¹⁸ It requires all member state delegates to vote to establish rules that limit the agenda to an up-or-down vote on a specific, pre-drafted balanced budget amendment.¹⁹ It disqualifies from participation any member state – and the vote of any member state or delegate – that deviates from that rule.²⁰ And it bars all member states from ratifying any other amendment that might be generated by the convention.²¹

Thus, from the vantage points of efficiency, public policy, and certainty, the Compact for a Balanced Budget is an upgrade from the non-compact approach to Article V. Nevertheless, objections to the proposal have been raised; the three most common are discussed below.

Objection 1:

Convention Must Come Before Amendment

Some opponents of the compact approach contend the “spirit” of Article V is violated by coordinating and consolidating the process

in such a way that the states applying for a convention also agree to ratify a specific desired amendment. But there is strong evidence the Founders expected the states would do just that.

In rebuttal of Patrick Henry's lengthy oration at the Virginia ratification convention that it was too difficult for the states to use Article V, George Nicholas responded, "It is natural to conclude that *those States who will apply* for calling the Convention, *will concur in the ratification* of the proposed amendments" (emphasis added).²² Nicholas clearly anticipated that states would coordinate their use of Article V from beginning to end.

Moreover, nothing in the history or text of Article V requires states to organize a "black box" amendment-drafting convention. No Founder ever expressed the distinctly modern view that the states must first organize an Article V convention to find out what constitutional amendments it might propose. The Article V convention was meant to be an instrument of the states that could be directed by the states to propose specific amendments, not an independent agency with a mysterious constitutional reform agenda of its own.²³

The Founders never "sold" ratification of the Constitution on the basis that the Article V convention was a mysterious, autonomous body that no one – not even the states – controlled outside of the convention. The Founders never would have succeeded with such absurdly unpersuasive arguments against opponents of ratification, such as Patrick Henry, who railed against the usefulness of the Article V convention as a means of limiting federal power from the states.

Objection 2: States Cannot Enter Compacts without Consent of Congress

Another common objection is that the compact approach is defective because Article I, Section 10 of the U.S. Constitution provides that states may not enter into compacts without the "consent" of Congress. There is no question the compact approach requires some form of congressional consent for the convention to be called and for legislative ratification to be selected, but such consent need not be express and it need not come in advance of the formation of an

interstate compact.

The U.S. Supreme Court has held for nearly 200 years that congressional consent to interstate compacts can be given expressly or implicitly, either before or after the underlying agreement is reached.²⁴ Moreover, under equally longstanding precedent, a binding interstate compact can be constitutionally formed without congressional consent so long as the compact does not infringe on the federal government's delegated powers.²⁵

Nothing in the Compact for a Balanced Budget infringes on any federally delegated power, because conditional enactments and express provisions ensure all requisite congressional action in the Article V amendment process would be secured before any compact provision predicated on such action became operative.

For example, no member state or delegate appointed by the compact can participate in the convention it seeks to organize before Congress calls the convention in accordance with the compact.²⁶ Similarly, the pre-ratification of the contemplated balanced budget amendment goes live only if Congress effectively selects legislative ratification. Thus no provision of the compact in any way invokes or implicates any power textually conferred on Congress by Article V unless implied consent is first received from Congress exercising its call and ratification referral power in conformity with the compact.

To claim the compact infringes on powers delegated to the federal government, one would have to demonstrate that the federal government has the exclusive power to direct and control an Article V convention by way of setting the convention agenda and delegate instructions. But all of the available Founding-era evidence shows it was the understanding of the framers and ratifiers that the states would target the Article V convention process to desired amendments, which implies state control over the convention agenda and delegates.

As illustrated by James Madison's *Report on the Virginia Resolutions*, an Article V convention was meant to bypass Congress and deliver the amendments desired by the states. It is only logical to conclude the states have the authority 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. Hence there is no need for congressional consent for the compact to be validly formed, although such consent is unavoidably necessary before the compact's contemplated convention call and ratification referral can be effective.

Objection 3:

Congress Cannot Act without Presidential Presentment

Another concern occasionally expressed about the compact approach is that the counterpart congressional concurrent resolution would have to be presented to the president for signature as ordinary bills must be. This requirement, known as presidential presentment, is described in Article I, Section 7, Clause 2 of the U.S. Constitution.

The U.S. Supreme Court ruled in *Hollingsworth v. Virginia* that Congress's role in the Article V amendment process does not implicate presidential presentment.²⁷ Even more so than the congressional proposal of amendments that was at issue in *Hollingsworth*, Congress's call and ratification referral powers under Article V are purely ministerial, procedural powers of the sort not ordinarily subject to presidential presentment.

With respect to the compact approach, the contemplated concurrent 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. Therefore, its passage does not require presidential presentment.

Conclusion:

The Most Secure Process

A compact-organized Article V convention is clearly the superior approach for a balanced budget amendment.

With the Compact for a Balanced Budget, you know what you are going to get from an Article V proposing convention:

- The text of the contemplated balanced budget amendment is known in advance.

- The identities of convention delegates are known in advance.
- The convention agenda and rules are known in advance.
- The convention itself would be limited to 24 hours, ensuring the fiscal impact of the convention is minimal.
- The amendment would be ratified if approved by the convention, because the compact pre-commits each member state to ratifying the contemplated amendment.
- Congress's willingness to call the convention in accordance with the compact would be known in advance, because the introduction of the requisite congressional resolution could be sought whenever the political stars align. The conditional enactments utilized in the resolution would allow the resolution to lie dormant if sought early, and later activate.

The compact's amendment payload would be worth the effort. Imposing a fixed constitutional debt limit, which requires a referendum of the states on any debt limit increase, would increase transparency and be far more likely to generate a balanced budget than the status quo of limitless debt spending.

With the compact's balanced budget amendment in place, Washington would no longer have the ability to set its own credit limit and write itself a blank check. The states would become an active board of directors charged with keeping an eye on our federal CEO and staff. Debt would become scarce. Priorities would have to be set. Sustainable federal programs would have to become the norm. A broad national consensus – not midnight-hour panic – would have to support any further increases in the national debt.

Before this crucial reform can become a reality, 34 more states (at the time of this publication) must join the compact to reach the ratification threshold of three-fourths of the states, and simple majorities of Congress must approve it. This can be done in as few as 12 months, because the Compact for a Balanced Budget consolidates everything states do in the constitutional amendment process into a single agreement among the states that is enacted once by each state, and everything Congress does in a single resolution passed once. This greatly simplifies the cumbersome amendment process

outlined in Article V of the Constitution, which would otherwise take more than a hundred legislative actions – a process no one has successfully navigated to its conclusion despite decades of trying.

Not only is the compact’s payload worth the effort, the compact approach is clearly a superior Article V vehicle for advancing and ratifying a balanced budget amendment.

About the Author

Nick Dranias is president and executive director within the Office of the President of Compact for America Educational Foundation, Inc., which is serving as compact administrator for the Compact for a Balanced Budget Commission. He is also a research fellow and policy advisor with The Heartland Institute. Dranias was previously director of policy development and constitutional government at the Goldwater Institute. He led the institute’s successful challenge to Arizona’s system of government campaign financing to the U.S. Supreme Court.

Dranias has authored scholarly articles dealing with a wide spectrum of issues in constitutional and regulatory policy. His articles have been published by leading law reviews, bar journals, and think tanks across the country.

Endnotes

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2. Whet Moser, “Remember When Barack Obama Voted Against Raising the Debt Limit?” *Chicago Magazine*, July 14, 2011, www.chicagogmag.com/Chicago-Magazine/The-312/July-2011/Remember-When-Barack-Obama-Voted-Against-Raising-the-Debt-Limit/.
3. *U.S. National Debt and Deficit History*, Chart 4.02, www.usgovernmentdebt.us/debt_deficit_history.
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5. Laurence J. Kotlikoff, *Assessing Fiscal Sustainability*, Mercatus Center, George Mason University, December 12, 2013, p. 4, mercatus.org/sites/default/files/Kotlikoff_FiscalSustainability_v2.pdf.
6. Enactment History of HB284, www.legis.state.ak.us/basis/get_bill.asp?bill=HB%20284&session=28.
7. Enactment History of HB794, www.legis.ga.gov/legislation/en-US/Display/20132014/HB/794.
- 8 Mississippi State Senate Bill 2389, available at <https://legiscan.com/MS/bill/SB2389/2015>.
- 9 North Dakota State House Bill 1138, available at <https://legiscan.com/ND/text/1138/2015>.
10. Although the effective date of Alaska’s HB284 is July 21, 2014, the contractually binding nature of Alaska’s adoption of the compact proposed by HB794 is not tethered to that effective date. Georgia’s HB794 has been effective since it was signed on April 12, 2014. By its terms, HB794 becomes contractually binding on Georgia immediately upon enactment of counterpart legislation by another state and Georgia’s receipt of seasonable notice. The relevant language of the compact (Article III, section 2) provides, “in addition to having the force of law in each Member State upon its respective effective date, this Compact and each of its Articles shall also be construed as contractually binding each Member State when: (a) at least one other State has likewise become a Member State by enacting substantively identical legislation adopting and agreeing to be bound by this Compact; and (b) notice of such State’s Member State status is or

has been seasonably received by the Compact Administrator, if any, or otherwise by the chief executive officer of each other Member State.” HB794, www.legis.ga.gov/Legislation/20132014/144709.pdf. In essence, Georgia invited acceptance of its offer to compact through performance without specifying a deadline for acceptance. As a result, under ordinary contractual principles, upon Alaska’s part performance of the terms of acceptance (enactment of HB284), Georgia became contractually obligated thereafter to keep its offer open for a reasonable period of time – and certainly that time will not expire before the effective date of Alaska’s legislation. RESTATEMENT (SECOND) OF CONTRACTS, §§ 41, 45 (1981). Therefore, by enacting the counterpart compact legislation HB284 and giving seasonable notice, the State of Alaska has performed the terms of acceptance proposed by HB794 and the Compact has been formed, although its various provisions will not have the force of law in Alaska until July 21, 2014. *Oklahoma v. New Mexico*, 501 U.S. 221, 236 (1991) (holding contractual principles, as well as statutory interpretive principles, govern the interpretation of a compact).

11. 13. See HB284/HB794, Article IV, section 9, www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF, www.legis.ga.gov/Legislation/20132014/144709.pdf.

12 www.legis.ga.gov/Legislation/20132014/144709.pdf.

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16. *Ibid.*, Title II, section 202.

17. *Supra* note 14.

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19. *Ibid.*, Article VI, section 9.

20. *Ibid.*, Article VI, section 10.

21. *Ibid.*, Article VIII, section 3.

22. Jonathan Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, vol. 3, pp. 101–2 (Virginia) (1827), available at files.libertyfund.org/files/1907/1314.03_Bk.pdf.

23. A similar conclusion has been reached by numerous experts. See, e.g., Michael Rappaport, *ibid.*; Mike Stern, *ibid.*; “Note, The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process,” *Harvard Journal of Law and Public Policy* 30 (2007), pp. 1005, 1022.

24. *Cuyler v. Adams*, 449 U.S. 433, 441 (1981); *Wharton v. Wise*, 153 U.S. 155 (1894); *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893); *Green v. Biddle*, 21 U.S. 1, 39–40 (1823).

25. *Cuyler*, 449 U.S. at 440; *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452, 459 (1978); the decision stated congressional consent is required only for an interstate compact that would enhance “states power quoad [relative to] the federal government”).

26. *Supra* note 14, Article VI, section 4, Article VIII, section 1.

27. *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).

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The burden is daunting. It's difficult to imagine the debt-addicted Congress and president doing anything to address the situation any time soon. But what if the states could advance and ratify a powerful federal balanced budget amendment in just 12 months?

The Compact for a Balanced Budget described in this booklet could accomplish that task. The compact establishes a binding commitment to fix the national debt, advancing a uniquely powerful yet plausible federal balanced budget amendment.

The compact approach uses "the 'secret sauce' of conditional enactments" to consolidate and simplify convoluted procedures for amending the U.S. Constitution under Article V. If a compact-driven balanced budget amendment is adopted, author Nick Dranias concludes:

Washington will no longer have the ability to set its own credit limit and write itself a blank check. The states would become an active board of directors charged with keeping an eye on our wayward federal CEO and staff. Debt would become scarce. Priorities would have to be set. Sustainable federal programs would have to become the norm. A broad national consensus – not midnight-hour panic – would have to support any further increases in the national debt.

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