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## A Proposed Balanced Budget Amendment

By Robert G. Natelson\*

### Introduction

As the debt of the United States government has mounted, there have been recurrent calls for adding a balanced budget amendment (BBA) to the U.S. Constitution.

However, drafting an acceptable BBA is difficult. One cannot merely copy balanced budget requirements from state constitutions because of the complexity of the federal financial system and because deficit financing is so ingrained in Washington, DC that conventional language likely would be evaded.

Moreover, the amendment must be politically salable and consistent with the overall constitutional design. When measured against such criteria, existing drafts suffer from significant, and sometimes crippling, defects.

Cognizant of political and constitutional obstacles that may face proposed balanced budget amendments to the U.S. Constitution, Professor Natelson offers here a new draft BBA for discussion.

In this paper, the author seeks to restart the process by offering a new draft for discussion.

### 1. Background and the Federal Debt Crisis

During the first half of the nineteenth century, state government overspending resulted in several states defaulting on their debt—that is, those states effectively declared bankruptcy.<sup>1</sup> In response, Americans inserted in nearly all state constitutions requirements that the state annual or biennial

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This paper owes much to the author's long-time study of fiscal limitations placed in state constitutions. His most important publication on that subject is Robert G. Natelson, *The Colorado Taxpayer's Bill of Rights* (2016).

budget be balanced.<sup>2</sup> These provisions forbid states from financing current expenses by incurring debt extending beyond the budget period.

Critics of these provisions sometimes point to fiscal problems in some states as evidence that balanced budget requirements have no effect. The truth is more nuanced. Balanced budget requirements differ from state to state: Some requirements are stronger than others. In Illinois, for example, which is sometimes cited as a state in financial trouble, the balanced budget rule is notably weak.<sup>3</sup> On the other hand, empirical studies of all states over time have shown balanced budget rules, especially stronger ones, do make a difference.<sup>4</sup> Perhaps the best evidence, though, is the overall experience of two centuries: Before state balanced budget requirements became common in the nineteenth century, there were multiple state debt defaults. Since state constitutional balanced budget rules became common, individual states sometimes have run into financial difficulties, but there have been no mass defaults of the kind that afflicted America during the 1840s.

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In any event, fiscal problems at the state level pale in comparison with the financial disaster many observers believe is looming at the federal level.

The seeds of the crisis were sown in the late 1930s, when the Supreme Court ceased to enforce the Constitution's principal limits on spending.<sup>5</sup> This decision was applauded by Keynesians, who argued governments should incur deficits in years of economic slowdown or in other emergencies and run surpluses in years of prosperity.

Whatever the merits of that argument as a matter of economic theory, the political reality has been Congress incurs deficits regardless of economic conditions. In the 78 federal fiscal years beginning in 1940, Congress has run a deficit 67 times and a surplus only 11 times. The deficits routinely have far exceeded even the largest surpluses.<sup>6</sup> In fact, the budget has not been balanced even once since 2001,<sup>7</sup> which is why the debt now amounts to nearly \$20 trillion. Efforts in Congress to address the problem for the long term have failed repeatedly.

Because the federal government can create money to cover current deficits, it has been able to postpone a nineteenth century-style debt crisis. However, almost everyone agrees the current trajectory is not sustainable. Debate tends to focus on whether continuing to add debt is more likely to provoke inflation, a currency crash, or merely a lower standard of living.

As a result, a supermajority of the American public believes a balanced budget amendment should be added to the U.S. Constitution.<sup>8</sup>

## 2. A Balanced Budget Amendment

Adopting amendments requires following the procedures laid out in Article V of the Constitution. To become effective, an amendment must be ratified by three-fourths (38) of the state legislatures or of state conventions. To be considered for ratification, however, the amendment must first be *proposed*. All previous amendments have been proposed by Congress,

and the same dysfunctions that impede Congress from balancing the federal budget also prevent it from proposing a BBA.

Moreover, experience at the state level teaches fiscal limitations proposed by legislatures tend not to have much “bite.” In other words, their restrictions are weak and easily evaded. This suggests even if Congress were to propose a BBA, it probably would have little practical effect.

Therefore, the most promising vehicle for proposing a BBA is the “Convention for proposing Amendments” authorized in Article V. Historical and legal sources, as well as an 1831 Supreme Court opinion,<sup>9</sup> tell us it is merely one kind of “convention of the states.” That fact renders convention protocols and composition rather clear, because conventions of the states have been common throughout American history.<sup>10</sup> Indeed, some conventions of states have met specifically to recommend constitutional amendments, although outside the formal structure of Article V.

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To trigger a convention for proposing amendments on any particular topic, Article V provides two-thirds of the state legislatures (34 of 50) must adopt resolutions (“applications”) demanding Congress issue a call. A majority of state legislatures have adopted BBA applications,<sup>11</sup> rendering it likely a proposing convention on that topic will meet in the next few years.

Some critics of both left and right fear such a convention will be open-ended and will allow for changes in the very nature of the American regime. But there is almost no legal or historical basis for that fear.<sup>12</sup> A convention serving a governmental purpose is legally restricted to the scope of its call. Thus, a convention for proposing a BBA will be limited to considering whether to propose such an amendment and, if so, to drafting the proposal. The convention will not draft on a blank slate. Precedents include the balanced budget provisions in state constitutions and numerous suggested drafts for a federal amendment. This *Policy Brief* suggests ways to build on the precedents.

### **3. Criteria for Drafting a Balanced Budget Amendment**

Drafting a constitutional amendment is never easy, and state-level experience demonstrates fiscal limits can be particularly difficult to write.<sup>13</sup> Some of the difficulties are political. Others are practical or semantic. Overcoming them requires adherence to at least the following criteria:

- The proposal should be written in a manner consistent with the Constitution’s text as currently understood. One should not draft as if one were writing a new, free-standing document.
- The Constitution is fairly concise, so complying with its style requires the amendment not be too long. Moreover, lengthy amendments face obstacles to ratification by feeding public suspicion and offering more targets for attack.

- To the extent possible, the amendment’s central terms should consist of words and phrases appearing elsewhere in the Constitution.
- The language should minimize opportunities for manipulation to evade the limits or otherwise thwart the intent behind them.
- Thus, the wording of exceptions (e.g., “emergencies”) should not be such as to allow exceptions to become the norm.
- Although all parts of the Constitution may come under judicial scrutiny, the amendment should minimize the chances of judicial intervention. In a democratic republic, budgeting is a quintessential *legislative* function.
- The amendment should not prejudice the outcome of unrelated constitutional controversies.
- The amendment should not contain ineffective or counterproductive provisions.
- The amendment should not include baggage that impedes creation of the coalition necessary to ratify.

#### **4. The Text of the Amendment**

The draft proposed here is set out below. The wording is necessarily technical, but a short “translation” follows it.

Section 1. Every measure that shall increase the total of either the public debt of the United States or the contingent public debt of the United States shall, after complying with the requirements of the seventh section of the first article of this Constitution, be presented to the legislatures of the several states; and before the same shall take effect, it shall be approved by a majority of legislatures in states containing a majority of the population of the United States as determined by the most recently completed decennial enumeration pursuant to the third clause of the second section of the first article. Each state legislature shall have power to determine its own rules for considering such measures.

Section 2. “Contingent public debt” means the secondary public liabilities of the United States. Any measure to increase total contingent public debt shall be presented to the state legislatures separately from any measure to increase total public debt.

Section 3. Any purported increase in total public debt or contingent public debt after the effective date of this article not approved in compliance with this article shall not be deemed money borrowed on the credit of the United States pursuant to the second clause of the eighth section of the first article nor valid public debt under the fourth section of the fourteenth article of amendment.

Section 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution within seven years from the date of its submission to the state legislatures or conventions in accordance with the fifth article of this Constitution. This article shall become effective six months after ratification as an amendment to the Constitution.

In simple modern English, this means Congress must obtain approval of a majority of the state legislatures, representing a majority of the U.S. population, before it increases the federal debt. It also must obtain approval of the same majority before it commits the federal government to paying debts others have promised to pay but fail to do so.

Controlling increases in debt in this manner has the necessary effect of forcing Congress to balance its budget unless the state legislatures agree running a deficit is necessary.

## 5. How the Draft Meets the Criteria

### A. Consistency with the Constitution's text

The proposal generally meshes with the Constitution's style and language. For example, it uses the future, future perfect, and future imperative tenses in a way not common in drafting today, but as the Constitution uses them. The proposal's key terms appear elsewhere in the existing document. The device of empowering state legislatures to

The BBA proposed here generally meshes with the Constitution's style and language. The proposal's device of empowering state legislatures to perform a federal function also appears in the existing document.

perform a federal function also appears in the existing document; consistently with established case law,<sup>14</sup> the state legislatures employ their own procedures for this purpose. The amendment thereby preserves the rule that fiscal powers are legislative in nature.

Like the existing Constitution,<sup>15</sup> the proposal provides cross-references to other parts of the instrument. The specific cross-references in the amendment are located in the footnote below.<sup>16</sup>

### B. Brevity

The length of the draft is well within historical norms for an amendment to the U.S. Constitution. The following list compares the word count of this draft and the five longest amendments previously adopted:

Fourteenth Amendment: 423 words

Twelfth Amendment: 399 words

Twenty-Fifth Amendment: 388 words

Twentieth Amendment: 341 words

**BBA Draft (including section tabs): 281 words**

Twenty-Second Amendment: 162 words

Of course, legislation represents a way to carry out constitutional provisions, and legislation need not be as brief as constitutional provisions should be. In a recent Heartland Institute *Policy Brief*, for example, economists John Merrifield and Barry Poulson suggested adoption of a deficit/debt brake to limit federal deficits.<sup>17</sup> Although their braking mechanism is too complicated to insert in the Constitution, one or both houses of Congress could adopt it as a house rule to assist in complying with a BBA.

### C. Use of constitutional and previously defined terms

Most BBA drafts rely heavily on terms without constitutional precedent, including, for example, “outlays,” “estimated revenue,” “single subject,” “gross national product,” and “emergency.”

If drafters of an amendment use terms not otherwise appearing in the Constitution, they may add definitions, increasing the amendment’s length. Or they may leave them undefined, increasing the risk of uncertainty, litigation, and official manipulation.

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Although the Constitution does not speak of “outlays” or “estimated revenue,” it does speak of borrowing and debt,<sup>18</sup> and a BBA can be expressed in those terms. If the government does not add to its debt during a given period, it has balanced its budget. Thus, one can achieve the same result by preventing debt increases as by mandating that outlays not exceed revenue.

This draft takes the debt-limitation approach. By doing so, it assures all central terms except one are terms that already appear in the Constitution. Those terms are: *presented* (derived from presentation of bills to the president),<sup>19</sup> *public debt* (appearing in the Fourteenth Amendment),<sup>20</sup> state *legislatures* (appearing throughout the Constitution),<sup>21</sup> *enumeration* (referring to the census),<sup>22</sup> legislative rules,<sup>23</sup> and money borrowed *on the credit of the United States*.<sup>24</sup>

The sole significant exception is “contingent public debt.” Because this term is new, the amendment defines it as “the secondary liabilities of the United States.”

This definition should offer no serious difficulties because secondary liability is a basic legal concept taught in all law schools. Essentially, one is secondarily liable if one becomes liable only if the principal debtor fails to pay.<sup>25</sup> Examples of federal secondary liability are loan guarantees such as those by the Small Business Administration and Department of Veterans Affairs, and mortgage insurance by the Federal Housing Administration.<sup>26</sup> Secondary liability also can arise from treaties or executive agreements by which the U.S. government serves as a surety for payments by a foreign government.

The federal government’s secondary liabilities far exceed its direct primary liabilities; by one estimate they are six times as large.<sup>27</sup> This is a matter of great concern to many people, and this proposed amendment provides for a way to check their rise. If, however, it becomes practically

or politically necessary to limit the BBA measure only to primary debt, this draft can be adjusted with minimal effort. The result appears in the footnote.<sup>28</sup>

#### **D. Minimize opportunities for manipulation**

Experience at the state level shows politicians and judges often manipulate fiscal restraints so as to impair their effect.<sup>29</sup> Although no constitutional language is foolproof, it is possible to draft a balanced budget amendment relatively less vulnerable to manipulation.

One way this BBA draft minimizes opportunities for manipulation is by employing existing constitutional terms rather than introducing phrases without established meaning. In addition to increasing legal clarity, appropriate use of known terminology can create

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positive incentives for enforcement. This is the effect of the draft's denial of "public debt" status to federal borrowing not duly approved under the amendment.

To explain: One way a government may avoid financial restrictions is to enact a revenue-raising device and label it with a title different from those mentioned in the restriction. For example, a *de facto* tax may be labeled a "fee" to avoid a tax-limitation measure. Under this draft, if Congress labels a device anything other than "public debt," then Congress renders the transaction outside the constitutional power to borrow "on the credit of the United States" and admits the obligation might be "questioned" (challenged) under the Fourteenth Amendment.

Moreover, unlike manipulable designations of "outlays" and "expected revenue," the federal debt limit is a concept established by practice<sup>30</sup> and, more importantly, relied on by financial markets. Raising the federal debt limit is usually a conspicuous public event and can lead to lower credit ratings and higher borrowing costs. This draft BBA enlists the financial markets as an enforcement mechanism by focusing additional attention and debate on raising the debt limit.

Finally, the requirement of presentment to, and approval by, state legislatures enlists those legislatures as agents of oversight. Of course, Congress may attempt to influence state legislative decision-making with bribes of grants in aid or warnings that in the absence of approval state funding will be cut. On balance, however, state legislatures retain some incentives to limit federal growth, simply because the more programs the federal government finances, the more likely it impinges on the prerogatives of the states.

#### **E. Provide for exceptions without permitting exceptions to become the norm**

One lesson of state fiscal restraints is that exemptions from the general rule should be provided for procedurally rather than by attempting to define words such as "emergency." Such words may be difficult to define sufficiently, and they are subject to official manipulation.

In this draft amendment, the procedural mechanism for creating an exception is presentment to the state legislatures and approval by a majority of them, in states representing a majority of the

American population. The approval mechanism was inspired by the proposed National Debt Relief Amendment (NDRA),<sup>31</sup> which has been endorsed by the state legislatures of Louisiana and North Dakota.

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NDRA, however, is open to the objection the states approving an increase in the debt might represent only a minority of the U.S. population. Accordingly, this draft adds the requirement the approving state legislatures contain a majority of the U.S. population. To avoid manipulation of population figures, those figures are

fixed by the latest decennial census rather than by interim estimates.

State legislatures serve as the approval mechanism for several reasons. They include the following:

- An alternative is to require a supermajority of both chambers of Congress, but the Senate and House are of very different sizes and optimal supermajorities differ with the size of the body polled.<sup>32</sup> Obtaining optimal figures for each chamber would involve detailed statistical work, and the results might change if either body changed in size.
- Under our system of government, borrowing is a legislative function, and one familiar to state lawmakers.
- State lawmakers have some incentive to scrutinize expansions of federal power, including fiscal power.
- Requiring congressional and state legislative action accords with the Constitution's character as, in James Madison's words, partly national and partly federal.<sup>33</sup>

## **F. Minimize judicial involvement**

Some state constitutions contain open-ended funding provisions that invite judicial intervention. Thus, provisions mandating "adequate" or "equal" school funding have afforded judges pretexts to take control over a considerable portion of the state budget.<sup>34</sup>

Similarly, attempts to define words such as "estimated revenue" unwittingly invite the courts to intervene. (Estimated by whom? Using what assumptions?) By contrast, an increase in the federal debt limit is a relatively straightforward concept, monitored by financial markets. Under this BBA draft, the determination of whether an increase in the debt limit is warranted is lodged in the federal and state legislatures, not in the courts.



## **G. Avoid prejudicing unrelated constitutional controversies**

A BBA should not decide more than the issue at hand. For example, the amendment should not prejudice future constitutional challenges to particular spending programs.

Some BBA proposals concede a portion of the economy to the federal government—say, 19 percent of gross domestic product (GDP). One objection to that approach is that it gives federal judges a reason for construing the BBA as a constitutional validation of those federal spending programs in force

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when expenditures were at or below that proportion of GDP. Colorable constitutional challenges should be decided on their merits after a full hearing, not as the inadvertent result of bad drafting.

## **H. Avoid ineffective or counterproductive provisions**

Over many years, we have learned a great deal from states' experiences with fiscal limitations. That experience demonstrates some provisions to be useless or even counterproductive. Examples include revenue caps based on economic performance, untested substantive terms such as "emergency," and supermajority thresholds inappropriate for the assembly making a decision. In particular, we have learned a supermajority that proves effective in a smaller body may become counterproductive in a larger one.

This proposed draft avoids those defects by avoiding economic formulae, relying on language with established meaning and on majority, rather than supermajority, decision-making.

Some balanced budget proposals contain "little Necessary and Proper Clauses"<sup>35</sup>—that is, provisions empowering Congress to enforce the amendment by appropriate legislation.<sup>36</sup> The provisions may have been inspired by constitutional amendments containing similar language.<sup>37</sup>

However, there are several reasons for omitting such a clause from a BBA, and this draft does so. First, a clause of this kind generally is inserted as part of a wider plan for increasing congressional authority. Such a provision appears in the Thirteenth Amendment, for example, as a way to grant Congress power to prevent slavery. Amendments designed specifically to reduce congressional reach, such as those in the Bill of Rights, do not feature language of this kind.

Second, there is no reason to recite that Congress has power to adopt procedures complying with a BBA because each house of Congress already enjoys full authority to adopt legislative rules to assist compliance.<sup>38</sup>

Third, in some instances, the courts have permitted Congress to abuse similar provisions. For example the Necessary and Proper Clause originally was designed simply as a rule of interpretation—as a message that Congress's express powers carried with them incidental powers of the kind Congress would enjoy even if there were no Necessary and Proper Clause.<sup>39</sup> However, the Supreme Court has permitted Congress to convert the Necessary and Proper Clause from a mere guide to interpretation to a vast reservoir of additional authority—thereby

permitting Congress to regulate all sorts of things outside its enumerated powers.<sup>40</sup> To a lesser extent, the analogous provision in the Fourteenth Amendment has been construed to grant Congress authority over matters otherwise reserved to the states.<sup>41</sup>

Under the circumstances, granting Congress power to enforce or facilitate the BBA by “appropriate legislation” or similar language is constitutionally unnecessary, and could even facilitate additional federal overreach.

## **I. Avoid provisions that, while attractive to some passionate conservatives or passionate liberals, will prevent the coalition necessary for ratification**

Conservatives drafting their ideal BBAs often suggest add-ons pleasing to them, such as restrictions on taxes. Liberals have proposed balanced budget amendments with clauses that exempt entitlement spending.

Such “bells and whistles” appeal to the conservative or liberal base, but they render impossible the wide consensus necessary to obtain ratification by 38 states. That is why the draft amendment proposed here is a “clean BBA”—that is, one without additional provisions. It also does not require any supermajority consent.

## **6. Conclusion**

This draft balanced budget amendment is designed to renew and improve discussion, not to end it. This draft assists the process of developing an acceptable BBA by identifying criteria for drafting and suggesting ways to meet those criteria.

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The difficulties in preparing an effective and acceptable BBA trigger an additional parting thought: Conventions of states during and before the nineteenth century consisted primarily

of state delegations of multiple commissioners, acting without significant technical support. Twentieth century conventions of states were composed somewhat differently. Because they addressed some highly technical issues of law and engineering, they generally were composed of only one commissioner per state, with each commissioner—and the convention as a whole—enjoying the assistance of technical staff.<sup>42</sup>

Shortly before or after the call for a BBA convention, states might consider learning from the conventions of the twentieth century. That is, they might send relatively small delegations, but assist those delegations with expertise in legal drafting and state and federal government finance. Additionally or alternatively, the convention might create relevant support committees for itself. As in the twentieth century conventions, however, actual decisions would be made only by the duly authorized commissioners, operating on the usual rule of one state/one vote.

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## About the Author

Robert G. Natelson is a nationally known constitutional scholar and author whose research into the history and legal meaning of the Constitution has been cited repeatedly at the U.S. Supreme Court, both by parties and by justices. For example, justices have cited his works 17 times in five cases since 2013. During the Supreme Court term ending in June 2016, parties referenced his work in 12 briefs and petitions for *certiorari*. He is widely acknowledged to be the country's leading scholar on the Constitution's amendment procedure and among the leaders on several other topics.

Natelson was a law professor for 25 years, serving at three universities, where among other subjects he taught Constitutional Law, Constitutional History, Advanced Constitutional Law, and First Amendment. Natelson is currently senior fellow in constitutional jurisprudence at The Heartland Institute, Independence Institute, and Montana Policy Institute. He heads the Independence Institute's Article V Information Center.

Natelson's articles and books span many parts of the Constitution, including groundbreaking studies of the Necessary and Proper Clause, federalism, Founding-era interpretation, regulation of elections, and the amendment process of Article V. In addition to his authorship of law journal articles and legal books, he has written the highly influential *Article V Handbook* for state lawmakers; the popular book *The Original Constitution: What It Actually Said and Meant*; and numerous shorter pieces for media outlets. Recent contributions have been published by the *Washington Post*, *Washington Times*, *Denver Post*, *American Spectator*, *The Hill*, *Barron's*, *Townhall*, *American Thinker*, *CNS News*, and *Daily Caller*, among others.

## About The Heartland Institute

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## Endnotes

<sup>1</sup> John Joseph Wallis, "Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852," *Journal of Economic History* 65 (211) (2005).

<sup>2</sup> *E.g.*, Colorado Constitution, Art X, § 16:

No appropriation shall be made, nor any expenditure authorized by the general assembly, whereby the expenditure of the state, during any fiscal year, shall exceed the total tax then provided for by law and applicable for such appropriation or expenditure, unless the general

assembly making such appropriation shall provide for levying a sufficient tax ... to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war.

<sup>3</sup> Katherine Barrett and Richard Greene, “Do States Really Balance Their Budgets?” *Governing Magazine* (October 2011), available at <http://www.governing.com/columns/smart-mgmt/do-states-really-balance-their-budgets.html>. Quoting from that article: “Consider Illinois. According to John Tillman, CEO of the Illinois Policy Institute, the provision in the constitution, which was drafted in 1970, was written purposely with loopholes so that the state could call it a balanced budget requirement without actually balancing the budget.”

<sup>4</sup> Robert Krol, “A Survey of the Impact of Budget Rules on State Taxation, Spending, and Debt,” *Cato Journal* **16** (295) (1997): 301–03 (collecting the studies).

<sup>5</sup> The principal limits were the Constitution’s scheme of enumerated powers, reinforced by the General Welfare Clause, U.S. Constitution, Article I, Section 8, Clause 1. The General Welfare Clause originally was intended as a limitation on the taxing power, Robert G. Natelson, “The General Welfare Clause and the Public Trust: An Essay in Original Understanding,” *University of Kansas Law Review* **52** (1) (2003). However, in *Helvering v. Davis*, 301 U.S. 619 (1937), relying on dicta in *United States v. Butler*, 297 U.S. 1 (1936), the court converted it into a new enumerated power of Congress: a license to spend for any purpose deemed consistent with the general welfare.

<sup>6</sup> *Federal Receipt and Outlay Summary: 1940 to 2021*, Tax Policy Center, Urban Institute and Brookings Institution, <http://www.taxpolicycenter.org/statistics/federal-receipt-and-outlay-summary>.

<sup>7</sup> *Ibid.*

<sup>8</sup> The precise numbers vary over time, but 74 percent in favor is typical. E.g., “CNN Poll: Americans like Balanced Budget Amendment,” Accuracy in Media, <http://www.aim.org/on-target-blog/cnn-poll-americans-like-balanced-budget-amendment/>.

<sup>9</sup> *Smith v. Union Bank*, 30 U.S. 518, 528 (1831).

<sup>10</sup> Robert G. Natelson, “The Convention of States in American History,” Article V Information Center, <http://articlevinfocenter.com/convention-states-american-history/>.

<sup>11</sup> The leading BBA advocacy group claims 27, <http://bba4usa.org/>, but the precise number of valid applications depends on unresolved legal questions. For example, if applications cannot be rescinded, the number outstanding is more than 27. If applications may not be limited to an amendment with precise wording, then the current application of Mississippi is void and the number is fewer. On issues of aggregation, see Robert G. Natelson, “State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters” (4th ed., 2016), § 3.9.6, available at <https://www.i2i.org/wp-content/uploads/2015/01/Compendium-4.0-plain.pdf>.

<sup>12</sup> Robert G. Natelson, “A Response to the Runaway Scenario,” Article V Information Center, <http://articlevinfocenter.com/a-response-to-the-runaway-scenario/>.

<sup>13</sup> Robert G. Natelson, *The Colorado Taxpayer’s Bill of Rights* (Denver, CO: Independence Institute, 2016).

<sup>14</sup> E.g., *Dyer v. Blair*, 390 Fed. Supp. 1291 (N.D. Ill. 1975) (Justice Stevens).

<sup>15</sup> For example, Article V cross-references to two other provisions.

<sup>16</sup> There are five cross-references in all. They are as follows:

(1) The “seventh section of the first article”—that is, Article I, Section 7. This is the federal legislative enactment procedure, together with the Presentment Clause. Here are the relevant excerpts from the existing Constitution:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections [followed by the veto procedure].

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

(2) “the third clause of the second section of the first article”—that is, Article I, Section 2, Clause 3—the Census Clause:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers ... The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years in such Manner as they shall by Law direct.

(3) “the second clause of the eighth section of the first article”—that is, Article I, Section 8, Clause 2 (Debt Clause):

The Congress shall have Power ... To borrow money on the credit of the United States . .

(4) “the fourth section of the fourteenth article of amendment”—that is, the Fourteenth Amendment, Section 4:

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.

(5) “the fifth article of this Constitution”—that is, Article V, the amendment article. This refers to the power of Congress to determine whether ratification is to be by state legislatures or state conventions:

... 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.

<sup>17</sup> John Merrifield and Barry Poulson, “Stopping the National Debt Spiral: A Better Rule for Solving the Federal Fiscal Crisis,” *Policy Brief*, The Heartland Institute, 2016, <https://www.heartland.org/publications-resources/publications/stopping-the-national-debt-spiral-a-better-rule-for-solving-the-federal-fiscal-crisis>.

<sup>18</sup> U.S. Constitution, Article 1, Section 8, Clauses 1 and 2; Article 1, Section 10, Clause 1.

<sup>19</sup> U.S. Constitution, Article 1, Section 7, Clause 2.

<sup>20</sup> U.S. Constitution, Amendment XIV, Section 4.

<sup>21</sup> E.g., U.S. Constitution, Article 1, Section 2.

<sup>22</sup> U.S. Constitution, Article 1, Section 2, Clause 3 and Article 1, Section 9, Clause 4.

<sup>23</sup> U.S. Constitution, Article 1, Section 5, Clause 2.

<sup>24</sup> U.S. Constitution, Article 1, Section 8, Clause 2.

<sup>25</sup> E.g., Legal Information Institute, Cornell University, *Secondary Liability* at [https://www.law.cornell.edu/wex/secondary\\_liability](https://www.law.cornell.edu/wex/secondary_liability).

<sup>26</sup> These and other examples are discussed in James D. Hamilton, "Off-Balance-Sheet Federal Liabilities," *Cato Papers on Public Policy* 7-37, Cato Institute, 2014, available at <https://object.cato.org/sites/cato.org/files/serials/files/cato-papers-public-policy/2014/6/cppp-3-1.pdf>. Professor Hamilton calculated contingent federal liabilities in 2012 as amounting to about six times primary liabilities.

<sup>27</sup> *Ibid.*, p. 4.

<sup>28</sup> The following are necessary changes:

Section 1. Every measure that shall increase the total of ~~either~~ the public debt of the United States ~~or the contingent public debt of the United States~~ shall, after complying with the requirements of the seventh section of the first article of this Constitution, be presented to the legislatures of the several states; and before the same shall take effect, it shall be approved by a majority of legislatures in states containing a majority of the population of the United States as determined by the most recently completed decennial enumeration pursuant to the third clause of the second section of the first article. Each state legislature shall have power to determine its own rules for considering such measures.

~~Section 2. "Contingent public debt" means the secondary public liabilities of the United States. Any measure to increase total contingent public debt shall be presented to the state legislatures separately from any measure to increase total public debt.~~

Section ~~3~~ 2. Any purported increase in total public debt ~~or contingent public debt~~ after the effective date of this article not approved in compliance with this article shall not be deemed money borrowed on the credit of the United States pursuant to the second clause of the eighth section of the first article nor valid public debt under the fourth section of the fourteenth article of amendment.

Section ~~4~~ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution within seven years from the date of its submission to the state legislatures or conventions in accordance with the fifth article of this Constitution. This article shall become effective six months after ratification as an amendment to the Constitution.

<sup>29</sup> See Robert G. Natelson, *supra* note 13.

<sup>30</sup> "Debt Limit," U.S. Department of the Treasury, <https://www.treasury.gov/initiatives/Pages/debtlimit.aspx>.

The debt limit is the total amount of money that the United States government is authorized to borrow to meet its existing legal obligations, including Social Security and Medicare benefits, military salaries, interest on the national debt, tax refunds, and other payments.

<sup>31</sup> The National Debt Relief Amendment provides: "An increase in the federal debt requires approval from a majority of the legislatures of the separate States."

<sup>32</sup> Bengt-Arne Wickstrom, "Optimal Majorities for Decisions of Varying Importance," *Public Choice* **48** (273) (1986), available at <https://link.springer.com/article/10.1007/BF00051625>.

<sup>33</sup> James Madison, *The Federalist* No. 39.

<sup>34</sup> Perhaps the most famous of the many cases of this nature is *Abbot v. Burke*, 575 A.2d 359 (N.J. 1990) in which the Supreme Court of New Jersey ordered the state legislature to alter its school financing system and to increase the amount of money spent.

<sup>35</sup> The Necessary and Proper Clause is U.S. Constitution, Article I, Section 8, Clause 18. It provides that Congress may adopt laws “necessary and proper” for carrying out certain other enumerated powers.

<sup>36</sup> E.g., H.J. Res. 2, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (Jan. 3, 2017) (“The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.”)

<sup>37</sup> E.g., U.S. Constitution, Amendment XIII (“Congress shall have power to enforce this article by appropriate legislation”). See also *ibid.*, Amendments XIV, XV, XVIII (repealed), XIX, XXIII, XXIV & XXVI.

<sup>38</sup> U.S. Constitution, Article I, Section 5, Clause 2 (“Each House may determine the Rules of its Proceedings ...”).

<sup>39</sup> On the original meaning of the Clause, see Gary Lawson, Geoffrey P. Miller, Robert G. Natelson, and Guy I. Seidman, *The Origins of the Necessary and Proper Clause* (Cambridge University Press 2010).

<sup>40</sup> E.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (relying on the Necessary and Proper Clause in conjunction with the Commerce Clause to authorize a federal ban on window-box medical marijuana for personal use); *Wickard v. Filburn*, 317 U.S. 111 (1942) (construing the Necessary and Proper Clause in conjunction with the Commerce Clause as justifying federal regulation of agriculture).

<sup>41</sup> E.g., *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (justifying federal control of conditions in state employment using Section 5 of the Fourteenth Amendment, despite lack of evidence of prior relevant state discrimination).

<sup>42</sup> E.g., Robert G. Natelson, “The Last Convention of States Ever Held?,” <http://articleinfocenter.com/last-convention-states-ever-held/> (discussing the organization of the Upper Colorado River Basin Compact Commission, the five state convention that negotiated the Upper Colorado River Basin Compact).