

Article V Convention

Twenty False Claims Regarding a Convention to Propose a Balanced Budget Amendment

Second Edition

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Introduction

The Balanced Budget Amendment Task Force (BBATF) is the national organization which is coordinating the effort to convene a convention to propose a balanced budget amendment to the U.S. Constitution. Over the years we have repeatedly run into the same forty-year old, worn out arguments in opposition to the convention that have simply no merit in fact or law. We recognize that state legislators, with all the important issues facing them, don't always have the time or resources to become Article V experts. This booklet is intended to provide you in succinct fashion the information you need to successfully debate and rebut the meritless opposing arguments.

When arguing in support of an Article V BBA resolution, feel free to direct your naysayer opponents to this booklet for "a fuller and more complete response" to the question posed. If you are a skeptic, please review these materials and their source data. We have yet to find any scholarly material which can successfully rebut the facts and law set forth herein.

The BBATF is very close to reaching the 34 state threshold required to call the first Article V convention of states in this country's history. It will be truly historic. As is pointed out herein, it will by no means be the first convention of states ever held, only the first called pursuant to and under the auspices of Article V.

On September 12, 2017, the first national convention of the states since 1861 convened in Phoenix, AZ for the limited purpose of "creating rules of procedures for a future convention for proposing a balanced budget amendment and communicating with Congress on the time and place for the convention." A host of issues were settled by this convention and the states are rapidly becoming fully prepared to hold an amendment convention (see Question 8 and Convention Rules).

We have established firm guidelines and procedures for an Article V convention of states over the years in court decisions, by examining historical practices, by using the convention procedure to draft model rules for a future convention, and by states passing binding faithful delegate procedures.

The time to proceed is now. For, as John Kasich has said, **"We are standing inside a house that is burning down around us, and we are afraid to go outside for fear that we might get hit by a meteor."** May this booklet give you the information you need to stop our country from burning itself to the ground in bankruptcy.

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Mistaken Argument No. 1
You can't control a "con-con."
It will run away and rewrite the Constitution.

There are multiple procedures and hurdles in place which ensure that an Article V convention will not propose a "rogue" amendment. The States limit the subject matter of the convention in their applications. The BBA resolution is limited to one subject: the proposing of a balanced budget amendment. Any effort to intrude upon the Bill of Rights for example would clearly be outside its scope and easily dispensed with on the floor of a convention.

The starting point is the resolution itself. If 34 legislatures call a limited convention, and they represent a supermajority of any votes at the convention, why would they ever allow it to go outside the scope? Each legislative body in the country has rules in place to keep its house in order. The same would be true of an Article V convention. Moreover, when the convention is called, we have urged Congress to make clear to the states in its call that any amendment proposed outside of the scope of the call would be deemed a mere recommendation, and no mode for ratification would be assigned to it.

Additionally, the State legislatures choose the delegates or "commissioners" as they are properly called. The states can require oaths the violation of which constitutes crimes, and they can recall rogue commissioners.

The commissioners are the agents of the legislature, not independent contractors, and must follow the instructions of the legislature. It is inconceivable that a majority of commissioners in a majority of states would risk recall from the convention or prison to hijack a convention. The fear that they will somehow be bought off by special interests is a practical and legal impossibility.

The Framers in their wisdom built the ultimate check into the process. The 3/4ths ratification requirement will always guarantee that no rogue amendment could ever be adopted. As of January 2017, there are 32 state legislatures in which both houses are controlled by Republicans. Nebraska's single chamber is Republican controlled. There are 4 split states and 13 Democrat states. To reach the 38 state ratification threshold will require amendments with broad, super-majority support in the country. Remember, the proposed Equal Rights Amendment could not muster the 38 states necessary for ratification. There is no way a harmful amendment could get the bi-partisan support necessary to be ratified.

Mistaken Argument No. 2

The 1787 convention was called solely to amend the Articles of Confederation and it ran away. They'll do it again.

The argumentative foundation for those who oppose a convention is that the Philadelphia Convention was called by the Confederation Congress solely to propose amendments to the Articles of Confederation, which required unanimous approval of the states, and that the Convention ignored this limitation and created a new government and provided for 3/4ths of the states to ratify. They suggest a BBA convention will do the same. The historical fact is that the Philadelphia Convention was not called to amend the Articles of Confederation and the ratification process was not changed.

As recent legal scholarship has made unmistakably clear,¹ the 1787 convention was initially suggested by the Annapolis convention held in September of 1786, which recommended the states meet in Philadelphia in May 1787 to take such steps as necessary “to render the federal constitution adequate to the exigencies of the union.” In other words, “create a new government.” Virginia (by being the first, “called the convention”) and five other states thereafter followed with naming delegations instructed to create a new government. Then, in February of 1787, the Confederation Congress tried to intervene, even though it had no authority to do so. A motion to strictly limit the Philadelphia convention to just amending the Articles was voted upon and was defeated. The Confederation Congress then endorsed the convention in a resolution which was a “recommendation” stating that “in [its] opinion,” the convention should be limited to revising the Articles. It specifically did not “call” the Philadelphia convention, nor did it have the legal authority to control it.

Ten of the 12 state delegations in Philadelphia had broad authority to draft the Constitution. The 1787 convention reported its work back to the Confederation Congress which accepted it and forwarded it to the states for ratification.

The “run-away” claim is an inaccurate and false myth. An **Article V** convention would have no such broad charge, and given the hundreds of analogous interstate and intrastate conventions in our nation’s history, there is no evidence to support the claim that delegates will attempt to run away with a convention.

¹ Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not The Product Of A Runaway Convention*, 40 HARV.J.L.PUB.POL. 61 (2017), copy available at http://www.harvard-jlpp.com/wp-content/uploads/2017/03/Farris_FINAL.pdf.

Mistaken Argument No. 3
**They could change the ratification requirement
like they did at Philadelphia in 1787.**

Those who oppose an amendment convention claim that the convention can ***unilaterally*** change the method of ratification at the convention to a lower threshold than 3/4ths of the states required by the Constitution. They necessarily claim that the convention will magically acquire extra-Constitutional power to declare a new method of ratification. This might be the most incredulous argument being made by the opposition. Any attorney claiming this can occur should be disbarred.

Naysayers base their argument on the fact the 1787 Philadelphia Convention provided that only 3/4ths of the states were needed to ratify the Constitution, instead of the 100% needed to approve an amendment to the Articles which was required by the Articles of Confederation.

Most do not realize the Articles of Confederation was essentially a “treaty” among 13 sovereign nations (states). As with most treaties, to change it, all parties must agree to the change. Hence, all states were needed to amend the Articles.

The Philadelphia convention, however, was acting outside the Articles of Confederation pursuant to the states’ reserved power. The unanimity requirement did not apply as the Philadelphia convention was not amending the Articles, but replacing it. Essentially, the 1787 convention said: “If 3/4ths of the States (sovereign entities) want to form a new nation under this Constitution, then those 3/4ths may do so with the remainder doing as they will.”

In contrast, the States at a convention for proposing a balanced budget amendment would be acting pursuant to the Constitution. Article V is very clear when it states that a proposed amendment “shall be valid ... when ratified by the Legislatures of 3/4ths of the several States”

Because an Article V convention is held pursuant to and under the auspices of the Constitution, it is subject to the terms and conditions of the Constitution, the primary one being that any amendment proposed, would be subject to the 3/4ths ratification requirement. To claim that the Philadelphia ratification issues (when no Constitution even existed) are precedent for Article V today is to compare "apples" with "mosquitoes." It is wholly absurd!

Mistaken Argument No. 4
**Congress could bypass the State legislatures
and choose the state convention method
for ratification of a harmful amendment.**

Article V provides two methods of ratification: by vote of the state legislatures or by state ratifying conventions. Twenty-six of our 27 amendments were ratified by state legislatures. The 21st amendment repealing prohibition was ratified using the state convention method. The thought of Congress at the time was that many state legislators would be reluctant to go "on the record" in repealing prohibition. As it turned out, Congress was right as the states quickly ratified the 21st amendment using the state convention method.

Some naysayers argue that if Congress chose the state convention method of ratification, then it would somehow be easier for a rogue amendment to get ratified. That argument fails due to the historic fact which cannot be overcome regarding ratification: Proposed amendments which do not have overwhelming public support *will not be ratified* and amendments with overwhelming support *have always been ratified*, regardless of the method. Rogue amendments simply won't have the support necessary to be ratified. Remember, not even the Equal Rights Amendment could get 38 states to ratify it.

Frankly, the BBATF has no objection to either mode of ratification as public support for a Balanced Budget Amendment is almost 80% nationally.

If the BBA is sent to state legislatures for ratification and a state votes against it, voters will likely change the legislature at the next election to one which will ratify. If the state convention mode is chosen, the people will have a more direct voice in ratification as in many cases the delegates for or against ratification are elected by the people.

This brings us back to the idea a runaway convention will propose amendments which strip the Bill of Rights and will destroy our Constitution which is suggested by the opposition to a BBA convention.

It is not possible for such amendments to ever be ratified by 38 states as the people will not allow it to happen. Thus, even if all of the harmful, radical scenarios were to occur and a harmful amendment outside the scope of the call of an Article V convention was proposed and forwarded to Congress, which in turn forwarded it to the states for ratification through the state convention method - a concept of infinitesimal likelihood - the people would stop that amendment dead in its tracks.

Mistaken Argument No. 5
**There is no judicial precedent construing
Article V so we really have no way of knowing
for sure what will happen if a convention were called.**

On the contrary, there are numerous judicial decisions which provide clarity regarding the Article V process. Listed below are a few of the cases that have looked to the Framers' intent and historical precedent to interpret Article V.

- * *Hollingsworth v. Virginia*, 3 U.S. 381 (1798) (following the practice used in proposing the first ten amendments to uphold the 11th).
- * *Hawke v. Smith*, 253 U.S. 221 (1920) (citing Founding-Era evidence to define what the Framers meant by the Article V word "legislature")
- * *Barlotti v. Lyons*, 182 Cal. 575, 189 P. 282 (1920) (also citing Founding-Era evidence to define what the Framers meant by the Article V word "legislature").
- * *Leser v. Garnett*, 258 U.S. 130 (1922) (relying on history to affirm the procedure that ratified the 19th amendment).
- * *Opinion of the Justices*, 132 Me. 491, 167 A. 176, 179 (1933) (consulting history to determine how delegates are chosen to a state ratifying convention).
- * *United States v. Gugel*, 119 F.Supp. 897 (E.D. Ky. 1954) (citing the history of judicial reliance on the 14th amendment as evidence that it had been validly adopted)
- * *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975) (Justice Stevens) (relying extensively on history to determine whether Illinois had validly ratified a proposed amendment)
- * *Idaho v. Freeman*, 529 F.Supp. 1107 (D. Idaho 1981) (also relying on history in discussing a range of questions)

These and other decisions are discussed and cited in the following legislative guide: Rob Natelson, *State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters* (4th ed. 2016) (<http://robnatelson.com/wp-content/uploads/2016/11/Compendium-4.0-plain.pdf>).

Mistaken Argument No. 6
**Since Congress must “call” the convention,
Congress will try to control and interfere with it.**

Congress’ duty to “call” the convention is “obligatory” and its role is ministerial. This is confirmed in the writings of multiple Framers and the courts. As Alexander Hamilton explained in Federalist No. 85, these words are “peremptory” and “nothing in this particular is left to discretion.”

The Supreme Court and lower courts have held that when interpreting Article V, look to the founding era intent of the Framers to give it meaning.² During the era leading up to the writing of the Constitution, more than 30 conventions were held, all of which were controlled exclusively by the states where each state got one vote. The whole purpose of the Article V convention process is to give the states a mechanism to bypass an oppressive federal government and propose amendments that Congress itself would never propose, so it would be totally inconsistent to think that Congress could interject itself into the process.

There is actually case law on point to refute the claim that Congress can control a convention. In *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975), future Supreme Court Justice Stevens held that a ratifying convention itself had exclusive authority to write its own rules of order without external interference. This reasoning applies with equal force to a proposing convention.

Moreover, history strongly suggests that Congress won’t try to control it. In the late 20th century when convention fever was high, a largely Democratic Congress dropped 41 different bills attempting to control some aspect of the convention process; not a single one came close to passing.

At the time, such legislation was supported by those who desired an Article V convention because they believed some sort of coordinating mechanism was necessary to enable a convention to be called. Subsequent self-organization by the states has superseded this need. Further legal study suggests that such legislation could very well be unconstitutional. Given that a Democratic Congress failed at passing Article V legislation, it is highly unlikely that such legislation could pass either a conservative or a split Congress today.

²See cases cited in response to Mistaken Argument No. 5 at page 5.

Mistaken Argument No. 7
**If you called a convention, California would
immediately take you to court and demand voting
on a proportional population basis.**

Ultra conservative groups try to strike fear in the minds of legislators from small states that large states will take control of the convention, giving them little or no voice. It is possible that some large state or liberal group would sue, but assuming they were found to have standing, they would lose.

First, as the Supreme Court has declared, we look to the founding era to determine what the Framers intended in Article V. All of the founding era conventions voted on a one state/one vote basis. They did so because our Founders viewed such conventions as meetings of equal sovereign bodies. Would anyone ever argue that voting within NATO should be apportioned by population instead of by sovereign nations? The same argument applies here.

Second, the Constitution already recognizes state sovereignty and unequal representative voting power in both the Senate and Electoral College. Were the House called upon to select the President, it would elect the President on a one state/one vote basis. The apportionment rulings under the 14th amendment apply to state legislatures, not the states as sovereign bodies pursuant to Article V, so those decisions simply don't apply.

Third, and most important, Article V of the Constitution provides clear intent that the amendment process is determined by equal "states." Two-thirds (34) of the states must pass an application to call a convention to propose an amendment and three-fourths (38) must vote to ratify it. For amending purposes, Texas' vote has no more force than New Hampshire's, even though its population is 20 times greater. To change this, an amendment would be required and it would never be ratified as the small states will never give up their equal sovereignty.

Since "small states" are a majority of states at a convention for proposing an amendment, these states will not vote to give the most populous states greater authority. But even if they did, 34 conservative states would easily control the majority of apportioned votes at a convention.³

³ See Natelson, "Trying to Abolish the Convention's One-State/One-Vote Rule Would Not Only Be Unconstitutional, It Wouldn't Be Worth Trying, *copy available online at* <http://articlevinfocenter.com/trying-to-abolish-the-conventions-one-stateone-vote-rule-not-only-would-be-unconstitutional-it-wouldnt-be-worth-trying/>.

Mistaken Argument No. 8

No one knows what the process is for calling and convening an Article V convention.

For the past four years, the states have worked together to establish procedures for an Article V convention. Their efforts were realized when, on March 30, 2017, the Arizona legislature passed HCR 2022 calling the first national convention of states since 1861. As a result of the Arizona BBA Planning Convention held September 12-15, 2017 and the other abundant legal and historical precedents, the process for calling, convening, and conducting a convention has been clearly defined.⁴

First, the legislatures of 34 states must pass a resolution to convene the convention limited to proposing a balanced budget amendment. This limits the authority of the convention to that subject. A convention has no authority to consider anything else, as it does not have permission to do so.

Second, once 34 states are reached, Article V expressly mandates that Congress “shall” call the convention. At this point, Congress is actually the “agent” of the states. A Congressional convening resolution is essentially limited to naming the time and place for the convention.

The Arizona BBA Planning Convention recommended the formation of what is presently being called the Phoenix Correspondence Commission (PCC). Structured in a similar manner as the historical “committees of correspondence,” the PCC will represent the states before Congress and suggest a location and date for a future BBA amendment convention.

The BBATF is working with Congress urging that any convening resolution include a provision advising the states that any amendment coming out of a convention that is not germane to a BBA will be deemed only an advisory recommendation and that Congress will not assign a mode of ratification to it. This commitment by Congress assures that even if a rogue amendment were ever proposed, it would never be referred to the states for ratification.

Third, once the call is made, each state legislature will pass a resolution determining the number of delegates or “commissioners” it will send, who they are, a method for recalling and disciplining the commissioners, and specific instructions on how to vote on key issues. Thirteen states have already passed “faithful delegate” bills that provide a mechanism for choosing and monitoring

⁴ For complete information regarding the Arizona BBA Planning Convention including all documents created and archived videos of all sessions, go to <https://www.azleg.gov/bbapc/>

commissioners.⁵ Multiple others have or are considering them. These laws typically require commissioners to take oaths to address only the limited subject matter of the convention which if violated could subject them to criminal penalties. In all cases, the legislatures themselves select the commissioners.

A state can send as many commissioners to a convention as it desires, but it only gets one vote at the convention. When the states meet, they meet as autonomous governmental bodies, much like NATO. Voting is strictly on a one state/one vote basis, not based on population. We expect a state on average to appoint approximately 3-7 commissioners. Many will be fellow legislators to insure still further that the state delegations do not go rogue.

When the convention meets at the time and place designated by Congress, its first duty will be to adopt convention rules. At the Arizona BBA Planning Convention, the states created a complete set of proposed rules for the convention. As a formal, national convention of the states, there is no higher authority to recommend such. Given the political composition of the Arizona convention, it is anticipated a preponderance if not all of the rules created in Phoenix will be adopted by the amendment convention.

Leading up to the convention, there will be a great national discussion of the content of an amendment. The Arizona convention rules provide that each state will have an opportunity to explain its position on a BBA and each will sit on the committee to create the amendment language. Experts will be invited to testify. By time a proposal reaches the floor of the convention for debate, it will have been researched and vetted on numerous occasions.

Much work has already been done within the Article V community and with Congress to insure a smooth transition from reaching the goal of 34 states calling for a BBA convention to calling and actually convening the convention. Because of these actions, we can be confident that any Article V BBA convention will stick to task, propose a mutually agreeable BBA and then adjourn with no harm to the Constitution ever arising.

⁵ Alaska: HCR 4 (permanently filed Sept. 23, 2016 Legislative Resolve 46); Arizona: HCR 2022 (passed March 30, 2017); Georgia: O.C.G.A. § 28-6-8; Florida: Fla. Stat. § 11.93; Indiana: IC 2-8-1-1 *et seq.*; North Dakota: NDCC § 54-03-01 *et seq.*; Oklahoma: HCR 1007 (passed May 26, 2017); South Dakota: HB 1069 (signed March 8, 2015); Tennessee: Tenn. Code Ann. § 3-1-1801 *et seq.*; Texas: 2017 Tex. RS SB21 (2017); Utah Code 20A-17-101; Wisconsin: AB 165 (passed Nov. 7, 2017; awaiting signature); Wyoming: W.S. 9-22-101 *et seq.*

Mistaken Argument No. 9

We have no idea what the convention rules will be?

The Arizona BBA Planning Convention held September 12-15, 2017 in Phoenix was called for the expressed purpose of creating a set of rules of procedure for a convention for proposing a balanced budget amendment (Please see Convention Rules at the end of this booklet).

The Arizona convention created a complete set of rules addressing virtually every issue which might arise. The rules were built upon the work by volunteer legislators and groups which have been meeting on this issue for almost five years.

There is also a wealth of history to look to in determining what the rules of an Article V convention would be. During the founding era, there were some 31 conventions of states held capped off by the Philadelphia Convention of 1787, which drafted the United States Constitution.⁶ Since our founding, at least seven more conventions, including Arizona in 2017, have been held.⁷

According to Prof. Natelson: "Under the incidental powers conferred by Article V, an amendments convention adopts its own rules and elects its own officers." This is consistent with founding era conventions, and more recently, Justice Stevens' much-quoted opinion in *Dyer v. Blair*, [390 F.Supp. 1291 (N.D. Ill. 1975)]. "Suffrage is decided by convention rule [which the convention can change], but the initial suffrage rule is 'one state, one vote.'"⁸

The Arizona rules include principles in common with these conventions: (a) voting will be on a one state/one vote basis; (b) a majority of states present and voting shall conduct the business of the convention; and (c) matters outside the scope of the call shall be deemed out of order. These principles are consistent with those observed in the numerous past conventions. Of course, the convention itself, once convened and credentialed, will as its first order of business, consider, debate and adopt a set of rules for the convention. Given that the majority of delegations will be appointed from smaller, conservative states, we would expect the principles set forth herein which protect those states to be adopted at the convention.

⁶Natelson, "Proposing Constitutional Amendments by Convention: Rules Governing the Process," 78 Tenn. L. Rev. 693, 706-08 (2011); Natelson, "Why the Constitution's "Convention for Proposing Amendments" Is a Convention of States (Heartland Inst. 2017), *copy available at*: <http://robnatelson.com/wp-content/uploads/2017/10/Natelson-CoS-final.pdf>

⁷Natelson, "The 1889 St. Louis Convention" (Ind. Inst. February 11, 2017) *copy available at* <https://i2i.org/the-1889-st-louis-convention-of-states/>.

⁸See Natelson, fn. 6, 78 Tenn. L. Rev. at 740-41.

Mistaken Argument No. 10 **The States will get stuck with the enormous cost of such a convention.**

Because the states, not the federal government, control the scope and jurisdiction of an Article V convention, the states will be responsible for the expense of the convention. The Arizona Convention Rules provide the states will bear the direct costs of their delegations and the cost of the convention will be equally shared by the attending states. The cost of sending a five to seven person delegation to such a convention would be insignificant, proportionately similar to how states already provide for funding their own officials during their legislative sessions. Given the preparatory work already started and to be completed, we anticipate that such a single subject limited convention would convene for no more than three weeks.⁹

Aside from the cost of state employees who were being compensated normally, the State of Arizona expended less than \$10,000 in hosting the September, 2017 convention as it was held at the capitol and all facility and audio visual equipment were already available in the capitol building.

However, since this will be one of the most important political events since our founding, states will actually compete to have the convention at their capitol. Thousands of people - delegates and staff, world-wide media, and citizens who want to be a part of this historic event - will descend upon the convention location renting thousands of rooms and spending millions of dollars. It is quite likely all of the administrative costs of the convention will be paid by the host state as it will recoup the cost many times over as a result of the positive “economic impact” of the convention. It is not unusual in today’s convention marketplace for a state or local tourist development office to provide financial incentives to major conventions.

Of course, the savings from the product of such a convention, a Balanced Budget Amendment, stand to justify many times over the cost of such a convention. The savings from one day’s borrowing of the federal government would more than offset the cost of such a convention.

⁹ The Washington Peace Conference of 1861, a forerunner of an Article V convention, lasted from February 4 through February 27, 1861, during which it drafted a fairly complicated multi-part amendment designed to forestall the Civil War. One would expect the drafting of a BBA to be less complex. See Natelson, "It's Been Done Before: A Convention of the States to Propose Constitutional Amendments" (Independence Inst. February 21, 2013) *copy available at* <https://www.i2i.org/its-been-done-before-a-convention-of-the-states-to-propose-constitutional-amendments/>.

Mistaken Argument No. 11

Congress is already ignoring the Constitution.

What makes you think Congress will follow a BBA?

Congress is steadfastly adhering to Article I, Section 8 of the Constitution which enables it to borrow money without limits. The Balanced Budget Amendment will change that.

Many of the issues relative to obeying the Constitution are directed to the main body of the Constitution and the Bill of Rights, as they were written in the language of the time and left to interpretation by courts and others. However, after the Bill of Rights, the amendments to the Constitution were written in very specific language and they have been honored. We adhere to the anti-slavery, women's and 18 year old suffrage and presidential term limits amendments.

The Constitution as presently drafted has no limits on the authority of the federal government to borrow money. The Founders in hindsight regretted this omission from the final document. Congress has tried, but it has consistently failed to adopt a balanced budget amendment.

The only solution is to propose a BBA with self-enforcing mechanisms and incentives within it to force compliance. For example, a BBA might grant the President a line item veto to balance the budget and make it an impeachable offense for the President to ignore it. States might be given authority to sign off on any increase in the debt limit. These are only a couple of examples of ways to ensure that a BBA is followed.

From a broader perspective, Congress arguably isn't ignoring the Constitution as much as some suggest. We actually have two Constitutions: the one drafted by the Framers with specific enumerated powers and the one which the Supreme Court has interpreted to contain far more expansive powers. The latter is the one which Congress is using to insert itself into our everyday lives like it does. Article V is THE mechanism the Founders gave us to fix this problem.

If a BBA were proposed and ratified, Congress would comply with it. History reflects that Article V movements cause Congress to react and the government by and large follows amendments more closely than they do the Constitution itself.¹⁰

¹⁰ See, e.g., Natelson, "The Lamp of Experience: Constitutional Amendments Work" (independence Inst. April 17, 2016) copy available at <http://articlevinfocenter.com/the-lamp-of-experience-constitutional-amendments-work/>.

Mistaken Argument No. 12

Justices Burger, Goldberg and Scalia opposed an Article V convention and were convinced it could not be limited.

In the 1960's and 1970's, a campaign begun by liberal politicians and law professors sought to discredit the Article V movement, which was pursuing efforts to overturn the Supreme Court's apportionment decisions.¹¹ This movement successfully interjected the two most common myths into the Article V debate: that an Article V convention is really a "con-con" or constitutional convention and that such a convention will "run away" because it cannot be limited to a given item or topic. This movement to discredit Article V was largely successful and was later adopted by conservative groups such as the John Birch Society and the Eagle Forum. It appears that Justices Burger and Goldberg were parties to this heresy.

Letters from Chief Justice Burger to Eagle Forum founder, Phyllis Schlafly, are often cited as a basis to oppose an Article V convention. There are two reasons not to give credit to this argument. First, much of the research regarding the extensive history of conventions well known to the Framers had not been completed at the time of his remarks. More significantly, there is ample evidence to believe the Burger's opposition was based more on his desire to uphold his controversial apportionment decisions and *Roe v. Wade* than it was a scholarly study on the true risks and benefits of such a convention.¹²

Historically, Justice Arthur Goldberg was not inclined to support restraint on the national government; hence, one would expect that he would look skeptically on the use of Article V to rein in the federal government. In a 1983 article, Goldberg labeled an amendments convention a "constitutional convention" and declared that its agenda would be uncontrollable.¹³ He was adopting the then liberal movement to discredit Article V and was commenting preceding the ground breaking research of multiple legal scholars noted below since 2010.

Justice Scalia is cited for questions posed to him in recent years about a "constitutional convention." He knew a constitutional convention is a gathering

¹¹ Natelson, "The Liberal Establishment's Disinformation Campaign Against Article V—and How It Misled Conservatives" (Article V Information Center, March 27, 2015), *copy available at* <https://i2i.org/wp-content/uploads/2015/01/Campaign-v.-Article-V-final.pdf>.

¹² Natelson, "More Evidence That Warren Burger Was Defending *Roe v. Wade* When He Opposed A Convention of States" (Article V Information Center, May 6, 2015) *copy available at* <http://articlevinfocenter.com/more-evidence-that-warren-burger-was-defending-roe-v-wade-when-he-opposed-a-convention-of-states/>.

¹³Natelson, fn, 11, at 13.

to create a new or drastically alter our Constitution. He rightfully opposed that gathering. However no movement is seeking or has sought a convention to rewrite our Constitution.

When Justice Scalia was asked about an Article V convention, he clearly favored a limited, single subject amendment convention.¹⁴ He stated in 1979: *“The Founders inserted this alternative method of obtaining constitutional amendments because they knew the Congress would be unwilling to give attention to many issues the people are concerned with, particularly those involving restrictions on the federal government’s own power.”*

He went on to explain that the argument against calling a convention effectively gives Congress a monopoly over amendments, contrary to the Framers’ intent. Scalia said, *“The alternative is continuing with a system that provides no means of obtaining a constitutional amendment, except through the kindness of the Congress, which has demonstrated that it will not propose amendments—no matter how generally desired—of certain types.”*

The fact is that with more detailed and recent research, most constitutional scholars who have examined this issue over the last two decades are in virtual universal agreement that an Article V convention won’t run away and that it can be limited.¹⁵

¹⁴ <http://www.aei.org/wp-content/uploads/2016/03/AEIForums31.pdf>.

¹⁵ See, e.g. Natelson, "Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013) (precedent and Framers' intent supports principle that states may limit the subject matter of a convention); Natelson, "Proposing Constitutional Amendments by Convention: Rules Governing the Process," 78 Tenn. L. Rev. 693 (2011); Rappaport, "The Constitutionality of a Limited Convention: An Originalist Analysis," 81 Const. Comm. 53, 56 (2012) ("The Constitution allows the state legislatures to apply not merely for a convention limited to a specific subject matter [but allows them] to draft a specially worded amendment and then to apply for a convention limited to deciding only whether to propose that amendment."); Stern, "Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention," 78 Tenn. L. Rev. 765, 774 (2011) ("Scholars who believe that an Article V Convention must be unlimited have struggled to explain the constitutional purposes that would be advanced by this interpretation."); see also Van Alstyne, "The Limited Constitutional Convention-The Recurring Answer," 1979 Duke L. J. 985, 990 (1979) (Article V convention most likely will be called to address "particular usurpations" by Congress).

Mistaken Argument No. 13

If the conservative John Birch Society and Eagle Forum oppose an Article V convention, perhaps we should also.

As previously noted, in the 1960s and 1970s, a campaign begun by liberal politicians and law professors sought to discredit the Article V movement, which was pursuing efforts to overturn the Supreme Court's apportionment decisions.¹⁶ That strategy was unfortunately later adopted by conservative groups such as the John Birch Society (JBS) and the Eagle Forum, and it continues to this day.

The JBS has in fact been very inconsistent on this issue. The fact is that JBS founder, Robert Welch, and its second President, Congressman Larry McDonald, both supported the calling of an Article V convention to coerce Congress into passing the Liberty Amendment back in the 60s and 70s.¹⁷ JBS tries to rewrite history and soft pedal that strategy by claiming that they never intended to call an actual convention, but just to "scare" Congress to propose an amendment that would repeal the income tax power.¹⁸ They offer no evidence whatsoever to support their convenient re-write of history other than what Welch allegedly "privately told the staff." How convenient, and totally inadmissible in any court of law due to its inherent unreliability.

Phyllis Schlafly and the Eagle Forum (EF) took up the banner against Article V around the time they were defeating the Equal Rights Amendment. Some have said that there was a concern that a convention would be used to re-propose the ERA. Schlafly also used her influence to try to persuade the Republican National Committee to oppose Article V, but it has never adopted such as part of its platform. It appears that Ms. Schlafly's opposition to Article V at least in part led to the battle for control of EF before her death.¹⁹

In summary, the anti-Article V convention groups have failed to offer any new or convincing arguments beyond those rebutted herein to support their concerns about the process.²⁰

¹⁶ Natelson, footnote 11, *supra*.

¹⁷ Ken Quinn, "John Birch Society Denies Its History and Betrays Its Mission" (April 15, 2015) (citing a Welch letter urging support for Article V resolution pending in Alabama & Congressional Record) *copy available at* http://www.conventionofstates.com/john_birch_society_denies_history.

¹⁸ JBS Weekly Member Update (March 23, 2015) *copy available at* <http://www.icontact-archive.com/Xij92lifAF0xVvofzxf2iuwd-xVVutk?w=4>.

¹⁹ Corsi, "Phyllis Schlafly: My board plotting to fire me over Trump," (WND April 11, 2016) *copy available at* <http://www.wnd.com/2016/04/phyllis-schlafly-my-board-plotting-to-fire-me/#UbX6zfpUTgVFxJuB.99>

²⁰ Guldenschuh, "The Article V Movement: A Comprehensive Assessment to Date" (Heartland Inst. Nov. 2015) at 10-13.

Mistaken Argument No. 14
**We oppose an Article V convention because
it has the support of liberals like George Soros.**

It seems that whenever the ultra-conservative groups want to discredit an issue, they claim that the ultra-liberal Frenchman George Soros is “actually behind the effort.” Liberals pull out the “Koch brothers” claim for the same purpose. Neither are presently involved with supporting the effort to convene a convention to propose a balanced budget amendment.

However, liberal groups, many likely funded by George Soros in some manner, are actively trying to stop the effort by the states to call a convention. In 2016, the liberal group Common Cause announced that it had recruited more than 200 liberal organizations in the United States, including the ACLU and AFSCME, to prevent any Article V applications from being approved.²¹

Collectively, they convinced four liberally controlled legislatures, New Mexico, Nevada, Delaware, and Maryland to rescind their previously approved applications. In Montana in 2015, a Soros-funded liberal group, Montana Budget and Policy Center, joined with the John Birch Society to successfully defeat an Article V BBA application pending there.

There is actually one liberal group - Wolf PAC - that supports the Article V process, but for a different issue. They seek a convention to propose a campaign finance reform amendment. The fact is, IF they can get 34 states to call for a convention for campaign finance reform, then so be it. And they are welcome to join us in our call for a convention to propose a balanced budget amendment.

However, the Common Cause coalition is similarly attempting to stop the Wolf PAC effort even though the amendment is viewed by most as more left-leaning in nature.

In the final analysis, there is no hidden conspiracy here. George Soros **opposes** the effort to call a convention to propose a balanced budget amendment and he and his supporters are actively trying to stop it.

²¹ See Common Cause "The Dangerous Path" (2016) copy available at <http://www.commoncause.org/issues/more-democracy-reforms/constitutional-convention/>

Mistaken Argument No. 15

Why not focus on nullification and electing conservative majorities who can “safely” amend the Constitution?

First and foremost, you cannot “nullify” the Constitution itself. Article I Section 8 specifically grants to Congress the ability to borrow money and incur debt without any limits. To change this, a Constitutional amendment is required. You cannot nullify an unbalanced budget. Thus, nullification cannot solve our budget woes.

Moreover, history suggests that nullification rarely works to cancel out big ticket issues. Nullifiers argue that the Constitution has enumerated powers and that all powers not specifically granted to the federal government are exclusively reserved by the Constitution and 10th Amendment to the states. If Congress acts outside those powers, its actions are unconstitutional and the states have a duty to render such acts null and void. Yet, the states could not nullify the federal government’s abolition of slavery or desegregation of schools or re-apportionment of the legislatures, even though some tried. There is no reason to believe that nullification will stop Obamacare.

The nullification argument is also somewhat hypocritical. It is inconsistent to support nullification and oppose an Article V convention on grounds that Congress will interfere with it. If Article V does not expressly address who controls the scope of the call or convention process, then under the nullifier’s argument, that power is expressly reserved to the states. The naysayers can’t have it both ways: the rules of nullification apply equally to Article V as they do to the alleged unconstitutional laws and court decisions which nullifiers seeks to overturn.

As for electing conservative majorities to safely amend or stop borrowing, history again suggests that won’t happen. In the mid-1980’s when the effort to convene a convention to propose a balanced budget was moving forward at the urging of President Ronald Reagan, ultra conservative groups fought the effort insisting all we had to do was “simply elect people who will stop borrowing and spending.” Since that time we have amassed \$18 trillion in debt. On three occasions in the last century we have had super-majorities in the Congress and Presidency and they gave us these three huge spending programs: the New Deal, the Great Society, and Obamacare. That track record of spending does not bode well for electing majorities that will balance the budget long term.

Mistaken Argument No. 16

**It's still too risky. We've never done this before.
Now is not the time to take such a big risk.**

When the Founders met in Philadelphia in 1776 to sign the Declaration of Independence, the risks were much higher, and they didn't have all the answers either. They declared war on the greatest military power on earth with no existing continental army. They pledged their lives and fortunes to a cause to save the country from continued oppressive government, and they succeeded because they trusted in each other, in their cause, and in a higher power to see them through.

We have far more answers today than the Founders had. The 2017 Arizona Convention of States was effectively a "dress rehearsal" for a future Article V convention. It showed that when a group of largely state legislators from all over the country come together, they act "like legislators," operating within a set of rules and wary to go outside them.

The risks of an Article V convention are minimal. But society is changing not necessarily for the better and the political and philosophical advantage we currently enjoy may not exist in a decade. Institutional politicians and "the swamp" of corruption in Washington were leading factors in the election of an outsider to the Presidency in 2016.

As President Reagan asked, "If not now, when? If not us, who?"²² If we wait until the first shot is fired, it will be too late.

The Article V convention process is THE mechanism our Founders gave to the states and the people to deal with the very problems we are experiencing right now. To ignore it is to give up. We trust the Founders, not the institutional politicians in Washington. State legislators from all over the country are working to save our country from bankruptcy by acting now and by diligently seeing the process through so as to insure that it works as our Founders intended it to work.

²² See Reagan's Second Inaugural Address, *copy available at* <http://www.bartleby.com/124/pres62.html>.

Mistaken Argument No. 17

A Balanced Budget Amendment will destroy our economy. What happens if a disaster strikes?

If preventing Congress from borrowing \$1 trillion a year will cause our national economy to collapse, we are in more trouble than anyone can imagine. In reality, our national debt and annual deficits are literally causing *economic decline* as borrowing from the private sector sucks hundreds of billions of dollars each year from the private economy. British economist John Maynard Keynes wrote that during periods of economic downturn, government should intervene with deficit spending. This would stimulate consumption, which would cause production, returning to a growing economy. He also anticipated as a result of the improved economy there would be an increase in revenues to government with which it would *pay back* what was borrowed.

The problem with today's deficit spending is that it is not going to increased production (wealth generating activity). It goes to paying interest which produces no economic benefit. Since 1969, Congress has not paid back any of the debt. Over the 9 year period from 2007 through 2015, our national debt increased more than \$10 trillion. Yet, such Keynesian borrowing produced one of the most lackluster economies since the Great Depression.

Additionally, Congress over the next ten years will borrow about \$10 trillion more, if nothing is done to stop it. There is not enough money in the world to finance this debt, and there hasn't been in the past. That is why between March of 2009 and June of 2014, the Federal Reserve Bank printed and loaned Congress almost \$2 trillion.

The printing of currency to pay for the deficit continues. Since the private sector does not have the cash and foreign entities are losing interest in loaning us money, over the next ten years the printing of currency could likely be the main source of financing our deficits. History has taught us the printing of currency to pay for its government is the last act of a desperate nation.

Some ask what will happen if we need money for a natural disaster or if a war breaks out. To get ratified by 38 states, any BBA is going to have to take such possibilities into account. Thus, a BBA might require an exception for a Congressionally declared war or "national emergency," which could only be declared by a two-thirds vote of both Houses. Ironically, had such a BBA been enacted as President Reagan desired, our more recent decisions to engage in conflicts abroad and to nationbuild would have been far more carefully considered than hindsight suggests in fact occurred.

Mistaken Argument No. 18
**Congress will balance the budget
by enacting a huge tax hike.**

If it were so easy to raise taxes, Congress would have done that instead of borrowing. But it is not easy, as the people will not tolerate it and under a balanced budget amendment that will likely be made an even more difficult thing to do.

First of all, we need to understand the relationship between government and the people, taxing and spending. When government asks the people, “do you want this or that service or benefit?” the people many times say “yes.” When the people are then asked to pay for it, usually they quickly say “no.” People want all the government goodies they can get as long as they do not have to pay for them.

Since Congress can borrow as much money as it likes, it has created a multitude of spending programs for which the people are not directly being taxed. Had the people been asked for a tax to pay for these programs, the answer would most often been no. It is this cycle which must be stopped by a BBA.

Depending on the structure of the balanced budget amendment, there will likely be a “phase-in” period during which Congress can gradually get its financial house in order. Ironically, the current tax system has over the last twenty years provided an abundance of cash to the government. The problem is Congress has created more new government spending programs than the cash provided.

However, the fear of a run-away taxing Congress is not to be ignored. Rather than trusting Congress, it is quite likely the proposed amendment will *include a clause making it difficult to raise taxes and fees*. Ratification of a BBA will be extremely difficult without this provision and, frankly, a clause like that would accelerate the ratification process as the people will support it.

Mistaken Argument No. 19
Social Security will be slashed
if we have to balance the budget.

One means to strike fear in the minds of millions of older individuals is to suggest Social Security will be the victim of balancing the budget and that severe cuts will have to be made if Congress cannot borrow money.

What we should be telling the people is that over the last 20 years trillions of Social Security payroll tax dollars were spent by Congress to pay for other government programs. *In reality, a balanced budget amendment might be the only thing which can save Social Security.*

In 1992, the Social Security fund was close to running deficits, meaning more money would be paid out in benefits than what would be received from the payroll tax. That year Congress effectively doubled the payroll tax which caused massive cash surpluses over the ensuing years. When the tax was passed, Congress pledged the surpluses would be “banked” and used when the fund would have again deficits, sometime in 2018. The fund would have enough cash on hand until 2035 or 2040.

But Congress viewed the surplus cash, in one year almost \$200 billion, as a slush fund to spend on other government programs. It gutted Social Security like a fish, spending all its cash reserves. Congress now owes the Social Security Trust fund almost \$3 trillion dollars but has no means to repay these funds. That is why the fund is in trouble financially. Social Security has been paying for the deficits since 1992.

Ironically, if we had a balanced budget amendment in place in 1992 and Congress would have been prohibited from borrowing from Social Security and the surpluses had been invested in the private sector, then there would be almost \$5 trillion in cash and assets in the fund and the Social Security tax would never have to be increased.

When the balanced budget amendment is written, there should be a prohibition from borrowing from the federal trust and pension funds including the Military Retirement Fund (owed more than \$800 billion) and the Civil Service Pension Fund (owed more than \$900 billion).

Social Security, Medicare, and military pensions will be saved by a Balanced Budget Amendment, not destroyed.

Mistaken Argument No. 20

We don't know what a Balanced Budget Amendment looks like!

The purpose of the convention is to study the issue, deliberate and debate, and craft an amendment as a result of this discussion, or not. Leading up to the convention there will be a great national discussion regarding debt, deficits, Federal government spending, and how to solve this enormous problem.

When it is certain a convention will be convened, universities, high schools, citizen groups, special interest groups, two people standing on a street corner, the entire nation, will begin to discuss and debate the issue. Groups from all around the country, including the BBATF, will ask for ideas for the amendment language, and there will be many thoughtful, educated suggestions. That is a good thing as the people will be engaged in this process.

After states appoint their delegations, hearings will be held in the states. The commissioners will listen to experts on the issue of federal finance, spending, borrowing, and the Washington system as presently functioning. They will bring these ideas to the convention and each state will have the opportunity to present them to the convention.

The issues likely to be debated at a BBA convention include:

1. Frivolous Congressional borrowing, especially from trust and pension funds.
2. Exceptions for armed conflict or natural disaster.
3. Limitations on raising taxes and fees.
4. Penalties to ensure BBA compliance.
5. Limiting the growth in the size of the Federal government.
6. Implementing the amendment to allow for an orderly change from a borrowing government to a responsible government.

A BBA can provide bi-partisan benefits to our country. For the left, it can protect our entitlement programs, re-fund our bankrupt governmental pension and trust funds, require the government to focus on its core activities such as education, and bring pause to future engagements in foreign conflicts. To the right, it can reduce existing and future growth of government, get our economic house in order and require super majority votes to raise taxes. The future can be bright, but only if we act now to avoid an economic collapse by proposing and ratifying a balanced budget amendment.

Where can I go to confirm all these things you are claiming?

The most prolific researcher and writer regarding Article V conventions is Professor Rob Natelson of the Independence Institute and Senior Fellow to the Heartland Institute. He has on numerous occasions served as a consultant to the BBATF. Many of the footnotes cited herein are to Professor Natelson's work.

Professor Natelson is widely conceded to be the nation's foremost scholar on the Article V application-and-convention process, about which he has published extensively. He served as a law professor for 25 years at three different universities. He has been cited repeatedly at the U.S. Supreme Court.

Below are links to Professor Natelson and his additional writings: <http://www.i2i.org/robnatelson.php> or RobNatelson.com. We particularly recommend the following articles:

- Natelson, "A Compendium for Lawyers and Legislative Drafters," *copy available at* <http://robnatelson.com/wp-content/uploads/2016/11/Compendium-4.0-plain.pdf>.
- Natelson, "Founding-Era Conventions and the Meaning of the Constitution's 'Convention for Proposing Amendments'", 65 Fla. L. Rev. 615 (2013)
- Natelson, "Proposing Constitutional Amendments by Convention: Rules Governing the Process," 78 Tenn. L. Rev. 693 (2011).

For a comprehensive report on the modern day development of the Article V convention of states movement and its status through the end of 2015, please see:

- Guldenschuh, "The Article V Movement: A Comprehensive Assessment to Date" (Heartland Inst. Nov. 2015) *copy available at* <https://www.heartland.org/policy-documents/article-v-movement-comprehensive-assessment-date-and-suggested-approach-state-legis>.

Special thanks and recognition are offered to William H. Fruth, co-founder of the BBA Task Force, for his detailed editing of this booklet.

Convention Rules

On September 12, 2017 the states met in formal convention at the Arizona State Capitol to create rules of procedure for a convention for proposing a balanced budget amendment pursuant to Article V. The delegations met until noon on Friday, September 15 and adjourned after approving Convention Resolution 1 (CR1).²³ CR1 is fourteen pages in length and is extremely comprehensive. It is anticipated a preponderance or the entire set of rules will be adopted by a convention for proposing a balanced budget amendment.

The following are excerpts from CR1 which relate to how the convention will function.

ARTICLE 1 – Subject of the Convention

1.1 Convention Limited Authority

This Convention is convened under the authority reserved to the state legislatures of the several States by Article V of the Constitution of the United States.

The only participants at this Convention are the several States represented by delegations duly selected in such manner as their respective legislatures have determined.

The Convention derives its authority from the applications adopted by at least two-thirds of the legislatures of the several States, and its authority is thereby limited to the subject of proposing an amendment to the Constitution of the United States regarding balancing the federal budget as specified in applications from at least two-thirds of the States. This Convention and these delegates have no authority to propose an amendment or amendments on any other subject.

ARTICLE 3 – Quorums and Voting

3.2 Voting

3.2.1 Voting by States

All voting at the Convention or in a committee shall be by State with each State having one vote, without apportionment or division. Each State shall determine the internal voting and quorum rules for casting the vote of its delegation.

²³ For the complete set of approved rules of procedure go to www.azleg.gov/bbapc/convention-details/final-work-products/.

3.2.2 Majority Vote

A majority vote of the quorum shall prevail on all issues before the Convention and in all committees, save for any vote to create a rule which requires a majority greater than a simple majority, which shall then require an equal majority to prevail.

ARTICLE 4 – Committees

4.2 Amendment Committee

4.2.1 Purpose of the Committee

The committee shall prepare proposed amendment language which shall be transmitted to the Convention for its consideration and debate. Any amendment language to be presented to the Convention by a State for its consideration by the Convention must originate in the committee. After this committee transmits its report (recommended amendment language) to the Convention, the committee shall not meet unless directed by the Convention. The Convention may amend the report of the committee.

4.2.6.1 State Participation

After organizing, the first order of business shall be providing each State attending the Convention equal opportunity and time to present to the committee its opinion, findings, and recommendations regarding the language and content of the amendment subject, including specific amendment language. All presentations are subject to Article 1.

4.2.6.2 Expert Testimony

Expert testimony before the committee by those not a participant of the Convention shall be limited to the subject of the Convention and shall be by invitation. The Chair shall determine the experts and may create a sub-committee to recommend such. The committee, by a majority vote, may include additional experts.

Commissioner Selection Resolution

While commonly referred to as “delegates,” the proper name for those representing a State at a convention is “commissioner” as the individuals receive a “commission” from the legislature. The commissioners form a delegation which speaks for the state.

The delegation is the agent for the legislature. It has certain latitude regarding deliberation but must place its principal’s (the legislature) interest first.

Leading up to a convention, each legislature will pass a resolution regarding its delegation. The resolution will address all or some of the following issues:

1. The number of commissioners (should be an odd number) and alternates.
2. The individuals who will serve as commissioners.
3. A definite term of service.
4. An oath of office.
5. A method of recalling a commissioner or the entire delegation.
6. Specific instructions to the delegation.

Since the delegation and the commissioners are the agents of the legislature, the specific instructions given to the delegation defines the limits it has regarding policy issues during the convention deliberations. The specific instructions might include some of the following:

1. The delegation shall vote for the “essential rules” for a convention.
2. The delegation or individual commissioner shall not participate in any discussion or vote for any amendment subject aside from that of a Balanced Budget Amendment.
3. The delegation shall not vote for any amendment which does not restrict Congress from raising taxes.
4. The delegation is instructed to vote for amendment language which provides for deficit spending to finance the extraordinary costs of armed conflict.

While the legislature can add a large number of instructions, in doing so it does not want to so severely limit its delegation that it cannot effectively participate in the deliberations of the convention.

**Prepared for State Legislators considering
an application for a convention to propose
a Balanced Budget Amendment pursuant
to Article V of the Constitution of the
United States.**



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