Wisconsin Grand*Sons of Liberty*

Issue Analysis & Position Statement - #015

Article V Amendment Convention

(with emphasis on the Balanced Budget Amendment proposals)

(For more in-depth analysis, see WiGOL's AVC FAQs and Court Findings booklet)
(Updated 31 January 2015)

Overview:

A convention to amend the Constitution makes most people and many organizations uncomfortable since the outcome is more often than not viewed as unpredictable. As the Constitution does not spell out in detail the procedure or process for an Article V convention, there is a fear that there is no certainty as to how to control the convention and prevent a "runaway" resulting in scrapping of the Constitution in part or in its entirety. The attractiveness of the convention is that it is the only alternative to the usual amendment process which is controlled by Congress.

There are more than a dozen organizations which are currently promoting an Article V convention as a method of amending the Constitution for either a singular issue or multiple issues. The foremost singular issue is that of amending a Balanced Budget Amendment to control federal spending.

Constitutional reform is a common goal to both sides of the political spectrum albeit for differing reasons and goals. Constitutional change represents the most efficacious method of cementing change despite being the hardest and most time consuming method of political change.

One of the most prevalent strategies currently being touted is that of using the Article V convention to secure passage of specific bills. In order to make the convention more palatable and to avoid a runaway, some are proposing that a constitutional tool, the interstate compact, be used to limit the scope of a convention and to assure that the convention not address undesirable issues. The compact involves convincing 34 states to accept the pre-determined terms of how the convention will operate and the wording of the amendment. The convention will be limited to the bill under consideration and will last only 24 hours.

Currently, the organizations calling for an Article V convention include:

- Balanced Budget Amendment Task Force (www.bba4usa.com)
- Citizens' Initiative (http://citizeninitiatives.org/Balanced_Budget_Amendment.htm)
- Balanced Budgets For America (http://www.bbayes.org/)
- Compact For America (www.compactforamerica.org)

- Citizens For A Balanced Federal Budget (http://federalbalancedbudgetamendment.com/)
- Friends of the Article V Convention (http://www.foavc.org/)
- Call A Convention (http://www.callaconvention.org/)
- Amend America (http://www.amendamerica.org/)
- Americans for a Balanced Budget Amendment (http://www.balanceourbudget.com/)
- Americans for a Balanced Budget (http://www.abbonline.org/)
- Restoring Freedom (http://www.restoringfreedom.org/)
- Campaign to Fix the Debt (www.fixthedebt.org/)
- The Concord Coalition (http://www.concordcoalition.org/)
- The BBA Now Coalition Campaign (http://www.bbanow.org/)
- Let Freedom Ring (http://www.bbaorbust.com)
- People's Balanced Budget Amendment (http://www.wedemandabalancedbudget.com/)
- I Am American.org (http://iamamerican.org)
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Opposition to a convention is primarily lead by:

- Eagle Forum (www.eagleforum.org)
- John Birch Society (www.jbs.org)
- Heritage Foundation (www.heritage.org)

Liberal View:

Many liberal organizations consider the amendment process as a way to advance the progressive agenda. This harkens back to the 1910s when the progressives were successful in adding the 16th, 17th, 18th and 19th Amendments. The current agenda looks like FDR's "Second Bill of Rights" mixed with social justice, economic justice, environmental justice, income redistribution and the extensive redefinition of corporate law. Reversing the issue of corporate personhood is a paramount goal of the left.

Income inequality, socialized medicine, campaign finance reform, elimination of the Electoral College, entitlements and reduced nationalism are targets of liberal reform. The most significant difference between the two opposing views of the spectrum lies in the way that each interprets the Constitution. The liberals adhere to the "Living Constitution" theory of Justice Brandeis which holds that the meaning is fluid and is dependent on the prevailing view of the times in which the document is invoked and no on the original intent of the Framers or the amending Congress. Liberals see the Constitution and Bill of Rights as malleable by the courts which can rewrite at will. Summarized, the meaning is changeable to fit the needs of those seeking change.

<u>Conservative View</u>:

Conservatives consider the amendment process as a viable method of returning to the Framers' intent. Fiscal responsibility and constitutional adherence are conservative foundational goals. Fiscal reform comes in the form of a Balanced Budget Amendment. Conservatives seek to reverse the passage of the progressive amendments.

The view of the meaning of the Constitution is static – the views of the Framers and the Congresses which passed later amendments are near sacrosanct and the meaning is therefore fixed for all time. Underlying this view is the assumption that the Constitution, Bill of Rights and all Amendments were created with a deliberate nod to understanding human nature and that the flexibility of change was accounted for in the Article V process. The documents were written based on the recognized wisdom acquired over 10,000 years of human civilization, that is timeless and unchanging and not on whim or momentary passion. If a problem is temporary and will not likely occur again, then there is no need to address it but if a problem or situation is so grave that it must be prevented from repeating then amending is necessary.

Pro Convention:

- The political situation has deteriorated so badly with the Constitution virtually ignored that could it really get any worse with a convention – even a runaway?
- Codifying the intent and the meaning of the constitutional clauses would clean up the interpretation and limit the ability of the courts to rewrite the law.
- The amendment process is non-violent and as close to permanent as can be had.
- The will of the people is clearly expressed, for good or bad, through the amendment process.
- The president has no role in the process and Congress' impact is limited.
- Anything proposed at the convention is still subject to approval by at least 38 states within 7 years.
- Wording will be precise and harder for the SCOTUS to misconstrue.
- Bill of Rights originally had 12 items but the states picked and chose only 10 to enact.
- There is, despite claims to the contrary, a pseudo-precedent for the amending convention: The Washington Peace Conference held in February 1861 in an attempt to devise amendments in order to save the Union. 21 of the 27 states remaining in the Union after 7 of the southern states seceded met for 3 weeks. They proposed a constitutional amendment to preserve slavery but it failed to save the union since Congress would not follow the Constitutional and vote on submitting to the states.
- Removing the process from Congress to the people and the states removes much of the "corrupted" influence of Congress which has a vested interest in doing things the same way as they have done for centuries.
- Every state except Hawaii has called for a convention. There have been at least 748 calls from the states for a convention.

- Calling for a convention has led Congress to act quickly, presumably to avoid a convention and the threat to Congress' power, to enact the 17th, 21st, 22nd and 25th Amendments.
- Thomas H. Neale of the Congressional Research Service has concluded that the threshold for calling an Article V convention has been met.
- 24 states have pending applications for a BBA convention.
- The threat posed by fiscal irresponsibility is enough to destabilize and destroy the nation. To reach this point, successive Congresses have had to act outside of their constitutional authority – and often illegally.
- States have held at least 679 constitutional conventions (both plenipotentiary and amendatory) and have "perfected" the process.
- Over 11,500 federal constitution amendments have been proposed. The process is well understood.
- 171 Balanced Budget applications from 39 states between 1955-2011
- Debt impoundment or sequester is required.
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Against Convention:

- Conventions may write their own rules allowing for abandonment of the agreed upon rules unless safeguards are in place.
- Lack of precedents creates fear that a runaway can occur since no one can claim that the rules are fixed.
- Not clear if 'judicial review' applies due to *Coleman* decision but may have been reversed by *Dyer* decision.
- Congress may simply ignore the outcome of the convention.
- Kirk Boyle, Legal Counsel to the US House of Representatives, claims that Congress is under no obligation to obey the US Constitution and therefore it does not need to acknowledge the calls for a convention from the states. Karen Haas, Clerk of the US House of Representatives, sets the official count of calls from the states at '0'. But in January 2015, the House adopted a new rule to require keeping count.
- BBA could force Congress to raise taxes drastically in order to balance.

SCOTUS Rulings:

- *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), was a case in which the United States Supreme Court ruled early in America's history that the President of the United States has no formal role in the process of amending the United States Constitution and that the Eleventh Amendment was binding on cases already pending prior to its ratification.

- *Marbury v. Madison,* 5 US 137 (1803): "It cannot be presumed that any clause in the Constitution is intended to be without effect." – The convention clause is therefore NOT without effect; it must be obeyed by Congress.
- *Martin v. Hunter's Lessee,* 14 US 304 (1816): "The government of the United States can claim no powers which are not granted to it by the Constitution." – No branch of government has the power to question the validity of a state application for an Article V convention.
- *Prigg v. Commonwealth of Pennsylvania,* 41 US 539 (1842): "[The] Court may not construe the Constitution so as to defeat its obvious ends when another construction, equally accordant with the words and sense thereof, will enforce and protect them." – To question the validity of a state's application attempts to construe and defeat the obvious ends of the convention clause.
- *Smith v. Union Bank*, 30 U.S. 518, 528 (1831): A convention for proposing amendments is, like all of its predecessors, a "convention of the states."
- *Dodge v. Woolsey*, 59 U.S. 331 (1855): "[The people] have directed that amendments should be made representatively for them, by the Congress . . . ; or where the legislatures of two thirds of the several States shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the constitution, when ratified. . . ." and "The departments of the government are legislative, executive, and judicial. They are coordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, right-fully done by either, is binding upon the others. The Constitution is supreme over all of them, because the people who ratified if have made it so; consequently, any thing which may be done unauthorized by it is unlawful." – The 3 branches of government are not authorized to question the validity of state applications for a convention.
- *Jarrolt v. Moberly,* 103 US 580 (1880): "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed." – Questioning the validity of a state application defeats its purpose.
- *Hawke v. Smith*, 253 U.S. 221 (1920): "[Article V] 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."
- *State of Rhode Island v. Palmer*, 253 U.S. 320 (1920): The two thirds vote required in Congress for proposing amendments is two thirds of a quorum present and voting, not of the entire membership.
- *Dillon v. Gloss* 256 U.S. 368 (1921): In discussing Congress's power to propose amendments, the Court affirmed that "[a] further mode of proposal—as yet never invoked—is provided, which is, that on the application of two thirds of the states Congress shall call a convention for the purpose."

- *Leser v. Garnett,* 258 U.S. 130 (1922): [T]he function of a state Legislature in ratifying a 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."
- *United States v. Sprague*, 282 U.S. 716 (1931): "[A]rticle 5 is clear in statement and in meaning, contains no ambiguity and calls for no resort to rules of construction. . . . It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses, or, on the application of the legislatures of two-thirds of the States, must call a convention to propose them." and "Where intention of words and phrases used in the Constitution is clear, there is no room for construction [re-interpretation] and no excuse for interpolation."
- *Coleman v. Miller,* 307 U.S. 433 (1939): clarified that if the Congress of the United States—when proposing for ratification an amendment to the United States Constitution, pursuant to Article V thereof—chooses *not* to specify a deadline within which the state legislatures (or conventions held in the states) must act upon the proposed amendment, then the proposed amendment remains pending business before the state legislatures (or conventions). Because of the political question doctrine and the Court's ruling in the 1939 case of Coleman v. Miller, it remains an open question whether federal courts could assert jurisdiction over a legal challenge to Congress, if Congress were to refuse to call a convention.
- *Ullman v. US,* 350 US 422 (1956): "As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." – Article V convention calls cannot be ignored, Congress must comply with a call.

Federal Court Rulings:

- *United States ex rel. Widenmann v. Colb*y, 265 F. 398 (D.C. Cir. 1920): Article V functions are complete when a convention or legislature has acted. There is no need for other officials to proclaim the action.
- *United States v. Thibault*, 47 F.2d 169 (2d Cir. 1931): The national government is not concerned with how Article V conventions or state legislatures are constituted.
- *State ex rel. Donnelly v. Myers*, 127 Ohio St. 104, 186 N.E. 918 (1933): Just as other enumerated powers in the Constitution bring with them certain incidental authority, so also do the powers enumerated in Article V.
- *In Re Opinion of the Justices*, 204 N.C. 306, 172 S.E. 474 (1933): A convention meeting under Article V may be limited to its purpose.
- *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (written by now Justice Stevens): A court may consider the history underlying Article V.
- *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981): Congress may not try to manipulate the ratification procedure otherwise than by choosing one of two specified "modes of ratification."
- *Carmen v. Idaho*, 459 U.S. 809 (1982): vacates *Idaho v. Freeman*.

Existing Law (Balanced Budget):

- Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985 - created sequesters
- Budget Enforcement Act of 1990 - introduced pay-as-you-go (PAYGO)
- Balanced Budget Act of 1997 – provided line item veto. Ruled unconstitutional by SCOTUS in 1998.

Pending Legislation (Balanced Budget):

- H.J. Res. 1 - Proposing a balanced budget amendment to the Constitution of the United States – 113th Congress, Rep. Bob Goodlatte (R-VA), 91 co-sponsors, introduced 1/25/13
- H.J.Res.2 Proposing a balanced budget amendment to the Constitution of the United States, 113th Congress, Rep. Bob Goodlatte (R-VA), Introduced Jan 25, 2013
- H.J.Res.4 Proposing a balanced budget amendment to the Constitution of the United States, 113th Congress, Rep. John Barrow (D-GA), Introduced Jan 25, 2013
- H.J.Res.5 Proposing a balanced budget amendment to the Constitution of the United States, 113th Congress, Rep. Vern Buchanan (R-FL), Introduced Jan 25, 2013
- H.J.Res.6 Proposing a balanced budget amendment to the Constitution of the United States, 113th Congress, Rep. Vern Buchanan (R-FL), Introduced Jan 25, 2013
- H.J.Res.11 Proposing a balanced budget amendment to the Constitution of the United States, 113th Congress, Rep. Lee Terry (R-NE), Introduced Jan 25, 2013
- H.J.Res.35 Proposing a balanced budget amendment to the Constitution of the United States, 113th Congress, Rep. Paul Broun, (R-GA), Introduced Apr 08, 2013
- H.J.Res.36 Proposing a balanced budget amendment to the Constitution of the United States, 113th Congress, Rep. Scott Perry (R-PA), Introduced Apr 08, 2013
- H.J.Res.38 Proposing a balanced budget amendment to the Constitution of the United States, 113th Congress, Rep. Jackie Walorski (R-IN), Introduced Apr 30, 2013
- H.J.Res.49 Proposing a balanced budget amendment to the Constitution of the United States, 113th Congress, Rep. Jason Smith (R-MO),Introduced July 15, 2013

- S. J. Res. 7 - A joint resolution proposing a balanced budget amendment to the Constitution of the United States, Sen. John Cornyn (R-TX), introduced 2/13/13
- S. J. Res. 20 - A joint resolution proposing a balanced budget amendment to the Constitution of the United States, Sen. Mark Udall (D-CO), introduced 7/10/13

Existing Law (Article V):

- U.S. Code, Title 1, Chapter 2, Section 106b (1 U.S.C. 106b)
- U.S. Statutes at Large, Section 112

Recent Legislation (Article V):

- None

Actions:

- 1935 Senator Millard Tydings (D-MA) makes first ever call for a Balanced Budget (S.J. Res. 36, 74th Congress) in response to FDR's ballooning budgets
- 1936 US Rep. Harold Knutson (R-MN) proposes first BBA to the US Constitution (H.J. Res. 579, 74th Congress)
- 1814 *Hartford Convention* – informal conference - proposed 7 amendments
- 1861 *Washington Peace Conference* – semi-formal conference - attempt to prevent the Civil War – proposed amendments

Comparison of Alternative Methods

1) ***Compact For America***

Overview:

This plan relies on implementing an interstate compact between the states to draft a BBA. The single day conference would be severely limited in scope and action to only agreeing to the wording and the passage of the BBA.

2) ***BBA Task Force***

Overview:

Relies on the "classic method" of constitutional amendment. The BBATF uses the 2 ALEC models for draft legislation. Relies on the states to press claim and secure convention.

3) ***National Debt Relief Amendment***

Overview:

Similar to BBATF in using traditional method to secure convention. Seeks to reduce national debt by requiring that any increase in the debt limit must be approved by the state legislatures.

Constitutionality:

Clearly, Article V is constitutional. The issue of how to force the compliance of Congress with obeying the Constitution and responding to the call for an Amendment Convention is unresolved. The losses of state sovereignty and federalism are dramatically demonstrated by the federal government's refusal to adhere to the Constitution. If the feds will not comply with the Constitution, then there is no Rule of Law and the solution is unthinkable.

Relationship to Constitutionalist Movement/TEA Party Movement Principles:

Free Markets:

There is really no issue with free markets and Article V. An analogy can be made that the states offer a free market alternative to each other and to the federal government in a limited fashion. Since the Constitution provides 2 methods of amending, using either option is acceptable. The amendment convention option is preferable due to the inability to utilize the congressional method. With the situation deteriorated to the point of Congress virtually mocking the people and the states, it is time to try some other method to rein in an unconstitutionally acting Congress.

Limited Constitutional Government:

Using the amendment convention process creates the opportunity to return to limited government and reverse the abuses of the General Welfare, Commerce, Tax and Spending, Due Process and Necessary and Proper Clauses. A number of amendments, including a Repeal, a Defining Federalism and a Balanced Budget Amendment could reduce and restrict federal power. A mechanism needs to be either found or created to enforce the constraints on the federal government. The Repeal Amendment would give the states a tool for forcing the feds to restrain themselves. Criminalizing violations of the Constitution would force Congress to carefully consider its actions but may be unconstitutional due to their immunity to prosecution.

Fiscal Responsibility:

The Balanced Budget Amendment goes directly to fiscal responsibility. Pursuing the BBA first creates a template and gathers the most support as ~75% of the public is in favor of the legislation.

Effect on Wisconsin:

Following the Amendment Convention method will serve to restore some measure of Wisconsin's state sovereignty and federalism. Restricting the federal government to its enumerated powers frees Wisconsin to resume governance as intended and relocates problem solving nearer to the people as originally planned and executed.

Effect on Federal Officials:

Wisconsin federal elected officials should support the amendment convention as their allegiance should be first to their state.

Additional Information:

http://foavc.org/

POSITION OF WiGOL:

Restoration of the balance in power between the states and the federal government is central to WiGOL's mission. The states calling for an Article V convention is appropriate and the correct remedy for the fiscal situation at present. **WiGOL endorses this call for a convention** and pledges to work to add Wisconsin's application to the total.

WiGOL strongly opposes the compact method and is uncomfortable with the idea of criminalizing the actions of the delegates in order to prevent a runaway convention. The structure constitutionally is such that a runaway will not happen. The states have the ability to vote down any dangerous or ridiculous proposal and should be expected to do so.

We strongly urge state legislators to push for a spending cap provision in any BBA.