

# WHOA! A Constitutional Convention? Who Would Want That?<sup>1</sup>

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*Arizona’s Legislature has passed three of the four “models” that are being pushed nationwide to call an “Article V” convention, sometimes called a “con-con,” to rewrite the U.S. Constitution. In the 2019 session, Arizona is on the cusp of passing still another bill to have a constitutional convention providing for Congressional term limits. The call for an Article V convention is no longer a quiet movement, and people who cherish the freedoms protected in the Constitution need to be concerned. Proposed mainly by conservatives wanting a balanced budget amendment or other restrictions on the power of the federal government, only a few more states are needed to require Congress to call one. Liberals are even joining in the effort, although for quite different proposed amendments, including overturning Citizens United. The problems are not mainly in the topic, however, but in the power that such a convention would have, once convened. Fears are that an actual constitutional convention would be a “runaway” convention, not subject to any actual controls even by the courts, and could completely rewrite the Constitution.*

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## 1. How Can the Constitution Be Amended?

All 27 amendments actually adopted for the U.S. Constitution have been proposed by Congress (requiring a 2/3 vote of each chamber) and then ratified by ¾ of the states either through legislative action or a state ratifying convention. A number, including the ERA, have been proposed by Congress and approved by some states, but not a sufficient number before the deadline expired to meet the Constitutional requirement.

However, there is a persistent movement gaining momentum in the United States to use an alternative method to amend the constitution using an “Article V Convention” or a “convention of the states,” or a “con con.” Actually, all of these are basically the same process; a second method offered by Article V. This second method is for the states to “apply” to Congress for a constitutional convention that would propose amendments which then would need to be ratified by ¾ of the states. Article V is rather short. Here it is, in its entirety:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the **application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments**, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate. [Emphasis added].

Although this seems to be a straightforward and simple procedure, scratching just a bit below the surface reveals a briar patch of complicated issues and enormous uncertainty that has resulted in many legal authorities (mainly liberal, but some conservatives too) advising against ever using this second method.

*Most liberal / progressive legal authorities and some conservatives say this is a TERRIBLY BAD IDEA.*

To proceed logically through this morass of complicated issues, this paper will first provide some background on the only national constitutional convention in U.S. history – the 1787 convention that wrote the current constitution. I will then turn to these questions:

- Why has this issue come up at this time?

- What is the conservative case for a constitutional convention and what are differences among their various proposals?
- Are any progressive (liberal) groups also proposing a constitutional convention?
- What are the reasons for opposition (from both liberals and conservatives)?
- What is the current situation in the Arizona Legislature?

## 2. Background: the 1787 Constitutional Convention

The intent of Article V was to enable the states to by-pass Congress and the President, if there was sufficient support in the states, and force Congress to convene a convention of delegates from the states that could, in turn, propose constitutional amendments. The constitution provides no other instructions for how this convention would be run. Simply, if 2/3 of the states request a constitutional convention, Congress has to “call” it and could give it a “charge.”

*The delegates ignored the charge from Congress, which was narrowly worded.*

The only clear example in U.S. History is the Philadelphia constitutional convention that was convened to amend the Articles of Confederation and, instead, wrote an entirely new constitution.

Almost all constitutional scholars agree that the Philadelphia convention of 1787 went far beyond its instructions from Congress. In 1786, a year before the Philadelphia convention, five of the 13 states had met in Annapolis and after reaching agreement that the current form of government was not meeting the needs of the new nation, produced a wide-open recommendation for the other 8 states (and Congress) that a convention needed to be held to

“devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the union and to report such an Act... to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the Legislatures of every State...”

[http://csac.history.wisc.edu/delegate\\_inst1.pdf](http://csac.history.wisc.edu/delegate_inst1.pdf) .

After the Annapolis convention’s proposal for a convention of the states that could completely recreate the government, the states began debating the issue. Some agreed to the broad instruction recommended by the Annapolis convention and others focused specifically on issues of trade and commerce, which were the primary issues that had prompted the Annapolis convention itself. Rather than have a convention with each state’s delegation being subject to different instructions, Congress then picked up the issue and specifically rejected the broad language from the Annapolis convention and passed a motion from Massachusetts that convened a meeting in Philadelphia of

delegations from the states, “for the sole and express purpose of revising the Articles of Confederation.” [http://csac.history.wisc.edu/delegate\\_inst18.pdf](http://csac.history.wisc.edu/delegate_inst18.pdf)

After the call from Congress, each state selected its own delegation and provided instructions to its representatives. Some of these were broad, some narrow. Each state had one vote even though they had different-sized delegations. The proceedings were secret. Twelve of the 13 states attended and eventually agreed to the proposed new constitution that was then submitted to Congress. (Rhode Island refused to send delegates). The convention even changed the method of ratification. The Articles of Confederation required a unanimous vote of the states for an amendment, but the new constitution only required  $\frac{3}{4}$  of the states to agree to it, even though eventually all did.

### 3. Why is this issue coming up at this time?

A confluence of events has produced some momentum for calling an Article V convention. From a substantive point of view, most of the pressure is coming from conservatives who want a balanced budget amendment, or even more significant limitations on the authority of the federal government. Their inability to move such a measure through the U.S. Congress has increased the support for an Article V

convention among conservatives.

One of the key events occurred in March, 2014, when the Michigan Legislature passed a resolution to submit an application to Congress calling for a balanced budget amendment, worded as follows:

"...call a convention of the states limited to proposing an amendment to the constitution of the United States requiring that in the absence of a national emergency, including, but not limited to, an attack by a foreign nation or terrorist organization within the United States of America, the total of all federal appropriations made by the congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year, together with any related and appropriate fiscal restraints."

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*The Constitution says that if 2/3 of the states pass legislation applying for a constitutional convention to propose amendments, then Congress SHALL call one.*

*How do you count this? Have 2/3 already applied?*

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This wording is that originally recommended by the American Legislative Exchange Council (ALEC), but the significance is that some claim Michigan’s application was the 34<sup>th</sup> state (2/3) calling for a constitutional amendment regarding a balanced budget. Therefore, so the claim goes, Congress is required to call a constitutional convention. (See Fox news, for example, <http://www.foxnews.com/politics/2014/04/02/rare-option-forcing-congress-to-meet-change-constitution-gains-momentum/>).

Buttressing the claim that 2/3 have applied to Congress for a convention to take up the balanced budget amendment, Rep. Duncan Hunter (Republican, CA), called on Speaker John Boehner of the U.S. House to determine whether the necessary number of states have acted and that Congress must therefore call such a convention. These proposals went nowhere, however, as Congress apparently believed that all 34 states have to issue a “call” that contains exactly the same language. Congress did, however, initiate a plan to keep track of the applications for an Article V convention, but to date the best updated information on which states have applied is the Wikipedia article with updates through February, 2017.

[https://en.wikipedia.org/wiki/List\\_of\\_state\\_applications\\_for\\_an\\_Article\\_V\\_Convention#Balanced\\_Budget](https://en.wikipedia.org/wiki/List_of_state_applications_for_an_Article_V_Convention#Balanced_Budget)

On the other side of the coin, however, is the fact that it is not easy to count how many states have active applications to Congress to call a constitutional convention for a balanced budget. When Arizona passed its call for the Balanced Budget Amendment, HCR2013, in March, 2017 they named 28 other states, not including Arizona or Wyoming which had passed it in February, for a total of 30 states. It only takes 34. However, in 2017, New Mexico and Nevada rescinded their previous applications for Article V conventions, leaving the total apparently at 28. The 28 states, at this writing that have called for a balanced budget using almost exactly the same language are: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming.

Some legal authorities even claim that once a state applies for a constitutional convention, it cannot rescind its call and that it does not have to be on the same topic as named by other states. If this were true, then Congress should have convened a constitutional convention more than a hundred years ago and many times since.

Congress has finally begun to compile and publish the various requests from the states <http://clerk.house.gov/legislative/memorials.aspx>.

#### **4. The conservative proposals for a constitutional convention**

The pressure on states to apply to Congress for an Article V constitutional convention is coming mainly from conservative groups who are lobbying for a balanced budget amendment or other strategies to limit the authority of the federal government. There are several different strategies in play, however, and different topics. The most recent one being a proposal to have term limits for members of Congress.

##### *4.1. American Legislative Exchange Council (ALEC) (Balanced Budget Amendment)*

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*There are five major conservative proposals current in play for an Article V constitutional convention:*

**Simple Balanced Budget (ALEC)**

*– purpose is to balance the budget (and other fiscal restraints) (28 states).*

**CONVENTION OF THE STATES –**

*Broader statement of purpose to limit power and jurisdiction of federal government including balanced budget and term limits 9 states)*

**COMPACT FOR AMERICA** – *“All in one” legislative action to propose and ratify amendments including balanced budget, raising debt ceiling requires approval by state legislatures, impoundment permitted, taxing restricted, and more (5 states)*

**LIBERTY AMENDMENTS** – *Mark Levin’s call for convention to approve 11 amendments*

**Term Limit Proposals** – *The newest focus is a call for a “con con” limited to requiring term limits for Congress (2 states).*

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**Convention of States** approach recommends that the legislation requesting the convention be to consider a specific TOPIC (limiting the scope and power of the federal government), rather than considering a specific AMENDMENT (e.g., a balanced budget amendment)

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The initial strategy, championed by ALEC and others, was simply for state legislatures to apply to Congress for an Article V convention that would be strictly limited to a balanced budget proposal. ALEC prepared a complete handbook for state legislators on how to do this. Here’s the wording that ALEC proposed:

The legislature of the State of {insert name} hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing an amendment to the Constitution of the United States requiring that in the absence of a national emergency the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year [together with any related and appropriate fiscal restraints]. [The last phrase was added later, after a number of states had already passed the legislation]. <http://www.alec.org/docs/ArticleVHandbook.pdf>

4.2. *Convention of States Proposal.* The Convention of States preamble summarizes how they see the problems: “Citizens concerned for the future of their country, under a federal government that’s increasingly bloated, corrupt, reckless and invasive, have a constitutional option. We can **call a Convention of States** to return the country to its original vision of a limited federal government that is of, by and for the people.”

This group cites four major problems: spending and debt crisis, a regulatory crisis of burdens on business; Congressional attacks on state sovereignty including federal grants and unfunded mandates and a federal takeover of the decision making processes. Their solution:

“Rather than calling a convention for a specific amendment, Citizens for Self-Governance (CSG) has launched the Convention of the States Project to urge state legislatures to properly use Article V to call a convention for a particular subject—reducing the power of Washington, D.C. It is important to note that a convention for an individual amendment (e.g. a Balanced Budget Amendment) would be

***The Compact for America*** is the “all in one” strategy so that one bill encompasses the actual amendment, the process, and the ratification!

limited to that single idea. Requiring a balanced budget is a great idea that CSG fully supports. Congress, however, could comply with a Balanced Budget Amendment by simply raising taxes. We need spending restraints as well. We need restraints on taxation. We need prohibitions against improper federal regulation. We need to stop unfunded mandates.” <https://conventionofstates.com/the->

[strategy/](#)

Examples of amendments that they say could be proposed include:

- A balanced budget amendment
- A redefinition of the General Welfare Clause (the original view was the federal government could not spend money on any topic within the jurisdiction of the states)
- A redefinition of the Commerce Clause (the original view was that Congress was granted a narrow and exclusive power to regulate shipments across state lines—not all the economic activity of the nation)
- A prohibition of using international treaties and law to govern the domestic law of the United States
- A limitation on using Executive Orders and federal regulations to enact laws (since Congress is supposed to be the exclusive agency to enact laws)
- Imposing term limits on Congress and the Supreme Court
- Placing an upper limit on federal taxation
- Requiring the sunset of all existing federal taxes and a super-majority vote to replace them with new, fairer taxes.

Thirteen states, including Arizona, have adopted this resolution: Alaska, Alabama, Arizona, Georgia, Florida, Tennessee, Oklahoma, Indiana, Louisiana, North Dakota, Texas, Missouri, and Arkansas.

...that will impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government and limit the terms of office for officials of the federal government.

Several states – including Arizona -- now are passing multiple versions of these various proposals, so they are counted in multiple lists.

#### 4.3. *Compact for America.*

Compact For America, (CFA) is a 501©4 organization, the brainchild of Nick Dranias of the Phoenix-based Goldwater Institute. This is a new strategy (introduced in 2013) that changes both the definition of a “balanced budget,” and the process for using Article V to amend the constitution. Their definition of a “balanced budget” includes balancing annual revenue with expenses, but permits “debt” which is set at 105% of the

current debt at the time the constitution is amended, and can be raised even beyond that if agreed to by Congress as well as a majority of state legislatures. The legislation provides for other fiscal restraints on the federal government. In their own words, here is what they are proposing as a “balanced” budget:

Specifically, the proposed Balanced Budget Amendment would define a balanced budget in common sense terms: cash-flow-out cannot exceed cash-flow-in except for borrowing under a constitutional debt limit. That debt limit would not be in the hands of Washington alone; it could be increased, but only with the approval of a majority of state legislatures. ... Finally, the amendment would quell fears of across-the-board tax increases by requiring any new income or sales tax to secure two-thirds approval of both houses of Congress, excepting measures that close loopholes or completely replace the income tax with consumption (end-user sales) tax (and leaving untouched the current constitutional rule for tariffs and fees). <http://www.compactforamerica.org/#!/solution/c1flq>

At one point they refer to the role of state legislatures as that of a “board of directors” that limits the authority of Congress, at least with regard to the debt limit. In the fine print, the suggested model legislation requires only a majority of state legislatures to approve increases in the debt limit, and does not specify whether a majority or a super majority is needed within a state legislature to pass the bill. The proposal also authorizes the President to use impoundment as a way to meet the balanced budget requirement, within the specified debt ceiling.

<http://goldwaterinstitute.org/sites/default/files/CFA-Text-Compact%20for%20a%20Balanced%20Budget%20Final%20%282%29.pdfN>

*The Compact for America is arguably the most dangerous of the various proposals because it would let the same group of people propose and also RATIFY the amendment at the same time, without time to generate public opposition.*

This proposal also attempts to overcome concerns about the Article V convention being a “runaway” convention by recommending a highly detailed and complicated amendment process. Basically, they create a compact among the states through legislation that all would pass (apparently using exactly the same wording). This would constitute an “all in one” proposal to propose the amendment, call a convention and ratify it all with the same legislative act. To summarize this proposal perhaps understates it, but the key points

in the proposal are these:

Mark Levin is a conservative talk show host and author of several books including *The Liberty Amendments*.

- State legislatures pass a resolution to become a member of a state compact that is devoted exclusively to holding an Article V convention that will be strictly limited to a balanced budget amendment (as defined within this legislation).
- The first states that join form a Commission to govern and implement the Compact. The Chief Executives of the member states are on this

Commission.

- When 38 states (that's the  $\frac{3}{4}$  needed for ratification) have joined the compact, then the Commission notifies Congress that  $\frac{2}{3}$  of the states have applied for an Article V convention. Congress then calls for the convention itself and specifies that the method of ratification is by legislative action (rather than a state-wide convention).
- Since 38 states already are members of the compact, and since each has already passed identical legislation regarding the balanced budget amendment, and since states cannot withdraw once the  $\frac{3}{4}$  threshold has been reached, then the amendment has not only been proposed but also ratified.

In other words, one piece of legislation, if passed by 38 states, seemingly would accomplish the goal of an amendment that would balance the budget, place limits on the debt ceiling, change the way the way the Constitution is amended, impose other fiscal restraints and changes, and impose term limits on Congress. Proposing and ratifying would both already have occurred.

Needless to say, some conservatives who support a balanced budget amendment via an Article V convention are very unhappy with this proposal as they do not believe it is restrictive enough since it permits debit and provides too much power to the president in permitting impoundment. Labeling it a "balanced budget" is somewhat disingenuous. Liberals (progressives) oppose it as just another strategy to end federal entitlement programs and hamstringing the federal government's role in governing the nation. But many are especially concerned that it would enable the same group of people to both propose the amendments and ratify at the same time, thereby not giving time for the public to "wake up" to what is happening.

ALEC, which strongly supports a balanced budget amendment (without the debt escape clause), has embraced this model as well.

Georgia, Alaska, Mississippi, Arizona, and North Dakota have passed this legislation.

#### 4.4. Mark Levin, *The Liberty Amendments*.

Still one more conservative proposal deserves mention: Mark Levin's "liberty amendments" which he proposes should be enacted by a convention of the states. So

far, there are no states that have specifically mentioned these amendments, but the broader language found in the Georgia, Alaska, and Florida applications might suffice. Levin's proposed amendments (summarized briefly) are these:

<http://www.redstate.com/2013/08/13/mark-levins-liberty-amendments/>

- Term limits of 12 years for both the House and Senate
- State legislatures elect the U.S. Senate (repeal 17<sup>th</sup> amendment)
- Term limits for Supreme Court justices; Congress and State legislatures overturn court decisions with 3/5 vote of both houses
- Balanced budget limited to 17.5% of GDP and 3/5 vote to raise debt ceiling. Power to tax limited to 15% of individuals income; prohibits all other forms of taxation; deadline for filing is one day before federal elections
- Sunset all federal regulations and reauthorization required of all federal departments every 3 years
- Defining the Commerce Clause and limiting it to prevent states from impeding commerce
- Limiting Federal power to take private property
- Allow state legislatures to amend the constitution with 2/3 vote (instead of 3/4) and without the need for a convention
- State authority to override federal statutes by 2/3 vote of state legislature

<http://www.redstate.com/2013/08/13/mark-levins-liberty-amendments/> liberty amendments.

#### 4.5. *Other Conservative Proposals -- The Term Limits Proposal.*

The newest proposal from the Conservatives is one that would focus specifically on requiring term limits for Congress. This one in passed the Alabama and Missouri legislatures in 2018 and currently has passed the Arizona House of Representatives but awaits action in the Senate. The application does not specify how long the terms would be. In Arizona, the discussion in the House focused almost exclusively on the merits (demerits) of term limits rather than on the risks of having a national convention to amend the U.S. Constitution itself. It passed the House 32-27 with three Democrats joining most Republicans to pass it, and four Republicans voting no. The primary voice against came from an extreme conservative and former legislator, Barbara Brewster who also focused on term limits, not on the broader constitutional issues. She said:

Our constitution is our political scripture. This issue is a way left-wing thing that is to destroy our checks and balances. They have been at it a long time... You do not want your legislators to be lame duck congressmen. Senators would be lame ducks for six years... lame duck congressmen do not have to worry about a re-election... Socialists are easy to replace. Deep state and world government

advocates are easy to replace, but when you have a constitutionalist like Andy Biggs and Ron Paul, you have someone with depth of knowledge not to be fooled [and you do not want them to be replaced.].

## 5. Are there any progressive (liberal) proposals for an Article V convention?

One national organization, WolfPac, is promoting an Article V constitutional convention to overturn the Supreme Court's *Citizen United* cases. They say Congress is too corrupt to pass such an amendment itself. <http://en.wikipedia.org/wiki/Wolf-PAC> Others, such as Move to Amend and Clean by 19, have initiatives underway to overturn *Citizen United*, but not through an Article V convention. Other liberals have argued that the constitution needs to be amended, but most have rejected the idea of a constitutional convention as the means to achieve change. Lawrence Lessig, Harvard Professor, is an exception. (see for example, Shaw's interview with Lawrence Lessig at <http://harvardmagazine.com/2012/07/a-radical-fix-for-the-republic> ). Five states have passed an Article V proposal for this purpose: Vermont, California, New Jersey, Illinois, and Rhode Island. The California AJR 1 resolution applies for a constitutional convention:

"for the sole purpose of proposing an amendment to the United States Constitution that would limit corporate personhood for purposes of campaign finance and political speech and would further declare that money does not constitute speech and may be legislatively limited."

It might be noted that the language in this proposal is not the same as the one Move On and others are using when they sloganize the effort by saying "corporations are not people and money is not speech." Some, including the ACLU, point out the problems with trying to claim corporations are not people at all – since they are groups of people – and problems in claiming they have no constitutional rights at all (such as free speech by non profit corporations).

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*There is one progressive (liberal) proposal for an Article V Convention—to overturn Citizens United. It has been passed by Vermont and California, both in 2014.*

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## 6. Opposition to Article V Conventions

Most moderate and liberal groups, as well as some conservatives are opposed to an Article V convention. Mainly, the opposition is based on concerns about a runaway convention that would be in the hands of the "other side" ideologically. There are concerns of massive expenditures to lobby delegates; concerns of courts saying that they (courts) have no jurisdiction at all; concerns about delegate

selection processes; and a general distrust (indeed, fear), that great damage would be done to the Constitution.

The greatest attention has been directed at the call for a balanced budget, which is overwhelmingly rejected by economists. Relying on well-established economic theory, economists and leading financial experts point out that balanced budget requirements would simply make recessions much worse and almost certainly make it impossible for the United States form of democratic capitalism to continue to be successful. For example, six Nobel prize winners in economics wrote to Congress opposing the balanced budget amendment (<http://www.cbpp.org/files/7-19-11bud-pr-sig.pdf>) (Also see Kogan, <http://www.cbpp.org/cms/index.cfm?fa=view&id=4166> for a summary). Capitalism has no built-in mechanisms to correct its own excesses. When economic growth begins to slow (for whatever reason), there is insufficient demand for the products that are being produced. Prices begin to drop; businesses are not making enough money; they lay off workers or go bankrupt; unemployment increases; people have less money to spend; demand drops even more; tax revenue drops and the government lays off even more people; producing an ever-continuing cycle downward into depression. Government stimulus is required to even out this kind of spiral.

Furthermore, a budget can be balanced by increasing taxes just as easily as cutting expenses, and since the conservative agenda for a balanced budget is to cut spending, the simplistic balanced budget amendments are not going to achieve the conservative objective.

The major opposition from conservatives is fear of what a liberal-controlled convention might do. For instance, Justice Antonin Scalia recently said, "I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?" Phyllis Schlafly, the well-known female anti-ERA champion strongly advises against such a convention, arguing that conservatives are fooling themselves to think that a constitutional convention is a way to by pass Congress <http://www.eagleforum.org/publications/psr/sept13.html>

Even though many Tea Party groups support the Article V convention, this is not true of all of them. One such group had this to say about Georgia's legislation proposing a balanced budget constitutional convention: **Valdosta tea party:** <http://valdostateaparty.com/NO-Constitutional-Convention.html>

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*There is considerable opposition to any of the various proposals for calling an Article V convention including many prominent constitutional scholars both left and right.*

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"Progressive groups like the Open Society Institute, the Center for American Progress, and the American Constitutional Society, to name a few, all groups funded by George Soros, are behind a movement for a more "Progressive constitution." They are simply not

going to let conservatives have the playing field to themselves. They will

use every trick, spending every dollar in their bulging war chests, to assure they control the process....[Chuck Baldwin was quoted as saying]: "The globalists who currently control Washington, D.C., and Wall Street are, no doubt, salivating over the opportunity to officially dismantle America's independence and national sovereignty, and establish North American Union -- in much the same way that globalists created the European Union. A new Constitutional Convention is exactly the tool they need to cement their sinister scheme into law."

Other conservatives, testifying in opposition to the Arizona proposals, contend that the constitution is not the problem, and that amendments would not make any difference because the real problem is that the constitution is not being obeyed or enforced.

Putting ideology aside, one after another distinguished constitutional scholar and numerous Supreme Court justices contend that Article V gives all the authority to the convention itself and there is no way to prevent it from becoming a "runaway" convention. Congress can "call" it and give it a charge, but there is no way to actually limit what the people at the convention do – not any more than there was for the 1787 convention that tossed the Articles of Confederation and wrote a new constitution. [http://www.cbpp.org/cms/index.cfm?fa=view&id=4165#\\_ftn2](http://www.cbpp.org/cms/index.cfm?fa=view&id=4165#_ftn2) For example, former Chief Justice of the United States Warren Burger wrote in 1988:

[T]here is no way to effectively limit or muzzle the actions of a Constitutional Convention. The Convention could make its own rules and set its own agenda. Congress might try to limit the Convention to one amendment or one issue, but there is no way to assure that the Convention would obey. After a Convention is convened, it will be too late to stop the Convention if we don't like its agenda.

Although the Compact for America is a long way from having enough states to result in an actual convention, this proposal generates a whole new set of concerns over the possibility that one group of people could both propose and ratify in a very short time span, leaving no time for opposition to materialize.

To summarize the primary questions/concerns about the procedural objections:

- The convention delegates would be chosen by the states and even if they have specific "instructions" from their states or from Congress, once

assembled, the convention carries its own constitutional authority and there would be no way to enforce the Congressional or state rules.

- Would each state have one vote, decided on by a majority of its delegates? This produces a highly skewed unrepresentative group to be proposing amendments. If states have different numbers of votes, who would decide how many each has?
- The convention would decide on its own agenda. Efforts to limit it to one topic could not be enforced.
- The Compact of America proposal to propose and ratify at the same time does not suffer from all of these problems, but has its own. First, states may not pass exactly the same legislation. Congress may call the convention, but they would first have to reconcile their various instructions from their home states. Congress has to specify the method of ratification and there is no assurance that Congress would permit the already-passed legislation to “count” as ratification. Congress could require an actual convention to agree to the language of the amendment and then require state conventions (not legislatures) to pass it. Thus, this proposal could easily fall apart unless Congress were in agreement; and if Congress agreed, why would they use this method at all rather than proposing their own amendment and putting it out for ratification? And the answer is that the state legislatures may be far more conservative than the U.S. Congress.

Since the constitution also gives Congress the authority needed to carry out its mission, some argue that the “charge” from Congress could include considerable detail about how the convention would be run including limiting it to just one topic. Others disagree, saying the constitution limits the role of Congress to calling the convention and the delegates would then decide on the rules including the scope of their authority. Still others contend that the states could control the convention through their control of their own delegations. And, ALEC has proposed specific legislation intending to enable the states to control the delegates. Under this proposal, all delegates would have to take a loyalty oath committing them to vote only for the actual wording proposed in the legislation that their state adopted. However, there is no guarantee that the delegates, once assembled, would need to pay any attention to these restrictions and legal scholars generally concede that the constitution does not grant power to the courts to enforce such provisions. (see Rogers, “Note: The Other Way to Amend the Constitution: The Article V constitutional Convention Amendment Process,”

[http://www.law.harvard.edu/students/orgs/jlpp/Vol30\\_No3\\_Rogersonline.pdf](http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No3_Rogersonline.pdf)

Almost alone in disputing the theory that a constitutional convention would be a “runaway” convention is Robert Natelson [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2044296](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044296) a former professor of law at the University of Montana. His views are not particularly well accepted, however, as indicated by the fact that the law faculty of Montana voted to prohibit him from continuing to teach a constitutional law class, and that they have denied him Emeritus status.

## 7. Where is Arizona on this issue?

Arizona passed three of the proposed models in 2017 – the balanced budget amendment, the more expansive limitation on federal authority, and the balanced budget with some debt – the “all in one” proposal thereby putting itself on multiple lists of possibilities – along with several bills intended to protect against a runaway convention. In 2019, Arizona is in the process of passing another one on term limits. In the 2017 session, these were supported mainly on party line votes and only the “liberty amendments” bill was killed on a 14-16 votes.

The four different bills introduced in Arizona in 2017 were:

- HB2226 – joining the Compact with America (balance budget but with debt permitted on a limited basis, all-in-one proposal). Passed.
- HCR2010 – Convention of States, a balanced budget amendment with the broader language (“...impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for officials of the federal government. (Same as SCR1024) Passed.
- HCR2013 – balanced budget; (the same as SCR1002). Passed
- HCR2022 – choose delegates, attending planning meeting, Nashville, 2017 Passed
- HB2449 - controls over the Arizona delegates to a constitutional convention. Passed

HB2226 includes the entire compact language, as written by the Goldwater Institute and propagated through the Compact for America. HB2449 that would “control” the delegates is an exact copy of the ALEC model legislation.

The bill to control delegates prohibits any delegate from voting on any amendment that:

- “1. varies from the exact text of the amendment contained in the Article V application.
2. that is outside the scope of the subject matter contained in the instructions prescribed by the legislature. “

Each delegate would also take an oath to obey these rules and acknowledging that failure to do so would have them recalled as a delegate and would constitute a Class 6 Felony.

## **8. Conclusion (and a personal opinion)**

There is no way for anyone – ranging from people who hardly know anything about this issue to well-read constitutional scholars – to actually know what would happen if Congress “calls” a constitutional convention. So, some speculation is in order.

First, how likely is it that 34 states will actually propose similar-enough legislation that one will be called? The pendulum seems to swing rather dramatically. A few years ago it seemed unlikely; then it became a real threat with 28 states already approving and six that had all-Republican legislatures being targeted by ALEC and others. But not one of these approved an Article V amendment in 2018. And, conservative resistance in some of those states helped kill the idea.

Second, there almost certainly would be new sources of opposition if enough states begin to approach the 34 state mark. The simple balanced budget is the least dangerous of those that are gaining some support because even if a convention were called and proposed an amendment, there would be time to campaign against its ratification. Some of the highly objectionable characteristics of such a convention would then become clear, such as the fact that each state gets only one vote.

Third, one might think that if there were a clear and pressing need and substantial public support, Congress almost certainly would propose its own version of an amendment. However, the disarray in the Trump administration and the fact that the Senate cannot garner 2/3 vote as long as Democrats are in opposition means Congress is unlikely to propose even a balanced budget amendment.

Fourth, social psychologists tell us that people tend to be overly cautious when the degree of uncertainty is high and the possibility of losing what one already has is also high. This is called “prospect theory” (Daniel Kahneman and Amos Tversky) and for most people, left and right, there are parts of the constitution that are cherished. Rather than risk losing what one already has, public sentiment probably would turn against the possibility of a highly risky outcome from a constitutional convention. That assumes, of course, that people start paying attention.

HB2226 (the compact with American proposal) is by far the most dangerous because it envisions a one-shot scheme so that when 38 states have joined the compact, they will in effect have ratified the amendments proposed within that legislation. Surely there would be court challenges on this, at least one of the grounds being that the constitution clearly envisions two separate processes – proposing by one body, and then ratifying afterward by another. Fortunately, only five states have approved this version and the possibility of a court challenge is greater as the Constitution clearly implies a two step process, not an “all in one” move to amend.



Arizona bill	Status	Name	Main Provisions of the Arizona 2017 Article V Convention Bills & Resolutions Compiled by Anne L. Schneider, PH.D., March 2017	Support	# States
2019 SCR1014 HCR2022	Passed House	Term Limits	"...propose an amendment to the Constitution of the United States to limit the number of terms a person may serve as a Member of the United States House of Representatives and as a Member of the United States Senate. "		2
<b>2018 - None</b>					
2017: HCR2013  (SCR1002)	Passed	Balanced Budget	"...AZ formally applies to the Congress of the United States to call a convention of the states only for the purpose of proposing an amendment to the Constitution of the United States requiring that, in the absence of a national emergency, the total of all federal appropriations made by Congress for any fiscal year may not exceed the total of all estimated federal revenue for that fiscal year, together with any related and appropriate fiscal restraints." ...AZ Secretary of State Transmit copy to U.S. Sen...U.S. House..."	ALEC	28
H2017 CR2010  (SCR1024)	Passed  Killed, recon, pass	<a href="#">Convention of States</a> – Limit Federal Government (topic)	"Whereas...AZ formally applies...limited to proposing amendments to the Constitution of the United States that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government and limit the terms of office for federal officials and for members of Congress..." "AZ...delegates instructed to not support term limits for members of congress that would limit their number of years to fewer than twelve." Notice, these are "topics," not specific amendments. Examples of amendments: term limits, balanced budget, redefinition of general welfare clause, commerce clause, limits on taxation, limits on expenditures.	ALEC	9
2017 HB2226	Passed	<a href="#">Compact for America</a>	(Sen. Fact Sheet): Establishes the Compact for a balanced budget amendment. Prohibits total outlays from exceeding total receipts; authorized debt is 105% of outstanding debt unless increase approved by state legislatures; Congress can authorize debt if it public ally refers single-subject measure to state legislatures for approval; requires President to impound if debt exceeds 98% of debt limit; new taxes require 2/3 vote; states cannot withdraw without unanimous approval once 3/4 have joined the compact; creates the Compact Commission, meets once a year; delegates to the convention are governor, speaker House, and President Senate; application not made until 3/4 states join the compact; Prospectively adopts and ratifies the balanced budget amendment through the respective legislature	Gold- Water Inst.  ALEC	5

2017 HCR2006	Failed 27-31	Kitchen sink (Levin, <a href="#">liberty amendments</a> )	Long list of possible amendments: term limits, direct election of senate; term limit on supreme court; balanced budget; 17.5% limit on fed. Spending; 15% limit on tax; reauthorize every agency every 3 years; ¾ states can override fed regulations; valid voter id to vote; other restrictions on vote	Mark Levin	
2017 HCR2022	Passed	Planning	Provides for AZ to pay for a delegation to the July 2017 National Balanced Budget Amendment Planning Convention (Nashville) and any Article V Balanced Budget Convention.		
2017 HB2449	Sen. Rules	Binds delegates, Article V con.	Binds delegates; provides punishments.		

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