



America's Constitutional Crisis: Time for an Article V Amendments Convention?

by Karen Lugo

Director, Center for Tenth Amendment Action

The movements for an Amendments Convention by the states breathe life into vital constitutional structure. Introducing these debates into the public square for deep analysis and robust inspection is the most important part of organizing around Amendment proposals.

Key Points

- Debate about the leading issues driving Amendments like a balanced budget requirement and regulation accountability will spur these issues on to center stage.
- Organizing toward an Amendments Convention will re-engage voters.
- The Amendments Convention supporters will re-invigorate constitutional enthusiasm.
- Discussion that centers on constitutional structure will educate the American public as to necessary reform.
- The energy behind Amendment proposals will motivate Congress to act ahead of a Convention called by states.

Introduction

Americans are considering new constitutional amendments to address federal breaches of enumerated power restraints. There are now feeble limitations on massive entitlement programs, chronic deficit spending, overuse of agency directives, and improper executive orders. These abuses of federal authority rise from disregard for the separation between branches of government and the disrespect for the proper balance of power with the states. The constitutional insults reach to the very foundations of America's societal compact and are deeply felt by citizens as loss of opportunity, liberty, property prospects, and economic freedom.

The American Constitution has stood strong during tests of domestic conflict, international war, and economic crisis. None of the convulsive events that shook American society to the core have wreaked direct damage on the Constitution. It has been the disregard of politicians and judges for the Constitution's principled foundations that has undermined its guarantees of liberty and state sovereignty. What the American Constitution will not survive is the slow erosion of its underpinnings by incremental disregard and cumulative modifications.

The constitutional reinforcements proposed thus far by the states express intent to require a balanced federal budget, limit the terms of congress-members, and restrict Washington's

regulatory power. Where the Constitution may have spoken implicitly on these concerns, politicians and courts over time have re-shaped the meaning of the Commerce Clause, the Necessary and Proper Clause, and the Spending Clause to alter the nature of government's role in the life of individuals and functions of the states. Now citizens through their states are employing a constitutionally provided Article V amendment mechanism to restore the boundaries between the private and government domains.

Whether structural limitations on government should be re-asserted through the ballot box or through constitutional measures is part of the debate. The movement behind the constitutional route asserts that the problem is larger than elected officials can or will address. This movement sees that the structure has been so eroded that it cannot provide the critical curbs on federal power and ambition. They also point to a demonstrated lack of congressional will to reduce its own power or to curtail presidential overreach.

Legal commentator and former U.S. Attorney Andrew McCarthy has written:

As designed, the Republic's central government featured citizen legislators, representatives of the people who actually were, well, representative of the people. More out of patriotic duty than financial remuneration, they met infrequently in the nation's

continued

capital—just a few months out of the year—reflective of the fact that the national government's responsibilities, though vital, were few and critically reliant on the indulgence of state governments. Over time, as the progressive administrative state grew, particularly under the Wilson and FDR administrations, Washington incrementally devoured state sovereignty. With this dramatic shift in the balance of power, a governing elite emerged—a permanent Beltway ruling class of career politicians whose main interest was in increasing federal power. They now inhabit Congress as if they were life peers or revolve between the bureaucracy and its back-scratching cottage industry of lobbyists, consultants, and celebrity media commentators.¹

St. George Tucker, a Virginia state judge, federal appeals judge, and law professor in the early 1800s, predicted that an Article V state-called convention for amendments “will probably never be resorted to, unless the federal government should betray symptoms of corruption, which may render it expedient for the states to exert themselves in order to the application of some radical and effectual remedy.”²

Jonathan Turley, a center-left progressive constitutional law scholar, warned the Congressional Judiciary Committee that America has reached a “constitutional tipping point” due to presidential efforts to concentrate authority that should properly reside in Congress or in the states. He accused the ostensibly equal branches of government of “being inert” and generally passive. He charged American generally with witnessing this power grab “without a whimper of regret or opposition.”³

While some are hopeful that continuing with the election process as usual will produce officials that possess the resolve and clarity to tackle these severe constitutional challenges, some scholars see that the intense debates and political engagement involved in proposing, passing, and ratifying a constitutional amendment are urgently needed. Additionally, an amendment provides a constitutional backstop against congressional negligence and excessive presidential ambition. Due to the

extended and deep debate, constitutional amendments provide stabilizing and respected civilizational cornerstones.

Since deep discussions on constitutional matters are rarely had outside federal elections and judicial confirmation hearings, constitutional authorities recommend a full engagement of the citizenry at this pivotal time. When Americans consider that there has rarely been a national forum for debating foundational legal framework, it is clear that the process alone is likely to engage many who care deeply about the consequences of the present trajectory of constitutional error.

State legislatures will also grapple with this vital debate. As states address these constitutional overreach challenges, important federalism lessons will be researched and decided.

Article V Amendments Convention

The American Constitution provides two avenues for adding amendments to the nation's governing compact. Whether an amendment may be proposed by a two-thirds vote in Congress or by delegates in a convention called for by at least two-thirds—34—of the states, the amendment must finally be ratified by three-fourths of the 50 United States.

Although some counts show that there have been over 11,000 attempts to modify the Constitution in the last two-and-a-quarter centuries of American life, the Constitution has only been successfully amended 27 times. Each of the existing amendments was initiated by Congress and passed both houses by a two-thirds vote before the amendment was submitted to the states for eventual ratification.

The alternative route through the states has been attempted as recently as 1985 with a balanced budget amendment campaign. The Constitution says that Congress “shall call a Convention”^{*} when two-thirds of the states submit an application proposing an amendment to the Constitution. These applications are often submitted in the form of a congressional resolution.

* The Federalist No. 85: “The words of this article are peremptory. The Congress ‘shall call a convention.’ Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air. Nor however difficult it may be supposed to unite two thirds or three fourths of the State legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.” (emphasis in original)

James Madison foresaw the need for amendment impetus from the states “to originate the [Constitutional] amendment of errors as they may be pointed out by the experience on one side, or on the other.”⁴

Constitutional law professor Rob Natelson has written a comprehensive historical and practical handbook for state legislators available through the American Legislative Exchange Council (ALEC) called *Proposing Constitutional Amendments by a Convention of the States*.⁵

Indiana State Senator David Long has also prepared an excellent resource guide for state legislators contemplating an amendment initiative entitled, *Amending the Constitution by State-Led Convention*.⁶

Over time, 45 states have generated applications to Congress for an amendments convention. The subject matter of the various applications varies but the two recurrent themes are: balanced budget proposals and restrictions on federal regulatory power. Twelve states have explicitly rescinded their applications since 1993 leaving 33 arguably valid applications on file⁷ until Michigan just passed a resolution calling for a convention to amend the Constitution.⁸

The qualification of the applications is a point of controversy but legal scholar Michael Paulsen argues that all applications passed according to prescribed protocol and regardless of subject, generally qualify unless the application has express language that restricts the convention to only the subject matter presented in the application.⁹

This last year, a new roll call of states responded to convention proposals with resolutions that are moving through committees and state house assemblies. There likely will be an additional 12 to 15 states passing some form of a convention call in 2014.

The current interest in organizing an Article V Convention Amendments campaign is gaining momentum for many reasons. First, Mark Levin's book *The Liberty Amendments* makes compelling cases for both the urgency and efficacy of the cause; second, the response to presidential overreach from Congress has been disorganized and lackluster; and third, there has been little success against the advance of unrestrained spending and the explosive growth of government that threatens devastating effects on current and future generations.

The Threat of a Convention May Be More Potent Than the Reality

There is much to be said for the power inherent in just proposing and organizing an amendments convention. Rather than dithering and hand-wringing over how long the process may take and what are the risks and obstacles, there are those that argue for the “shot across the bow” warning effect when masses demand constitutional accountability.

In some cases, the petition process has been used to convince reluctant legislatures that there is state support for constitutional change. Due to the heightened interest in pressing constitutional questions, history demonstrates that both state legislatures and federal congressional interests will move to stay ahead of a citizen movement.

Law professor Gerard Magliocca has written extensively on the widespread effect of mass movements of the citizenry—specifically dealing with calls for Article V conventions—and he recites several historical examples of legislative action as well as judicial notice based upon the organizational impulses from a majority of the states.¹⁰

Whether the massive support for an amendments convention is perceived as what Magliocca calls “brandishing the ultimate weapon,” an undeniable surge of enthusiasm may well go a long way to accomplishing the policy goals of a convention as the effort gains momentum.

Noted constitutional authority and author, Yale Professor Akil Amar has written that an amendments convention “might never need to be deployed in order to have its desired effect.”¹¹ He asserts that the “mere potential availability might suffice to pry needed amendment proposals from a Congress desirous of maintaining control over the amendment agenda.”¹²

For example, when the 17th Amendment was considered, the legislation cleared the two-thirds vote requirement twice in the House of Representatives but a reluctant Senate refused to pass it with the required supermajority vote. States mobilized to call a convention and the measure to establish the direct election of senators by popular vote rapidly gained approvals. As the state applications rose to the 30-state level, the Senate grew concerned about the prospects of a state-called convention and so moved to pass the 17th Amendment in 1912. States ratified the amendment a year later.

Even with enthusiastic support from the states and President Reagan, the Balanced Budget Amendment could not clear the supermajority vote requirement in the House. States had mobilized concurrent with congressional activity and when Missouri became the 32nd state to present an application for a state-called Article V Convention, Congress moved to pass the Gramm-Rudman-Hollings Act in 1985 which triggered automatic spending cuts. This took the steam out of the state drive to convention despite President Reagan's direct plea to the state of Montana urging passage in the 33rd state: "I believe this may finally convince Congress to act on an amendment of its own, which has always been my goal."¹³

The Montana effort though was on the back side of the enthusiasm curve for a Balanced Budget Amendment as support was divided by passage of what is commonly known as Gramm-Rudman in 1985. Unfortunately the automatic spending cuts contained in Gramm-Rudman were eliminated in 1990's budget deal.

Interestingly, appellate courts have sometimes regarded strong state support for political initiatives as persuasive authority in constitutional assessments. Magliocca notes a series of legal "decisions involving the death penalty and the Due Process Clause, [where] the Justices have looked to the actions of state legislatures for interpretive guidance on contemporary values."¹⁴ He concludes that calls for an amendments convention on issues of deep concern to Americans should send the same kind of message.

Finally, regardless of the outcome, the groundswell of enthusiasm and support surrounding state-generated calls for an amendments convention would hold focus on critical issues and would re-engage many supporters that have concluded that Washington is so taken with special interests that citizen participation is futile. Efforts to organize an amendments convention will also underscore demands for political accountability on the highest priority state and individual concerns.

Amendment Initiatives in Circulation

Balanced Budget Amendment by State Petitions for an Article V Convention

An organization called Citizens for Self-Governance¹⁵ under the direction of Mark Meckler, co-founder of Tea Party Patriots, and Michael Farris, Chancellor of Patrick

Henry College and Chairman of the Home School Legal Defense Association, is lobbying state legislators to support an amendments convention effort. There have been two summits, the first was the noted Mt. Vernon Assembly, to inform and organize around "stopping runaway power of federal government." A map on the Citizens for Self-Governance website that reflects supportive volunteer and legislative activity by state shows that the convention call is moving forward in eight states.

Balanced Budget Amendment by Interstate Compact and Article V Convention

Nick Dranias of the Goldwater Institute is leading the effort for a balanced budget-themed initiative that starts as in interstate compact: "The compact allows the states to agree in advance to everything they control in the Article V process—from the text of the proposed amendment, to the application to Congress, to delegate appointments and instructions, to the selection of the convention location and rules, to the ultimate legislative ratification of the proposed Balanced Budget Amendment."¹⁶

This approach allows states to negotiate agreement on the terms of the proposed balanced budget measure within the interstate compact framework while also legislating the form and structure of the delegate process for the ultimate convention.

Regulation Freedom Amendment

The Madison Coalition, under Roman Buhler's guidance, is working with leadership in state houses to produce a "Regulation Freedom Amendment." This amendment would be similar to, but simpler than the REINS (Regulations from the Executive in Need of Scrutiny) Act, passed by the U.S. House. It would require that Congress approve major new federal regulations before they can take effect. The amendment text says: "Whenever one quarter of the Members of the U.S. House or the U.S. Senate transmit to the President their written declaration of opposition to a proposed federal regulation, it shall require a majority vote of the House and Senate to adopt that regulation."

The Madison Coalition hopes to move states in dramatic fashion such that Congress is motivated to pre-empt a convention of states and pass the Regulation Freedom Amendment by a supermajority. The Amendment would then be presented for ratification by three-fourths (or 38) states.

There is sound momentum behind the Regulation Freedom Amendment with Governors Mike Pence of Indiana and Phil Bryant of Mississippi on board. Also, Tennessee Senate Majority Leader Mark Norris, Idaho House Speaker Scott Bedke, Wyoming House Speaker Tom Lubnau, Georgia Senate President David Shafer, Indiana Senate President David Long, along with legislators in more than 20 states are supporting this regulatory reform.

As these and other plans progress there will be opportunity to scrutinize the relative merits and drawbacks of the respective amendment strategies. Legislators and citizens working to bring state attention to an amendments convention may want to consider participating in all of the efforts that are sound and have the potential support to go the distance. It is likely that some efforts will merge, at least at the point that a convention is called. Alternatively, the several measures may be taken up in Congress as amendment instruments in an effort to pre-empt a state-called convention.

Can Convention Delegates Be Limited by the Language of Amendment Resolutions as Approved in the States?

The Mount Vernon Assembly, mentioned above, met in December 2013 to lay groundwork for a Convention of States. This unofficial assembly of state legislators discussed ground rules for a convention and recommended “laws in each state that strictly limit the authority of delegates and punish those delegates who exceed their authority.”

Indiana has been the first to consider statutory structure for delegates and amendment language. While formally calling for a convention to issue the Regulation Freedom Amendment, Indiana State Senator David Long shepherded legislation that binds Indiana delegates to the substance of the state-approved measure by limiting the authority of delegates to just an up or down vote on a specific amendment and also replacing delegates who disregard that limit.¹⁷

The Tennessee Senate and the State Houses of Wisconsin and Arizona have also recently passed similar “faithful delegate” laws.

Constitutional scholar Rob Natelson, law professor Mike Rappaport, and House of Representatives Senior Counsel

Michael Stern have done extensive research on a limited convention and agree that it is possible to bind delegates to only accomplish the purpose that the states describe for them in the authorizing legislation.¹⁸

To the contrary, constitutional analysts like William Alstynne argue that historical framing-era precedent denies the validity of a convention where delegates cannot negotiate toward a reasonably-related but compromised result.¹⁹

What Do Scholars, Historians and Constitutional Analysts Say?

Most constitutional authorities in the originalist tradition that have opined publicly support the idea of organizing toward an amendments convention. The overriding benefit of educating the citizenry as to the constitutional theories at stake and re-engaging those that have been discouraged by an unresponsive political process should outweigh the interest in continuing with conventional strategies to influence legislation. Even so, it is important to consider the arguments on either end of the range of interests.

Eagle Forum’s Phyllis Schlafly has spoken out against the idea of an amendments convention based upon her belief that the convention may be sidetracked or corrupted and she has written that “[t]he whole process is a prescription for political chaos, controversy and confrontation.”²⁰

Matt Spaulding, Associate Vice President and Dean of Kirby Center at Hillsdale College, wrote several years ago when he was with the Heritage Foundation that: “The lack of precedent, extensive unknowns, and considerable risks of an Article V amendments convention should bring sober pause to advocates of legitimate constitutional reform contemplating this avenue.”²¹

Michael Uhlmann, Claremont Graduate School Political Science professor argues that “[c]onstitutional conventions aren’t things to toy with” and “I don’t trust the spirit of the age. It could go anywhere.”²²

The skeptics all seem to share a fundamental distrust of the process and alarm over the potential for mischief. However, there is a very distinguished list of supporters that is growing by the day. They have resolved concerns to the degree that they see the potential benefits of both

the national discussion and the amendment possibilities as outweighing the risks.

Most seem to be in accord with constitutional law professor and author of *The Lost Constitution*, Randy Barnett who observes that the present course has proven to be intolerably destructive and that an amendments convention could not foreseeably produce worse results:

“We now have a runaway Congress,” he said. “What’s worse, a convention that can be checked in numerous ways—not just one way, but many ways—or the runaway Congress we now have? We have a clear and present danger of the runaway Congress.”²³

Well-known constitutional commentator Ilya Shapiro of Cato Institute agrees with Barnett and says fears of a runaway convention are overblown: “I mean, if the American people can propose and ratify amendments that constitutionalize socialism (or whatever), then we’ve lost the political culture ballgame already and might as well go sea-steading in Galt’s Gulch.”²⁴

Other notables that support the organization of an Article V convention—specifically the Regulation Freedom Amendment concept—are Federalist Society co-founder David McIntosh, Americans for Tax Reform Chair Grover Norquist, former House Appropriations Chair Bob Livingston, Former Veterans Affairs Sec. and RNC Chair Jim Nicholson, RNC Counsel John Ryder, RNC Rules Chair Bruce Ash, former RNC General Counsels David Norcross, Tom Sansonetti and Mark Braden, President Reagan’s Director of the White House Office of Legal Counsel Chuck Cooper, and David Rivkin, counsel to the 26 states who sued to overturn Obamacare.

George Will has recently endorsed the route that Goldwater Institute is taking to a balanced budget amendment, called Compact for America. Goldwater Institute is taking a novel approach to the amendment end by initially organizing states under an interstate compact agreement. Will qualifies the plan as one that provides needed limits:

Now, leave aside questions about this tax policy, or about the wisdom of constitutionalizing any tax policy. Do you believe a balanced-budget amendment is a required response to the nature of today’s politics and governance, now that courts neglect to do their duty in enforcing Congress’s adherence to the Constitu-

tion’s enumeration of its powers? If so, the compact’s amendment is remarkably resistant to evasion.²⁵

Andrew McCarthy, a highly respected government attorney and cultural observer, commended Mark Levin’s *Liberty Amendments* book and heralded the Article V Convention mechanism as “the plot to save America.” McCarthy supplied this historical imperative in his review of Levin’s book:

Levin takes liberty and the separation of powers as his intrinsically linked guiding lights and recalibrates constitutional governance accordingly—just as the Framers foresaw when they sculpted an amendment process that, as Madison predicted, would neither render the Constitution “too mutable,” nor “perpetuate its discovered flaws.”²⁶

The Constitution in Crisis

When Wisconsin state Representative Chris Kapenga conceived and chaired the Mount Vernon Assembly to draft convention ground rules, he understood the historic gravity of the moment:

About a year ago, I visited Mount Vernon for the first time. I sat on the same porch where George Washington sat with companions such as James Madison, Thomas Jefferson, and Alexander Hamilton. It inspired me and made me think about how we are dealing with issues now similar to those they were dealing with then: issues of balance. Then, America had to strengthen its federal government. Now, the federal government’s power has grown excessive. The states need to step up and re-balance matters.²⁷

Momentum is building around an amendments convention. States have the opportunity to inform an historical debate on how to prioritize and organize the movement. For those who believe that several constitutional tipping points have occurred and that the window to put corrective pressure on the scales is closing, this constitutional amendments convention is a present remedy that comes straight from the Framers of the original Constitution. ★

Endnotes

- ¹ Andrew C. McCarthy, "The Plot to Save America," *The New Media Journal* (20 Sept. 2013).
- ² Henry St. George Tucker, *Blackstone's Commentaries: With Notes Of Reference To The Constitution And Laws Of The Federal Government Of The United States And Of The Commonwealth Of Virginia* 371-72 (Rothman Reprints, 1969) (1803).
- ³ Jonathan Turley, *Enforcing the President's Constitutional Duty to Faithfully Execute the Laws Testimony before the Committee on the Judiciary*, United States House of Representatives (26 Feb. 2014).
- ⁴ *The Federalist No. 43*.
- ⁵ Robert G. Natelson, "Proposing Constitutional Amendments by a Convention of the States: A Handbook for State Lawmakers."
- ⁶ David Long, Indiana Senate President Pro Tempore, "Amending the Constitution by State-Led Convention: Indiana's Model Legislation."
- ⁷ Michael Stokes Paulsen, "How to Count to Thirty-Four: The Constitutional Case for A Constitutional Convention," 34 *Harv. J.L. & Pub. Pol'y* 837, 856-7 (2011).
- ⁸ Jonathan Oosting, "Accidental History, How Michigan May Have Triggered Convention to Amend U.S. Constitution," MLive (10 Apr. 2014).
- ⁹ Paulsen, *supra*, at 848-50.
- ¹⁰ Gerard Magliocca, "State Calls For An Article Five Convention: Mobilization And Interpretation, 2009," *Cardozo L. Rev. De Novo* 74 (2009).
- ¹¹ Akhil Reed Amar, *America's Constitution: A Biography* (New York, 2005) 290.
- ¹² *Ibid.*
- ¹³ Magliocca, *supra* at 84-5.
- ¹⁴ *Ibid.*, 77.
- ¹⁵ Citizens for Self-Governance, *Article V: An Emergency Solution, Hidden in Plain Sight*.
- ¹⁶ Nick Dranias, "Compact for a Balanced Budget," Goldwater Institute (20 Nov. 2013).
- ¹⁷ David Long, Indiana State Senator. "Amending The U.S. Constitution by State-Led Convention: Indiana's Model Legislation."
- ¹⁸ Mike Rappaport, "A Limited Article V Convention," *Library of Law and Liberty* (3 Sept. 2013).
- ¹⁹ William Van Alstyne, "Does Article V Restrict The States To Calling Unlimited Conventions Only? - A Letter To a Colleague" (9 Mar. 1979).
- ²⁰ Phyllis Schlafly, "Is Article V in Our Future?" *Conservative Action Alerts*.
- ²¹ Matthew Spaulding, Ph.D., "Don't Be Fooled By Article V Conventions," *The Foundry* (10 Feb. 2011).
- ²² Philip Klein, "Is It Time For a Convention?" *The American Spectator* (Oct. 2010).
- ²³ Adam Freedman, "Who's Afraid of a Runaway Convention?" *National Review Online* (14 Oct. 2010).
- ²⁴ Ilya Shapiro, "Who's Afraid of an Amendments Convention?" *CATO at Liberty* (3 Feb. 2011).
- ²⁵ George Will, "Amend the Constitution to Control Federal Spending," *Washington Post* (9 Apr. 2014).
- ²⁶ McCarthy, *supra*.
- ²⁷ Ralph Benko, "The Big Political Story of 2016 Will Not Be About Who Replaces Obama," *Forbes* (9 Dec. 2013).

About the Author



Karen Lugo is the Director of the Center for Tenth Amendment Action at the Texas Public Policy Foundation. She joined the Foundation in September 2013.

As Co-Director of the Center for Constitutional Jurisprudence Center in California, Lugo has submitted circuit-level and Supreme Court *amicus* briefs on such issues as Structural Separation of Powers; Federalism, Commerce Clause, and Police Powers; FISA Surveillance; Healthcare Reform; Arizona's Border Security; and more.

Lugo is the founder of the Libertas-West Project, a center for study Islamic integration and radicalization issues. In this capacity, she writes and speaks for European and American groups on the importance of basing assimilation efforts on principles of Western exceptionalism. Lugo was an appointee to the California Advisory Committee to the U.S. Commission on Civil Rights. She was president of the Orange County, California, Federalist Society lawyer chapter for seven years and currently serves on the Federalist Society Federalism and Separation of Powers as well as the National Security and International Law Executive Committees.

Lugo has been a regular guest on the Orange County PBS local issues debate program, "Inside OC," and she is a frequent contributor to *Pajamas Media*, *National Review Online*, *Townhall.com*, *American Thinker*, and *Family Security Matters*. She has been interviewed by dozens of radio hosts and has spoken for hundreds of civic groups on constitutional and cultural concerns.

About the Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

