

## Article V Information Center Law Report

### Is the “Compact for America” Plan to Amend the Constitution Constitutional?

By Robert G. Natelson

“Purpose—to greatly simplify the amendment process [by state legislative action]. . . .”

—Compact for America, *Legislative One-Page Overview*

“It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.”

—United States Supreme Court in *Hawke v. Smith* (1920)

#### I. INTRODUCTION AND DISCLAIMER.

The name of the Article V Information Center reflects its mission of providing citizens and officials with accurate, impartial information about amending the U.S. Constitution. The Center generally provides resources to all, and maintains strict neutrality among bona fide efforts.

On the other hand, the Center would not be fulfilling its mission as an *information* source if it did not report legal issues in particular approaches. If activists solicit money and support for an approach that not even tenably complies with the law, the Center has an obligation to inform. Initially, we do so privately. If the campaign is not responsive, we do so publicly.

The Compact for America (CFA) has been soliciting money and support for an amendment process that *clearly* violates Article V case law. Its legal vulnerabilities derive from a long string of court decisions beginning in 1798 and continuing into the 21<sup>st</sup> century. During the 1980s and 1990s, the basic assumptions underlying CFA were litigated extensively, and the courts uniformly rejected them. Those defeats set back the Article V movement for years. Thus, CFA’s legal vulnerabilities present grave implications, not only for those investing resources in CFA but for the credibility of the Article V movement.

There is no “news” in this Report. The basic legal issues discussed here have been treated in the legal literature. The author summarized some of this case law in a paper published in 2011 for the Goldwater Institute in Phoenix, Arizona, where his primary contact was the same individual who is now CFA’s president and executive director. The author discussed the implications with him at the time, and, subsequently, with at least one other person in the CFA leadership. These legal issues also are known among many Article V activists.

Unfortunately, they are largely *unknown* among state lawmakers and the general public. Some academics, opinion leaders, institutions, and lawmakers have endorsed the CFA plan, as have four

state legislatures—apparently without knowledge of its striking legal vulnerabilities. Accordingly, the Center has decided to issue this Law Report outlining the issues in detail.

*A caveat:* One should not read this Law Report as denying the power of state legislatures to determine the general subject-matter of a convention in their applications or to select or to instruct their convention commissioners. Those powers are implied in the grants in Article V.<sup>1</sup>

Finally: We urge readers with questions or doubts to submit this Report to their own competent constitutional legal counsel. We are confident as to how counsel will respond.

## II. ABOUT THE AUTHOR.

Robert G. Natelson served as a law professor for 25 years at three different universities. He taught Constitutional Law, Advanced Constitutional Law, First Amendment, and Constitutional History, among other courses. He has published constitutional research and analysis extensively in both the scholarly and popular press.<sup>2</sup> Since 2013, his research has been cited repeatedly in the U.S. Supreme Court by counsel and by justices. His legal and historical research into Article V is widely credited with ushering in the current Article V movement.

He is Senior Fellow in Constitutional Jurisprudence at the Independence Institute and at two other policy centers. He is also director of the Article V Information Center. Before his academic

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<sup>1</sup>See especially Robert G. Natelson, *State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters* (2014) (legal treatise).

Some other works by the same author relevant to this paper include:

*Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 Fla. L. Rev. 615 (2013)

*The Article V Convention Process and the Restoration of Federalism,* 36 Harvard J. L. & Pub. Pol. 955 (2013)

*James Madison and the Constitution's "Convention for Proposing Amendments,"* in *Union and States' Rights: A History and Interpretation of Interposition, Nullification, and Secession 150 Years After Sumter* (Univ. of Akron Press, Neil H. Cogan ed., 2013)

*Proposing Constitutional Amendments by Convention: Rules Governing the Process,* 78 Tenn. L. Rev. 693 (2011)

*Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers* (Independence Institute, 2012) (updated and amended version of an earlier paper published by the Goldwater Institute)

*Amending The Constitution by Convention: Lessons for Today from the Constitution's First Century* (Independence Institute, 2011) (updated and amended version of an earlier paper published by the Goldwater Institute)

*Amending the Constitution by Convention: A More Complete View of the Founders' Plan* (Independence Institute, 2010) (updated and amended version of an earlier paper published by the Goldwater Institute)

<sup>2</sup>See <https://www.i2i.org/about/our-people/rob-natelson/>.

career he practiced law for about a decade, and is still admitted to practice in Colorado.

### **III. AMENDMENT PROCEDURE UNDER ARTICLE V.**

Article V lays out alternative step-by-step procedures for adopting amendments. The procedure of interest here is the one involving a “Convention for proposing Amendments.” When fleshed out with legal and historical material,<sup>3</sup> that procedure is as follows:

First, two-thirds of the state legislatures (now 34) apply to Congress for a convention for proposing amendments on a particular subject or subjects. Congress then must call the convention on the requested subject or subjects. The convention is of the kind traditionally called a “convention of the states.” That means it is a gathering of delegations (“committees”) of delegates (“commissioners”) from each participating state. Each state legislature determines how the commissioners will be selected, how many to send, and provides for their appointment. The state legislatures provide for commissioning and instructing them.

The convention for proposing amendments meets, passes on the credentials of the commissioners, elects its officers, adopts its rules, and debates solutions to the issues for which it was convened. It decides whether to propose one or more amendments within the scope of its authority. If it decides to do so, it drafts and presents its proposals.

Congress next opts for one of two “Modes of Ratification”—that is, for ratification either by state legislatures or state ratifying conventions. If Congress entrusts ratification to the state legislatures, those legislatures decide whether to ratify. If Congress entrusts ratification to state conventions (as in the case of the Twenty-First Amendment), the state legislatures constitute and call the state conventions. Delegates to the state conventions are popularly elected. They meet, pass on the credentials of the delegates, elect their officers, adopt their rules, and debate and decide whether to vote “yes” or “no” on the proposed amendment(s).

The Congress, state legislatures, and conventions acting under Article V do so as deliberative assemblies representing the people rather than in their law-making or legislative capacities. Accordingly, neither the president nor state governors have any veto or other constitutional role in these procedures, although they may play, and sometimes have played, hortatory roles. Also, on a few occasions state legislatures have delegated to the governor some initiative in selecting commissioners.

### **IV. THE COMPACT FOR AMERICA PLAN.**

The Compact for America (CFA) seeks to adopt a federal balanced budget amendment by short-circuiting, or at least condensing, the amendment process. The organization urges state legislatures adopt a “Bill” entitled “AN ACT TO ADOPT THE COMPACT FOR A BALANCED BUDGET; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.” It is subtitled,

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<sup>3</sup>Historical convention usages are outlined in Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 Fla. L. Rev. 615 (2013).

“TO ADOPT THE COMPACT FOR A BALANCED BUDGET; AND TO DECLARE AN EMERGENCY.”

As this wording indicates, the measure is designed as a piece of legislation. It accordingly provides for approval or veto by the governor. The bill applies for a convention and causes the state to enter into a compact with other acceding states. The compact purports to override prior inconsistent state law. The compact also purports to determine, among other items:

- \* appointment of commissioners to the convention;
- \* the precise text of the amendment;
- \* the rules, procedures, and length of the convention; and
- \* the venue for litigation under the compact, presumably including any litigation pertaining to the application, convention, and ratification.

The Compact further commits the state to ratifying the prescribed amendment once certain conditions have been satisfied.

CFA further recommends that Congress adopt a resolution based on a model called “House Concurrent Resolution \_\_\_ Effectuating the Compact for a Balanced Budget.” This resolution both calls the convention and fixes a mode of ratification.

CFA thereby hopes to reduce the steps of amendment to essentially two: (1) state legislation that combines the application, drafting and ratification processes into one step and (2) a congressional resolution that combines the call and selection of mode of ratification into one step.

One reason the CFA plan was developed was to meet the objections of certain small right-wing groups that have long trucked in “runaway convention” fears. Despite the tightly controlled nature of the plan, however, those groups have not been appeased, and have rejected CFA.

## **V. ARTICLE V CONSTITUTIONAL LAW AND HOW CFA DEFENDS ITS PLAN.**

In addition to the Constitution’s grants of enumerated powers to Congress, the President, and the judiciary, several provisions grant powers to entities *not* part of the federal government or at least not treated as part of the federal government for execution of those powers. Recipients include the Electoral College,<sup>4</sup> various conventions,<sup>5</sup> state executives,<sup>6</sup> Congress as a free-standing

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<sup>4</sup>U.S. Const., art. II, § 1, cl. 2. *Ray v. Blair*, 343 U.S. 214 (1952) (holding that the Electoral College exercises federal functions although its members are not federal officers or agents); *Burroughs v. United States*, 290 U.S. 534 (1934) (same); *Fitzgerald v. Greene*, 134 U.S. 377 (1890).

<sup>5</sup>U.S. Const. art. V (federal proposal convention and state conventions to ratify amendments), art. VII (conventions to ratify Constitution).

<sup>6</sup>*Id.* at art. I, § 2, cl. 4; art. I, § 3, cl. 2 (original Constitution); art. IV, § 2, cl. 2 (original Constitution); art. IV, § 4.

assembly,<sup>7</sup> and the state “Legislatures.”

The designation of state “Legislatures” means either of two different things, depending on context.<sup>8</sup> In constitutional grants of power to regulate federal elections,<sup>9</sup> the recipients are each state’s general legislative authority. *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 135 S.Ct. 2652 (2015); *cf.* *Hawke v. Smith* (“Hawke I”), 253 U.S. 221 (1920) (so noting). *See also* *Ray v. Blair*, 343 U.S. 214, 224 (1952) (“presidential electors exercise a federal function . . . but they are not federal officers or agents . . . They act by authority *of the state* that in turn receives its authority from the federal constitution.”) (emphasis added).

The general legislative authority of the state includes not only the representative assembly, but the governor (if he signs or vetoes bills), and the people in states with initiative and referendum. *Arizona State Legislature, supra*. This interpretation of state “Legislature” is in keeping with Founding Era practice, in which election rules generally were established by ordinary legislation.<sup>10</sup>

In most, if not all, of the other cases in which the Constitution grants power to state “Legislatures,” the grant is conferred on the state’s representative assembly *per se*. The Constitution grants the power to the assembly as a free-standing body. In those instances, the assembly exercises the power without participation by the governor or the initiative or referendum processes. For example, before the Seventeenth Amendment was ratified, the authority to elect U.S. Senators was in the state legislatures as free-standing assemblies, without gubernatorial or direct popular participation. *Cf. Hawke I, supra* (so noting).<sup>11</sup>

Article V (like much of the rest of the Constitution) is a series of power grants. CFA argues that it can supplement those grants and conflate their procedure by using pre-constitutional powers “reserved” to the states by the Tenth Amendment. CFA claims that these reserved state powers include authority to adopt state laws and interstate compacts controlling all facets of the amendment process not committed to Congress. CFA asserts that these laws and compacts can dictate in advance the text of the amendment, select commissioners, set convention rules, commit in advance to ratification, and so forth. CFA contends that the application process pre-dates the Constitution, and is therefore particularly amenable to state control.

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<sup>7</sup> See below.

<sup>8</sup> *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932):

Thus, for example, the meaning of the word ‘Legislature,’ used several times in the Federal Constitution, differs according to the connection in which it is employed, depending upon the character of the function which that body in each instance is called upon to exercise.

<sup>9</sup> *Id.* at art. I, § 4, cl. 1; art. II, § 1, cl. 2.

<sup>10</sup> Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1 (2010).

<sup>11</sup> In addition to the grants in Article V, *Hawke I* lists in this category the grants in art. I, § 3, cl. 1 (original Constitution); two in Article IV, one in Article VI, and the Enclave Clause of Article I, § 8, cl. 17. See also the discussion of these provisions in *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 135 S.Ct. 2652 (2015).

To support these contentions, CFA relies principally on fragments of founding-era and other historical evidence. However, it rarely addresses Article V case law. From CFA literature, you might think the courts had never ruled on such issues.

In fact, they have ruled extensively. This is important because, while founding-era evidence is useful, the courts generally do not use it to overturn consistent judicial precedent unless that evidence is very strong indeed.

**VI. THE AMENDMENT PROCESS OPERATES BY ENUMERATED POWERS GRANTED, NOT TO GOVERNMENTS PER SE, BUT TO FREE-STANDING ASSEMBLIES. THOSE ASSEMBLIES ARE NOT SUBJECT TO CONTROL BY STATE CONSTITUTIONS OR ORDINARY LEGISLATION.**

Early in our constitutional history, the U.S. Supreme Court decided *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). One of the issues in the case was the validity of the recently-ratified Eleventh Amendment. The party opposing the amendment pointed out that Congress's proposal resolution had not been presented to the president for his signature or veto, as apparently required by the Order, Resolution, or Vote Clause. U.S. Const. art. I, § 7, cl. 3.

The Court nevertheless upheld the amendment as validly adopted. The Court had excellent evidence of the original meaning of the proposal provisions in Article V, since the first ten amendments had been proposed by the First Congress in 1789 without presidential signature. Justice Samuel Chase added: "The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution."

During the ensuing century constitutional amendments were relatively infrequent and Article V litigation rare. But the years from 1913 to 1920 witnessed adoption of four new amendments (the Sixteenth through the Nineteenth), thereby sparking additional litigation.

Most of this litigation centered on issues directly applicable to the CFA plan—that is, the extent to which state law could affect the Article V ratification procedure. The courts agreed that Article V delegated powers to Congress, conventions, and "the Legislatures" of the states. But they needed to decide definitively whether "the Legislatures" meant (1) general state legislative authority or (2) state representative bodies acting as free-standing assemblies. The question arose because several states were resorting to their general legislative authority to submit ratification to referendum.

State courts addressed the issue in 1919 and 1920. Most held that "the Legislatures" referred to independent assemblies assenting on behalf of the people, not to general legislative authority. *Barlotti v. Lyons*, 189 P.282 (Cal. 1920) (so holding); *Opinion of the Justices*, 107 A. 673 (Me. 1919) (so stating as to both legislative ratification and congressional proposal); *Prior v. Norland*, 68 Colo. 263, 188 P. 727 (1920) (so holding as to state legislatures). The *Prior* case illustrates the reasoning:

[I]n the matter of the ratification of a proposed amendment to the federal Constitution, the General Assembly does not act in pursuance of any power delegated or given to it by the state Constitution, but exercises a power which it possesses by virtue of the fifth article of the Constitution of the United States. That article provides that proposed amendments "shall be valid, \* \* \* as parts of this

Constitution, when ratified by the Legislatures of three-fourths of the several states.” A ratification by a General Assembly, of a proposed amendment to the federal Constitution, is not, therefore, lawmaking legislation for the state, subject to approval or rejection by the referendum.

\* \* \* \*

The state Legislature in ratifying the amendment, as Congress is proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a lawmaking body, but is acting in behalf of and as representative of the people as a ratifying body under the power expressly conferred upon it by article 5.<sup>12</sup>

When an Ohio court reached the opposite conclusion, the U.S. Supreme Court reversed. *Hawke v. Smith*, 253 U.S. 221 (1920) (“*Hawke I*”) confirmed the delegated nature of Article V authority:

[t]he power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.

*Id.* at 230.

The Supreme Court also explained to whom the authority was given:

The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the federal Constitution through the medium of a referendum rests upon the proposition that the federal Constitution requires ratification by the legislative action of the states . . . . This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.

253 U.S. at 229.

The Supreme Court confirmed this reasoning in *Hawke v. Smith*, 253 U.S. 231 (1920) (“*Hawke II*”). In 1922, the justices issued *Leser v. Garnett*, 258 U.S. 130 (1922) (Brandeis, J.). *Leser* addressed the issue of whether state legislatures’ failure to follow certain state constitutional provisions—such as established rules governing when it could consider amendments—invalidated their ratification of the Nineteenth Amendment.<sup>13</sup> Writing for a unanimous court, Justice Brandeis held not:

The argument is that by reason of these specific provisions the Legislatures were without power to ratify. But the function of a state Legislature in ratifying a

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<sup>12</sup>See also *Herbring v. Brown*, 180 P. 328 (Or. 1919) (noting that the state attorney general held a similar position; the case ultimately was decided on state constitutional grounds).

<sup>13</sup>See *Trombetta v. Florida*, 353 F.Supp. 575 (M.D. Fla. 1973) for an explanation.

proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.

258 U.S. at 137.

In other words, Article V law is federal law. *See also* Opinion of the Justices, 413 A.2d 1245 (Del. 1980). Accordingly, state law (including legislation such as that promoted by CFA) cannot control the ratification or proposal process. *See also* Dyer v. Blair, 390 F.Supp. 1291 (N.D. Ill. 1975) (Justice John Paul Stevens).<sup>14</sup>

If the power to ratify constitutional amendments is bestowed by the Constitution, then does the Constitution grant that power to state legislative assemblies acting as independent bodies or to the state legislative authority in general? As we have seen, several lower court decisions issued in 1919 and 1920 ruled that the delegation was to state legislative assemblies acting alone—and the Supreme Court’s opinion in *Hawke I* seemed to agree. The following year the U.S. Supreme Court issued *Dillon v. Gloss*, 256 U.S. 368 (1921), which contained dicta further confirming that view.<sup>15</sup> In 2015, the Supreme Court laid doubts on this score to rest with its extensive discussion in *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*.<sup>16</sup>

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<sup>14</sup> Illinois had both a state constitutional rule and legislative rule requiring three-fifths of each house to ratify a federal constitutional amendment. The court upheld the requirement, but on the ground that the legislature, when acting as the ratifying assembly, had implicitly accepted it. The court refused to rely on the preexisting rules.

<sup>15</sup>*Dillon*, 256 U.S. at 377:

Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people’s will and be binding on all.

In *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 135 S.Ct. 2652 (2015), the court pointed out that when the Constitution delegates a ratifying or consenting function to a state legislature, the Constitution delegates only to the legislative assembly and does not permit a role for ordinary state legal processes:

*Smiley v. Holm* raised the question whether legislation purporting to redistrict Minnesota for congressional elections was subject to the Governor’s veto. . . . In holding that the Governor’s veto counted, we distinguished instances in which the Constitution calls upon state legislatures to exercise a function other than lawmaking. State legislatures, we pointed out, performed an “electoral” function “in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment,” a “ratifying” function for “proposed amendments to the Constitution under Article V,” as explained in *Hawke v. Smith*, and a “consenting” function “in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17.”

In contrast to those other functions, we observed, redistricting “involves lawmaking in its essential features and most important aspect.” And the Elections Clause, we explained, respected the State’s choice to include the Governor in that process, although the Governor could play no part when the Constitution assigned to “the legislature” a ratifying, electoral, or consenting function. . . .



To be sure, all the cases just referred to dealt primarily with the issues of congressional *proposal* and state legislative *ratification*. Over the years the courts have extended the same principles—that Article V delegates power to assemblies acting independently—to other amendment functions:

- *Hawke I* itself stated that congressional choice of a “Mode of Ratification” is a “federal function” derived from the Constitution. The Court repeated this point in *United States v. Sprague*, 282 U.S. 716 (1931).
- In *Coleman v. Miller*, 307 U.S. 433 (1939), the Supreme Court strongly implied that the same principles govern the entire amendment process. 307 U.S. at 438 (“the questions . . . arose under Article V of the Constitution . . . which alone conferred the power to amend and determined the manner in which that power could be exercised. . . . they are exclusively federal questions and not state questions.”).
- Accordingly, several state courts have indicated that ratification by state conventions is likewise a “federal function” exercised by independent assemblies. *State ex rel. Donnelly v. Myers*, 127 Ohio St. 104, 186 N.E. 918 (1933); *State ex rel. Tate v. Sevier*, 62 S.W.2d 895, 898 (Mo. 1933), *cert. denied*, 290 U.S. 679 (1933)

To this pattern there is only one variation: Although all courts agree that the power to provide for state ratifying conventions derives from the U.S. Constitution,<sup>17</sup> they are split as to whether the Constitution grants that power to the state *legislative assembly acting alone* (as is usually the case when the Constitution delegates to state “legislatures”) or to the general *state legislative authority* (as when the Constitution delegates power to regulate congressional elections).<sup>18</sup> However, the

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Article I, § 3, gave state legislatures “a function different from that of lawgiver,” 285 U.S., at 365, 52 S.Ct. 397; it made each of them “an electoral body” charged to perform that function to the exclusion of other participants, *ibid.* So too, of the ratifying function. As we explained in *Hawke*, “the power to legislate in the enactment of the laws of a State is derived from the people of the State.” 253 U.S., at 230, 40 S.Ct. 495. Ratification, however, “has its source in the Federal Constitution” and is not “an act of legislation within the proper sense of the word.” . . .

Constantly resisted by THE CHIEF JUSTICE, but well understood in opinions that speak for the Court: “[T]he meaning of the word ‘legislature,’ used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise.” *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434, 52 S.Ct. 607, 76 L.Ed. 1204 (1932) (citing *Smiley*, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795). Thus “the Legislature” comprises the referendum and the Governor’s veto in the context of regulating congressional elections. . . . In the context of ratifying constitutional amendments, in contrast, “the Legislature” has a different identity, one that excludes the referendum and the Governor’s veto. *Hawke*, see *supra*, at 2666 – 2667.

<sup>17</sup>Opinion of the Justices, 172 S.E. 474, 478 (N.C. 1933) (“In considering, ratifying or rejecting, the proposed amendment to the Constitution of the United States . . . the said convention would, quoad hoc, be acting as a federal agency with its authority as such agency grounded in the Constitution and laws of the United States.”); Opinion of the Justices, 148 So. 107 (Ala. 1933) (apparently conceded that a ratifying convention would hold a “delegated power” while determining that state law controls its creation and that state law could provide for voter instruction of delegates); *State ex rel. Donnelly v. Myers*, 127 Ohio St. 104, 186 N.E. 918 (1933); *State ex rel. Tate v. Sevier*, 62 S.W.2d 895, 898 (Mo. 1933), *cert. denied*, 290 U.S. 679 (1933).

<sup>18</sup>Compare Opinion of the Justices, 148 So. 107 (Ala. 1933) (determining that state law controls the

judicial split is irrelevant to the CFA plan, because whoever exercises the power still exercises delegated authority. Erecting state ratifying conventions is not a function reserved by the Tenth Amendment or derived from state sovereignty. See Part VIII. It is a “federal function,” and therefore not subject to manipulation by ordinary state legal processes.

Nevertheless, the CFA leadership responds that the state legislative application process is different from the other Article V grants and therefore governed by different principles.

But is it? We address what the courts have to say about that in the next Part.

## **VII. THE SAME PRINCIPLES AND RULES GOVERNING OTHER ARTICLE V FUNCTIONS ALSO APPLY TO STATE LEGISLATIVE APPLICATIONS.**

CFA leadership has argued that even if other Article V functions derive exclusively from the constitutional grants to independent assemblies, this is not true of the state application procedure. CFA notes that state legislatures sometimes “applied” for various items before the Constitution existed. CFA therefore claims the power to “apply” is a pre-constitutional power, reserved by the Tenth Amendment. According to CFA, this renders Article V’s application clause “a clear textual entry for state control based on reserved legislative power.”<sup>19</sup>

A glaring deficiency in this argument lies in what it concedes: If the reserved power argument applies only to applications, then why do the CFA documents purport to regulate the convention and ratification processes as well?

More importantly, however, the question already has been raised in the courts, and authoritatively resolved against the CFA position. As noted by the California Supreme Court,

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convention’s creation and could provide for voter instruction of delegates) with *State ex rel. Tate v. Sevier*, 62 S.W.2d 895, 898 (Mo. 1933), *cert. denied*, 290 U.S. 679 (1933):

It therefore follows that when the Legislature enacted House Bill 514, which provides the method for assembling a convention, it was not, strictly speaking, performing the functions of a legislative body for the state, but was acting as a representative of the people, pursuant to authority delegated to it by the federal Constitution to provide a method for obtaining and assembling conventions to represent the people in ratifying or rejecting proposed amendments to the federal Constitution. Such enactment was, therefore, not lawmaking for the state, and for that reason is not subject to the referendum.

<sup>19</sup>Nick Dranias, *Article V Conventions and the Tenth Amendment Go Hand in Hand*, American Thinker, Dec. 26, 2015:

Specifically, Article V says “on the Application” of two-thirds of the state legislatures, Congress “shall call a convention for proposing amendments.” Grammatically, no express grant of power to make the requisite “application” is conferred by Article V on state legislatures. Rather, the “Application” power is presumed to exist. As such, reference to the “Application” is a clear textual point of entry for state control based on reserved legislative power. The Tenth Amendment’s guarantee of the reserved powers of the states is, therefore, critically important to understanding and enforcing Article V as it applies to the convention mode of proposing amendments.

*See also CFA Policy Brief No. 9*, [http://media.wix.com/ugd/e48202\\_33eb5c71010e4f30a77a39239a4fe657.pdf](http://media.wix.com/ugd/e48202_33eb5c71010e4f30a77a39239a4fe657.pdf).

“Courts and commentators agree . . . that the term ‘Legislatures’ bears the same meaning throughout article V.” *AFL-CIO v. Eu*, 686 P.2d 609, 620 (Cal. 1984), *stay denied sub nom. Uhler v. AFL-CIO*, 468 U.S. 1310 (1984). In other words, like other Article V powers, the authority to apply is conferred on state legislatures and they act independently of state law.

The California justices could claim that “[c]ourts . . . agree” because, in fact, courts do agree. Either expressly or by necessary implication, *every reported case addressing the issue has determined that the application power is governed by the same principles and rules as the rest of Article V*.

Possibly the first holding of this kind was Opinion of the Justices, 262 Mass. 603, 160 N.E. 439 (1928). Faced with the question of the effect of an initiative petition on the application process, the court determined:

Amendment of the Constitution of the United States and repeal of amendments thereof constitute federal functions derived *in every particular* entirely from the Constitution of the United States. That instrument transcends all provisions sought to be enacted by the people or by the legislative authority of any state.

160 N.E. at 440 (emphasis added).

The Wyoming Supreme Court apparently arrived at the same conclusion in 1932. *Spriggs v. Clark*, 14 P.2d 667 (Wyo. 1932) (assuming that same rules apply to the application as to the ratification process). The following year, the Missouri Supreme Court was more explicit. In *State ex rel. Tate v. Sevier*, 333 Mo. 662, 62 S.W.2d 895 (1933), *cert. denied*, 290 U.S. 679 (1933), it wrote:

When a state Legislature performs *any act looking to the ratification or rejection of an amendment to the federal Constitution*, it is not acting in accordance with any power given to it by the state Constitution, but is exercising a power conferred upon it by the federal Constitution.

62 S.W.2d at 667 (emphasis added).

In 1977 the Massachusetts Supreme Judicial Court returned to the question:

The function of a State Legislature in amending the Constitution of the United States constitutes a Federal function derived entirely from the Constitution of the United States. . . Since the word “Legislatures” in the ratification clause of art. V does not mean the whole legislative process of the State, as defined in our State Constitution, we are of opinion that the word “Legislatures” in the application clause, likewise, does not mean the whole legislative process.

Opinion of the Justices to the Senate, 366 N.E.2d 1226, 1228 (Mass. 1977).

During the 1980s and 1990s, a long line of cases explicitly applied to the application process precisely the same standards applied to other procedures in Article V. Here is a more complete extract from *AFL-CIO v. Eu*, *supra*:

As we noted earlier, the cited cases refer to the role of the Legislature in ratifying,

not in proposing, constitutional amendments. Courts and commentators agree, however, that the term “Legislatures” bears the same meaning throughout article V. The Massachusetts Supreme Judicial Court, in holding that a governor cannot veto an application for a constitutional convention, declared that “[s]ince the word “Legislatures” in the ratification clause of Art. V does not mean the whole legislative process of the State . . . we are of the opinion that the word “Legislatures” in the application clause, likewise, does not mean the whole legislative process.

686 P.2d at 610.

All other decided cases followed suit in treating state applications by the same rules that govern state ratifications. *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984), *stay denied* 469 U.S. 1301 (1984) (applying *Hawke* and *Leser* rules to the application process); *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996), *cert. denied* 519 U.S. 1147 (1997) (same); *In re Initiative Petition No. 264*, 930 P.2d 186 (Okla. 1996) (same); *League of Women Voters of Maine v. Gwadosky*, 966 F.Supp. 52 (D. Me. 1997) (same); *Morrissey v. State of Colorado*, 951 P.2d 911 (Colo. 1998) (same); *See also Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999) and *Miller v. Moore*, 169 F.3d 1119 (8<sup>th</sup> Cir. 1999). *Cf. Barker v. Hazetine*, 3 F. Supp. 2d 1088, 1093 (D.S.D. 1998) (“While both *Hawke* and *Leser* pertained to ratification of constitutional amendments, the rationale of those cases applies equally to the proposal of constitutional amendments.”).

In sum: CFA’s assertion that state applications are not subject to the same standards applicable to the rest of Article V is not an accurate statement of the law. It is not even a defensible statement of the law.

#### **VIII. STATES CANNOT USE TENTH AMENDMENT RESERVED POWER (STATE CONSTITUTIONS, LAWS OR COMPACTS) TO CONTROL THE ARTICLE V PROCESS.**

The powers recognized as reserved to the states by the Tenth Amendment are only those the states already enjoyed before the Constitution was ratified. Powers granted by the Constitution, such as that of exercising amendment functions, did not exist prior to the Constitution. Hence, the Tenth Amendment is inapplicable to them.

The governing case in this regard is *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), in which the Supreme Court stated:

Petitioners’ Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only “reserve” that which existed before. As Justice Story recognized, “the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them . . . . No state can say, that it has reserved, what it never possessed.”

514 U.S. at 802.

This rule applies even if the Constitution delegates the power in question to the general state

legislative authority rather than to a free-standing assembly. *Thornton* itself dealt with the former kind of case, because it addressed election regulations delegated by the Constitution to the general state legislative authority. However, by citing other examples of powers that were not pre-constitutional, the Court was careful to establish the principle for both kinds of recipients. Among its examples was the amendment process; *Thornton* quoted language directly from *Hawke I*. 514 U.S. at 805.

*Thornton* buttressed several earlier cases ruling that the Tenth Amendment is irrelevant to Article V. *United States v. Sprague*, 282 U.S. 716 (1931) had held that the Tenth Amendment is irrelevant to Article V's grant of certain functions to Congress. Similarly, *United States v. Thibault*, 47 F.2d 169 (2d Cir. 1931) stated that

the Tenth Amendment does not alter the fifth article. The fifth article directs the manner in which proposed amendments shall be submitted to the states. The representatives of the people determine whether the amendment shall be adopted and this is entirely consonant with popular government. No authority is taken away from the people. . .

47 F.2d at 171.

That is why, as the courts have observed, Article V law is exclusively federal. Opinion of the Justices, 413 A.2d 1245 (Del. 1980) (and cases cited therein). As the U.S. Supreme Court held in *Coleman v. Miller*, 307 U.S. 433 (1939):

But the questions raised in the instant case arose . . . under Article V of the Constitution . . . which alone conferred the power to amend and determined the manner in which that power could be exercised. *Hawke v. Smith* (No.1) . . . ; *Leser v. Garnett* . . . Whether any or all of the questions thus raised and decided are deemed to be justiciable or political, they are exclusively federal questions and not state questions.

307 U.S. at 438.

#### **IX. THE STATES MAY NOT USE THEIR RESERVED POWERS (STATE CONSTITUTIONS, LAWS, OR COMPACTS) TO ALTER OR CONFLATE THE PROCEDURES OF ARTICLE V.**

A long line of cases, beginning with *Hawke I*, holds that states may not use their general legislative authority or reserved powers to alter or distort Article V procedures. Thus—

- State constitutional provisions attempting to govern how a state legislature ratifies are invalid. *Trombetta v. Florida*, 353 F.Supp. 575 (M.D. Fla. 1973); *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975) (Stevens, J.)
- Standing legislative rules attempting to govern how a state ratifies do not control. *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975) (Stevens, J.); *Idaho v. Freeman*, 529 F.Supp. 1107 (D. Idaho 1981), *judgment vacated as moot*, *Carmen v. Idaho*, 459 U.S. 809 (1982).

- Efforts to use state referendum rules to govern the application, proposal, or ratification processes are invalid. *Hawke I*; *Hawke II*; *State of Montana v. Hatch*, 526 P.2d 1369 (Mont. 1974); and numerous other cases. The state may, however, hold a referendum if it is advisory. *Kimble v. Swackhamer*, 439 U.S. 1385, *appeal dis'd*, 439 U.S. 1041 (1978) (Rehnquist, J.); *cf.* *Simpson v. Cenarrusa*, 944 P.2d 1372 (Id. 1997) (upholding “instructions” to apply for a convention only after stripping out any legal effect from the instructions).
- State initiatives directed to the same ends are invalid. *E.g.*, *AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984), *stay denied sub nom.* *Uhler v. AFL-CIO*, 468 U.S. 1310 (1984); *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984), *stay denied*, 469 U.S. 1301 (1984) (rejecting attempt to use initiative process to force legislature to apply for convention); *In re Initiative Petition No. 264*, 930 P.2d 186 (Okla. 1996) (same); *Opinion of the Justices*, 673 A.2d 693 (Me. 1996) (rejecting attempt to instruct members of Congress to propose an amendment); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999); *Gralike v. Cooke*, 191 F.3d 911 (8<sup>th</sup> Cir. 1999), *aff'd on other grounds sub nom.* *Cook v. Gralike*, 531 U.S. 510 (2001) (same); *Miller v. Moore*, 169 F.3d 1119 (8<sup>th</sup> Cir. 1999) (same).

Incidentally, the fact that an interstate compact is federal as well as state law makes no difference, because the federal government may not use its general legislative power to control the amendment process either. *State of Idaho v. Freeman*, 529 F.Supp. 1107, 1151 (1981), *judgment vacated as moot sub nom.* *Carmen v. Idaho*, 459 U.S. 809 (1982) (“Thus Congress, outside of the authority granted by article V, has no power to act with regard to an amendment, i.e., it does not retain any of its traditional authority vested in it by article I.”). *Cf.* *State ex rel. Tate v. Sevier*, 62 S.W.2d 895, 898 (Mo. 1933), *cert. denied*, 290 U.S. 679 (1933) (“when the Legislature enacted House Bill 514, which provides the method for assembling a convention, it was not, strictly speaking, performing the functions of a legislative body for the state, but was acting as a representative of the people, pursuant to authority delegated to it by the federal Constitution”). Indeed, allowing the federal government to do so would undercut the reasons behind the Article V application process.

**X. ARTICLE V ASSEMBLIES MUST BE FREE TO DELIBERATE WITHIN THEIR HISTORICAL SPHERE; NO STATE LEGISLATIVE AUTHORITY OR OTHER ARTICLE V ASSEMBLY MAY UNDULY INTERFERE.**

The courts have held repeatedly that assemblies operating under Article V must be deliberative in nature; their conclusions cannot be prescribed in advance for them. *Hawke I* referred to the deliberation requirement this way:

This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the Legislatures of two-thirds of the states; thus securing *deliberation and consideration* before any change can be proposed. The proposed change can only become effective by the ratification of the Legislatures of three-fourths of the states, or by conventions in a like number of states. The method of ratification is left to the choice of Congress. Both methods of ratification, by Legislatures or conventions, call for action *by deliberative assemblages* representative of the people, which it was assumed would voice the will of the people.

253 U.S. at 226-27 (emphasis added).

In 1984, the California Supreme Court elaborated on the principle in the context of a state *application*:

The only conclusion we can draw from this fact is that the drafters wanted the amending process in the hands of a body with the power to deliberate upon a proposed amendment and, after considering not only the views of the people but the merits of the proposition, to render a considered judgment. A rubber stamp legislature could not fulfill its function under article V of the Constitution.

AFL-CIO v. Eu, 686 P.2d 609, 622 (Cal. 1984), *stay denied sub nom.* Uhler v. AFL-CIO, 468 U.S. 1310 (1984).

Six other cases standing for the deliberative principle are set forth in the footnote.<sup>20</sup> In fact, not only is it unconstitutional to prescribe the conclusions to be reached, it is also unconstitutional to try to attempt the same thing through indirect coercion. *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996), *cert. denied* 519 U.S. 1147 (1997) (attempted coercion of legislators through ballot language); *League of Women Voters of Maine v. Gwadosky*, 966 F.Supp. 52 (D. Me. 1997) (rejecting law designed to push legislators into applying for term limits amendment); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999) (rejecting attempted coercion by ballot language); *Gralike v. Cooke*, 191 F.3d 911 (8<sup>th</sup> Cir. 1999), *aff'd on other grounds sub nom.* *Cook v. Gralike*, 531 U.S. 510 (2001) (same); *Miller v. Moore*, 169 F.3d 1119 (8<sup>th</sup> Cir. 1999) (same).

Nor can the rules or procedures of an Article V legislature or convention be prescribed in advance, as the CFA documents attempt to do. This is true even when the prescribing body is the same one that later applies or ratifies. When a legislature acts under Article V, its decision on rules and procedures is made in the session wherein it acts, not in advance by a predecessor legislature. This was so held by future Justice John Paul Stevens when he decided that previously-adopted rules did not legally bind the legislature at the time of ratification. In *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975), he wrote:

Article V identifies the body—either a legislature or a convention—which must ratify a proposed amendment. The act of ratification is an expression of consent to the amendment by that body. *By what means that body shall decide to consent or not to consent is a matter for that body to determine for itself. . . .* We have concluded that article V delegates to the state legislatures—or the state conventions depending upon the mode of ratification selected by Congress—the power to determine their own voting requirements.

*Id.* at 1307-08 (emphasis added). *See also* *Idaho v. Freeman*, 529 F.Supp. 1107 (D. Idaho 1981),

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<sup>20</sup>State ex rel. *Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984), *stay denied*, 469 U.S. 1301 (1984) (rejecting attempt to use initiative process to force legislature to apply for convention); *In re Initiative Petition No. 264*, 930 P.2d 186 (Okla. 1996) (same); *Opinion of the Justices*, 673 A.2d 693 (Me. 1996) (rejecting attempt to instruct members of Congress to propose an amendment); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999) (repeating emphasizing that legislatures and conventions operating under Article V must have freedom of deliberation); *Gralike v. Cooke*, 191 F.3d 911 (8<sup>th</sup> Cir. 1999), *aff'd on other grounds sub nom.* *Cook v. Gralike*, 531 U.S. 510 (2001) (same); *Miller v. Moore*, 169 F.3d 1119 (8<sup>th</sup> Cir. 1999) (same).

*judgment vacated as moot*, *Carmen v. Idaho*, 459 U.S. 809 (1982) (stating that ratifying bodies may determine their own rules); *Morrissey v. State of Colorado*, 951 P.2d 911, 915 (Colo. 1998) (“Article V provides for applications by the ‘Legislatures of two-thirds of the several States,’ . . . it envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled. . .”).

With respect to the scope of deliberation enjoyed by various assemblies, there is a long and rich history. Legislatures enjoy almost unfettered deliberation. Conventions also may deliberate, but the scope is determined by the reasons for which they are called: A state ratifying convention is called solely to vote “aye” or “nay” on a proposed amendment, so it may not spend time “deliberating” about the condition of the local transportation system.

The scope of deliberation is fixed by a governing principle running through Article V: Terms and procedures should conform to historical usage.<sup>21</sup> This means founding-era usage if known, and otherwise subsequent usage. Ratification conventions traditionally are limited to up-to-down votes. Proposing conventions are limited by the assigned subject matter. Within the scope of the subject matter, proposing conventions are free to deliberate and draft.<sup>22</sup> As explained in the next section, the CFA effort to dictate an up-or-down vote to a convention for proposing amendments conflicts with history as well as case law.

## **XI. CFA’S FOUNDING-ERA EVIDENCE.**

In view of the unanimity of the case law, CFA’s only hope of validating its approach is to convince the courts that founding-era evidence contradicts the holdings of dozens of decided cases, and that the evidence is so strong that those cases should be overruled.

In fact, however, CFA has provided only a handful of fragments in support of its view that the amendment process (or the application process) is to be exercised under state law.

Several of its fragments appear to have been gleaned from this author’s writings on founding-era convention issues.<sup>23</sup> The Founders sometimes referred to “states” acting in the application process and sometimes more accurately to “state legislatures,” but CFA focuses on the

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<sup>21</sup>The Article V cases following historical usage are many. In addition to *Hawke I*, see, e.g., *Hollingsworth v. Virginia*, 3 U.S. 381 (1798) (following practice pertaining to first ten amendments); *Opinion of the Justices*, 167 A. 176, 179 (Me. 1933) (determining the mode of election for a state ratifying convention by consulting historical practice); *Leser v. Garnett*, 258 U.S. 130 (1922) (relying on history to affirm validity of the procedure adopted for the Fifteenth, and therefore the Nineteenth, Amendment); *United States v. Gugel*, 119 F. Supp. 897 (E.D. Ky. 1954) (citing history of judicial reliance on the Fourteenth Amendment as evidence that it had been validly adopted); *Dyer*, 390 F. Supp. at 1306–07 (applying historical evidence in determining how conventions determine voting rules); *Barlotti v. Lyons*, 189 P. 282 (Cal. 1920) (citing Founding-Era evidence in defining the Article V word “legislature”).

<sup>22</sup>See Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 Fla. L. Rev. 615 (2013). Information on the five later interstate conventions is available on the Article V Information Center website, [articlevinfocenter.com](http://articlevinfocenter.com).

<sup>23</sup>E.g., Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 Tenn. L. Rev. 693, 699-702 (2011)



first set. The lesson we are supposed to derive is that states may use their general legislative authority—their reserved powers—to affect Article V procedures.

However, the wording of Article V does not refer to “states” (as in some other constitutional grants) but to state “Legislatures.” Moreover, one cannot expect the Founders to have always been precise on the subject: At the time there was much more practical identity than there is today between state governments and their legislatures—and the Founders were not writing legal treatises. They were arguing a case for the general public.

Finally, even if a court concluded that previous tribunals had been mistaken and that Article V’s grants to state “Legislatures” meant the general legislative authority rather than the representative assembly, it would not help the CFA cause. As pointed out earlier in the discussion of *Thornton*, the Constitution sometimes delegates to state legislatures as such and sometimes to state governments, but within the subjects of those grants the Tenth Amendment reserved authority is inapplicable to both.

CFA also offers evidence that legislative applications may limit the convention to specific wording, but this evidence also is slender. It consists partly of founding-era passages from the *Journals of the Continental Congress* in which some person or entity “applied” for specific relief. But during the founding era, an application was simply an address, request, or petition.<sup>24</sup> Its nature depended on what the applicant was applying for. An Article V “Application” is, specifically, a conditional demand for an interstate proposing convention.

What an interstate proposing convention was and how it operated was well understood during the founding era. As far as can be determined, no state applying for a proposing convention ever presumed to dictate its final result. No applying or calling state ever presented a proposal and demanded merely an up-or-down vote. All interstate proposing conventions (unlike ratifying conventions) had more deliberative freedom. They were task forces, designed to formulate solutions to existing problems. They also were assemblies of sovereigns that applicants could not offend by making result-oriented demands in advance.<sup>25</sup>

CFA sometimes cites the work of two scholars who entertain the theoretical possibility of a proposing convention limited to an up-or-down choice.<sup>26</sup> We do not deny that theoretical possibility. But neither author identifies instances in which proposing conventions have been so limited. This is a problem because, as noted earlier, the courts construe Article V terms and usages in light of historical precedent.

It is open to scholars to theorize. But no responsible advocate should build an entire Article

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<sup>24</sup>*What is an Amendments Convention “Application?” What is a “Call?”* at <http://articlevinfocenter.com/what-is-an-amendments-convention-application-what-is-a-call/>.

<sup>25</sup>See Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 Fla. L. Rev. 615 (2013).

<sup>26</sup>Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 Const. Comment. 53 (2012); Michael Stern, *Reopening the Constitutional Road to Reform: Toward A Safeguarded Article V Convention*, 78 Tenn. L. Rev. 765 (2011).

V campaign on a purely theoretical possibility—particularly when it conflicts with case law that emphasizes repeatedly that Article V assemblies must be fully deliberative.

## **XII. CONCLUSION.**

Constitutional amendments are controversial, and a federal balanced budget amendment is particularly so. If CFA continues to gain traction, lawsuits challenging its procedures are virtually certain.

CFA is highly unlikely to prevail in those lawsuits. Its approach relies too heavily on legal assumptions repeatedly rejected by the courts. The scanty and refutable Founding Era evidence it offers in support is unlikely to persuade judges to overturn well-established case precedent.

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