

Acknowledging the Elephant in the Room: The Congressional Obstacle to the Balanced Budget Amendment Task Force's Effort to Achieve a Convention Call

The Balanced Budget Amendment Task Force (“BBATF”) claims that 27 states have adopted resolutions which can be aggregated toward the 34 needed in order to trigger Congress’s duty to call a convention of the states. In making this claim, the BBATF ignores that the 27 resolutions are diverse and, in many cases, irreconcilable with one another. As a result, Congress will not aggregate all 27 resolutions together for purposes of considering whether the states have made an application under Article 5 for a convention to propose a balanced budget amendment. The purpose of this paper is to explain this situation in further detail and to demonstrate other approaches toward an Article 5 convention which do not suffer from the same deficiency.

Article 5 of the U.S. Constitution establishes two methods of amendment. The first provides for Congress to initiate the process by proposing an amendment for the states to consider. The second allows for the states to initiate the process by making application to Congress to call a convention of the states for the purpose of proposing and considering amendments. In either case, any proposed amendment must be ratified by $\frac{3}{4}$ of the states in order to take legal effect. All 27 amendments to the Constitution were induced by Congress through the first method. Although there has never been a convention of the states called by Congress as a result of a successful effort by the states to induce a constitutional amendment, there is currently a substantial and growing interest among the states in just that prospect.

Article 5 states in pertinent part as follows:

*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... (emphasis added).*

In light of this recent interest and the fact that there is no direct experience to call upon in the event one or more such efforts succeed, the manner in which the states would make

“application” and Congress’s role in “calling a convention” bears scrutiny. In order to meet the two thirds requirement to call a convention, 34 states must join in “the application.” There are currently at least three distinct efforts underway to consolidate states in an effort to reach the two thirds required for the call of a convention. All three are working toward an application which would seek a limited, rather than general, convention. In other words, to one degree or another, all three of these efforts seek to limit the scope of the ultimate convention by virtue of the applications the states would make.¹

The *Convention of States* project seeks a broad, but still limited convention, “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 its officials and for members of Congress.”² Hence, the *Convention of States* application would limit the convention to addressing fiscal restraints, limiting federal power and imposing term limits. Though broad, the text of the application

¹ It is argued by some that Article 5 does not permit states to apply for a “limited convention”. Those making this argument assert, among other things, that the strict text of Article 5 does not necessarily imply a right of the states to apply for anything less than a general convention constituted for the purpose of proposing any amendments the convention desires. For purposes of this paper, I will assume that the states are constitutionally entitled to make application for a limited convention for three reasons. First, the arguments in favor of the constitutionality of a limiting application are more persuasive. See Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 Const. Comm. 53 (2012), (<http://ssrn.com/abstract=2035638>); Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 Tenn. L. Rev. 765 (2011), (<http://ssrn.com/abstract=1904587>). Second, all three of the most serious efforts to make application for a convention involve limited applications. Finally, the point of this paper is to illustrate one potential problem with a limited application which can easily be avoided. Were the limited application ultimately found to be unconstitutional, the primary point of this paper would be moot.

² <https://d3n8a8pro7vhmx.cloudfront.net/conventionofstates/pages/142/attachments/original/1410009563/Application-for-a-Convention-of-States-v.5.pdf?1410009563>

would exclude for the convention's consideration any amendment which does not fit within those broad parameters.

The *Compact for America* project seeks the most narrow convention conceivable; one limited to the consideration and proposal of a specific, pre-drafted balanced budget and taxing amendment which would not be subject to revision or amendment by the convention.³ Both the *Compact for America* and the *Convention of States* are attempting to consolidate a sufficient number of states to call the limited conventions they seek by having participating state legislatures adopt a pre-drafted resolution which is identical in all important aspects from one state to the next. If either achieves a sufficient number of resolutions, there will be no question as to whether the states have collectively made "application" because they will have all asked for exactly the same convention, under the same terms.

In contrast, the *Balanced Budget Amendment Task Force* (BBATF) seeks to take advantage of a hodgepodge of existing applying resolutions adopted by various states and dating back to 1976 seeking a balanced budget or a limited spending amendment.⁴ The BBATF wants to aggregate some 27 varying resolutions to constitute an application for the purpose of calling a convention to consider and propose a balanced budget or limited spending amendment. The 27 resolutions the BBATF seeks to aggregate are attached in the appendix along with Wyoming's recently adopted resolution which, as of this writing, the BBATF has not indicated it will count toward its aggregation effort. The supposed advantage of the BBATF approach exists in the notion that there are already 27 resolutions and thus, only 7 more are said to be needed to achieve the two thirds threshold required to trigger Congress's call of the convention. What the

³ <http://www.compactforamerica.org/#!/solution/c1flq>

⁴ <http://www.bba4usa.org/bba-in-the-states.html>

advocates of this approach ignore is that the applying resolutions are distinct, many of them seeking by their express terms conventions which are mutually exclusive of one another. As a result, they cannot be aggregated together in order to constitute “the application.”

Unlike the *Compact for America* and the *Convention of States* projects, there was no persistent effort to make the resolutions identical or even consistent with one another. Only in the past few years has the BBATF encouraged newly participating states to adopt consistent resolutions. Accordingly, some of the resolutions vary substantially. This diversity raises a crucial question that should not be overlooked by anyone who seriously hopes to champion the cause of any state induced amendment. Pursuant to Article 5, it is “*the application*” which triggers Congress’s constitutional obligation to call the convention. “*The Congress...on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments.*” It is, therefore, Congress which must determine whether “the application” has been made, thus triggering its duty to call the convention. In order to determine whether two thirds of the states have made “the application,” Congress must analyze the various applying resolutions to determine if they collectively in fact make “application” for the same convention. It is no answer to say that two thirds of the states have made such an application by virtue of the sole fact that they have each sent Congress a resolution seeking *any* convention on *any* subject matter. The resolutions must each seek essentially the same convention in order that 34 of them can be deemed to have made a single, unified application on behalf of all the involved states.

For example, in its applying resolution, Delaware asked Congress “*to call a convention for the proposing of the following amendment...’The costs of operating the Federal Government shall not exceed its income during any fiscal year, except in the event of declared*

war.” Congress cannot count this application as one of the two thirds necessary to constitute an application of at least 34 states for any purpose other than the consideration of Delaware’s specifically identified amendment. This resolution cannot be aggregated with a resolution for a convention to consider and adopt an unspecified, as yet undrafted balanced budget amendment because any deviation from Delaware’s specified amendment language would result in a convention different than the convention Delaware requested. If two states submit resolutions to Congress seeking conventions to consider amendments for different purposes, or even with different criteria for addressing the same subject matter, they cannot be aggregated together in order to achieve the 34 state threshold.

The reason is fundamental to the Constitution’s structure and the federalism it so carefully institutes. Article 5 allows both the central government and the state governments a method of initiating amendments. The method we are discussing is the method designed for the states, exercising their sovereignty jointly, to initiate amendments. Congress may not disregard the express terms of the applying resolutions in order to cobble together a false “application” of 34 states in order to call a convention. Were Congress permitted to disregard the specific terms and conditions the states expressed in their applying resolutions, the method intended by the founders to be under the control of the states acting in true concert would become in actuality a tool of Congress to call a convention it would otherwise have no power to call.

Almost all of the resolutions the BBATF wants to aggregate contain specific language to limit the request for a convention to the subject matter as stated in the particular resolution. Included are provisos limiting the request for a convention to the “*sole and exclusive purpose*” (3 states), the “*specific and exclusive purpose*” (13 states), the “*exclusive purpose*” (1 state), and “*a convention limited to proposing an amendment...*” (7 states). Two other states

have no specific limiting language but request a convention for consideration of a specific predrafted amendment the text of which is included in the resolution. In all, 26 of the 27 resolutions include language which overtly limits the request for a convention to the purpose as stated in the resolution. Nine of those 26 states go even further to ensure that any convention called is limited to the subject matter of their respective resolutions. For example, five states (Iowa, Missouri, New Hampshire, Alaska and Colorado) included provisions that their respective resolutions are “*null and void,*” “*rescinded,*” or of no “*force or effect*” in the event the convention is not limited to the “*specific*” and/or “*exclusive*” purpose stated in their resolutions. Another (Nevada) conditions its request on Congress establishing restrictions on the convention “*limiting the subject matter of the convention called...to the subject matter of this resolution.*” Two states (Ohio and Utah) limit the authority of their delegates to the convention to debate and vote only on a proposed amendment as described in its resolution. Finally, one state (North Carolina) provides that its resolution is “*rescinded in the event that the convention is not limited to the subject matter of this application.*”

In short, nearly all of the states that have adopted resolutions the BBATF wishes to aggregate into an application have included language which limits their request to a convention to consider only an amendment as they have described in their respective resolutions. To the extent that these states have described the amendments differently and in a mutually exclusive way, they cannot be aggregated for purposes of constituting an “application” for a convention.

Because Congress will presumably be seeking to avoid calling a convention for purposes of limiting its power to borrow and spend, it is likely that Congress will seize upon every cogent argument not to aggregate resolutions for purposes of constituting “the

application.” In the remainder of this paper, I will demonstrate the most obvious arguments Congress might use to leverage the distinctive nature of the various application resolutions in order to thwart aggregation and thus, justify refusal to call a convention. It is important to note that there are other arguments that can be made against aggregation based upon somewhat less obvious distinctions and contradictions in the language of the various resolutions. My intention is to present only the most obvious distinctions and incongruities in order to demonstrate the ease with which Congress will be able to justify its refusal to aggregate.

To aid in analysis, it is helpful to categorize the similar applying resolutions. I have grouped them into 10 groups or “Types.” Below, I describe each Type, identify which states have adopted resolutions with respect to each Type, and offer the most obvious arguments for why they are or are not capable of being aggregated with one another.

Type 1; Iowa (1979), Missouri (1983), New Hampshire (2012). The resolutions of Iowa and Missouri call for a convention “*for the specific and exclusive purpose of proposing an amendment...to require a balanced federal budget and to make certain exceptions with respect thereto.*” New Hampshire’s resolution calls for a convention “*for the specific and exclusive purpose of proposing an amendment...requiring, with certain exceptions, that for each fiscal year the president of the United States submit and the Congress of the United States adopt a balanced budget.*” Though they employ different language, all three call for a balanced budget with “certain exceptions” presumably left to convention delegates to determine.

Type 2; North Carolina (1979). This resolution calls for a convention “*for the exclusive purpose of proposing an amendment...to require a balanced Federal budget in the absence of a national emergency.*”

Type 2 calls for a balanced budget in the absence of a national emergency.

Because the Type 1 resolution contemplates the convention delegates making “certain exceptions” to any proposed amendment, the Type 1 states clearly anticipate that the convention delegates will not be limited in considering these exceptions. Because Type 2 would require a balanced budget in any event other than a national emergency, it cannot be aggregated with Type 1 as it would prevent delegates from considering such other “certain exceptions.”

Type 3; Alabama (2011). This resolution calls for a convention “*for the specific and exclusive purpose of proposing an amendment...requiring that, in the absence of a national emergency (as determined by the positive vote of such members of each house of Congress as the amendment shall require), the total of all federal appropriations made by Congress for any fiscal year not exceed the total of all federal revenue for that fiscal year.*”

Types 1 and 2 call for an amendment requiring a balanced budget. By definition, budgets are forward looking estimates with respect to both revenues and expenditures. Type 3 seeks a convention to consider an amendment requiring that “*the total of all federal appropriations...not exceed the total of all federal revenue for that fiscal year.*” Accordingly, Type 3 calls for an amendment that disallows deficit spending in fact, not merely as a matter of budgeting and planning. Where amendments falling within Types 1 and 2 would only require the forward looking estimates of expenses not exceed estimates of revenues, Type 3 would require that actual expenses not exceed actual revenue. Further, though one would assume Congress and the President would normally produce a balanced budget in working to accomplish the Type 3 ultimate objective of not spending more than actually taken in, they would not strictly speaking, be required to do so. Because of the limiting language in Type 3 to the effect that the resolution is “*for the specific and exclusive purpose*” of proposing an amendment that would

require actual appropriations not to exceed actual revenues, it cannot be made to fit the parameters of Types 1 and 2 and cannot be aggregated with them, for purposes of constituting an “application.”

Type 4; Kansas (1979), Indiana (1979), Nevada (1980) Alaska (1982). These resolutions call for a convention for the “*sole and exclusive purpose,*” the “*specific and exclusive purpose,*” or call for a convention “**limited to proposing**” an amendment which would require that, “*in the absence of a national emergency*” the total of all appropriations for any fiscal year not exceed the total of all estimated federal revenues for that year. Type 4 is a hybrid of sorts, requiring that the “total of all (**actual**) appropriations...not exceed the total of all **estimated** federal revenues.” These resolutions cannot be aggregated with Types 1 and 2 which require only that estimated expenses not exceed estimated revenues. Nor can Type 4 be aggregated with Type 3 which requires that actual revenues not exceed actual expenses.

Type 5; Ohio (2013), Florida (2014), Louisiana (2014), Michigan (2014), Tennessee (2014), South Dakota (2015), North Dakota (2015), Utah (2015). These resolutions call for a convention limited to the same general description as Type 4 with the added provision, “*together with any related and appropriate fiscal restraints.*”⁵

Accordingly, Type 5 contemplates that the convention delegates will have authority to propose and consider unspecified fiscal restraints, presumably at the discretion of the delegates to the convention. Type 4 resolutions do not contain this provision. Thus, Type 5

⁵ Utah’s resolution differs from the others in that it requires that all actual expenses not exceed all estimated revenues for a “specific period” rather than for a “fiscal year.” An argument could be made that Utah’s resolution therefor permits more flexibility than the other Type 4 or 5 resolutions and should be a Type unto itself. However, in keeping with the stated intention of offering only the most obvious distinctions and incongruities, I have included Utah’s among the Type 5 resolutions).

resolutions authorize the convention to do more than the Type 4 resolutions would permit. They, therefore, cannot be aggregated. Moreover, Type 5 resolutions cannot be aggregated with Types 1 through 3 for all of the same reasons that Type 4 could not.

Each of the Type 5 resolutions contain a provision directing that it should be considered as covering the same subject matter, and aggregated with “outstanding balanced budget applications” previously adopted by other states. The states expressly identified in this regard by one or more of the Type 5 applying resolutions are: Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, South Dakota, Tennessee, and Texas. However, the Type 5 states cannot unilaterally override the specific language of the resolutions of other states to the extent those states adopted resolutions seeking a different “Type” of amendment. At most, Congress might interpret this provision to warrant disregarding the “together with any related and appropriate fiscal restraints” language in order to aggregate Type 5 with Type 4 but a Congress seeking to defeat the aggregation of 34 states would not likely be inclined to do so. Congress is far more likely to conclude that the statement expressing a desire to be aggregated with resolutions of other types is contradictory to the other provisions of Type 5 requesting a convention on the limited terms expressed therein. If so, Congress should be expected to err on the side of the limitation rather than the aggregation provision.

Type 6; Wyoming (2015). This resolution calls for a convention limited to the same general description as type 5 but with added conditions to preserve Wyoming’s revenues derived from the federal government. Wyoming adopted a mutated version of the Type 5 resolution, adding an extensive provision designed to protect its continued receipt of federal

funds in association with the large percentage of federally owned land in that state. The resolution states that “*Wyoming should not suffer significant further harm as a result of participation in the convention in relation to the large percentage of federal land ownership*” and acknowledges that it will seek “*adequate assurances that the state’s unique stature is protected and recognized.*” In light of these provisions, Wyoming’s resolution constitutes a type unto itself and cannot be aggregated with any other resolution.

Type 7; Georgia (2014). Georgia’s resolution is the least limited of all the resolutions. It simply calls for a convention and “*recommends that the convention be limited to consideration and proposal of an amendment 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 revenues for that fiscal year.*” Because there is no express limitation to the convention stated, only a recommendation, Congress could aggregate Georgia’s resolution with any other Type if is so desired. However, it is most clearly capable of being aggregated with Type 4 because the scope of the convention Georgia’s resolution “recommends” mirrors the Type 4 resolutions.

Type 8; Arkansas (1979), Nebraska (1979), New Mexico (1979), Pennsylvania (1979), Texas (1979). These resolutions are identical to Type 4 insofar as they call for a convention “*for the specific and exclusive purpose of proposing an amendment...requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenue for that fiscal year.*” The distinction is that Type 8 applications first propose that Congress prepare and submit to the states such an amendment and make the request for a limited convention only in the alternative. Congress, seeking any plausible excuse to avoid aggregation, may take the

position that because Congress could still prepare and submit a balanced budget amendment to the states at any time, these states' alternative requests for a convention are not ripe. In the event Congress cedes this argument and aggregates Type 8 with Type 4, the result would be 9 resolutions aggregated.

Type 9; Colorado (1978). This resolution calls for a convention “*for the specific and exclusive purpose of proposing an amendment...prohibiting deficit spending except under conditions specified in such amendment.*” Though it employs different language, Colorado’s resolution is very similar to Alabama’s Type 3 resolution because in application, they both essentially prohibit spending more than actually taken in. There is, however, a crucial difference. Type 9 contemplates that the convention delegates have discretion to consider and adopt conditions pursuant to which the amendment would not apply. In contrast, the Type 3 resolution contemplates a single exception to when the amendment would apply; in the event of a “*national emergency (as determined by the positive vote of such members of each house of Congress as the amendment shall require).*” Type 3’s “national emergency” exception is far more restrictive than Type 9’s contemplation of delegates having the broad authority to adopt undefined “conditions” on the application of the amendment’s terms. Thus, Type 9 and Type 3 cannot be aggregated.

Type 10; Delaware (1976), Maryland (1977), Mississippi (1979). These resolutions call for a convention for the purpose of proposing a specific, pre-drafted amendment. The three applying resolutions which fall into this category each specify a different amendment for consideration by the convention. Thus, they cannot be aggregated with each other, nor can they be aggregated with any of the other Types because none of the other Types require only the consideration of a pre-drafted amendment. However, it might be the case that one or more of

Types 1 through 9 can be aggregated with one or more of the Type 10 resolutions if the pre-drafted amendment proposed does not run afoul of the more general language of the previously discussed Types. In order to make this determination, we'll need to consider each of the pre-drafted Type 10 resolutions as compared to the Types discussed thus far.

Delaware's proposed amendment is as follows: "*The costs of operating the Federal Government shall not exceed its income during any fiscal year, except in the event of declared war.*" This resolution is similar to Type 3 which requires that all actual appropriations for any fiscal year not exceed the total of all actual revenue for that fiscal year, but Type 3 does not include the additional provision excepting its application in the event of declared war. Type 3 cannot, therefore, be aggregated with Delaware's resolution. It is also similar to Type 9 which prohibits deficit spending, except that Type 9 has a broader exception, "except under conditions specified in such amendment." As discussed earlier, Type 9's exception contemplates the convention delegates making a determination as to what the "conditions specified in such amendment" shall be. Delaware's resolution cannot be aggregated with Type 9 because it would refuse the convention delegates this authority to consider conditions when the amendment would not apply.

Maryland's proposed amendment is as follows:

The total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues for that fiscal year, excluding any revenues derived from borrowing; and this prohibition extends to all Federal appropriations and all estimated Federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this Article. If the President proclaims a national emergency, suspending the requirement that the total of all Federal appropriations not exceed the total estimated Federal revenues for a fiscal year, excluding any revenues derived from

borrowing, and two-thirds of all Members elected to each House of the Congress so determined by Joint Resolution, the total of all Federal appropriations may exceed the total estimated Federal revenues for that fiscal year.

Maryland's resolution is similar to Type 4 which calls for the consideration of an amendment which would require that in the absence of a national emergency, the total of all appropriations for any fiscal year not exceed the total of all estimated federal revenues for that year. The only substantive difference is that Maryland's resolution contains additional provisions to (a) explicitly state that the President and Congress must comply and (b) proscribing how the question of whether a "national emergency" exists is to be determined. These additional provisions do not run afoul of Type 4's requirement that the convention must be for the "sole and exclusive purpose," the "specific and exclusive purpose," or that the convention be "limited to proposing" such an amendment. Accordingly, Type 4 resolutions could be aggregated with Maryland's for a convention to consider and propose Maryland's pre-drafted amendment. If Congress cedes the argument that Type 8 cannot be aggregated with Type 4 due to Type 8 making the request for a convention in the alternative to the request that Congress propose such an amendment, then Type 8 can also be aggregated for the purpose of calling a convention to consider Maryland's pre-drafted amendment.

Mississippi's resolution states as follows:

Section 1. Except as provided in Section 3, the Congress shall make no appropriation for any fiscal year if the resulting total of appropriations for such fiscal year would exceed the total revenues of the United States for such fiscal year.

Section 2. There shall be no increase in the national debt and such debt, as it exists on the date on which this article is ratified, shall be repaid during the one-hundred-year period beginning with the first fiscal year which begins after the date on which this article is ratified. The rate of repayment shall be such that one-tenth (1/10)

of such debt shall be repaid during each ten-year interval of such one-hundred-year period.

Section 3. In time of war or national emergency, as declared by the Congress, the application of Section 1 or Section 2 of this article, or both such sections, may be suspended by a concurrent resolution which has passed the Senate and the House of Representatives by an affirmative vote of three-fourths (3/4) of the authorized membership of each such house. Such suspension shall not be effective past the two-year term of the Congress which passes such resolution, and if war or an emergency continues to exist such suspension must be reenacted in the same manner as provided herein.

Section 4. This article shall apply only with respect to fiscal years which begin more than six (6) months after the date on which this article is ratified.

Mississippi's resolution calls for actual appropriations not to exceed actual revenues. It is, therefore, most similar to Type 3 and Type 9. However, Type 3 limits its focus to the "sole and exclusive" purpose of proposing an amendment requiring that, "in the absence of a national emergency," total appropriations may not exceed total revenues. Type 3 does not expressly provide for an exception "in time of war." Because Type 3's scope is limited by its terms to the "sole and exclusive" purpose stated, it is not capable of being aggregated with Mississippi's resolution. Similarly, Type 9 limits its focus to "the specific and exclusive purpose" of prohibiting deficit spending "except under conditions specified in such amendment. The Type 9 resolution contemplates that convention delegates will have discretion to consider and propose conditions under which the amendment will not apply. Because Mississippi's resolution does not provide for the convention delegates to consider and propose such conditions, Type 9 is not capable of being aggregated with Mississippi's resolution. Furthermore, neither Type 3 nor Type 9 would otherwise be capable of aggregation with Mississippi's resolution due

to the fact that it includes a provision scheduling the payment of the existing debt which exceeds the “sole and exclusive” purpose of Type 3 and “the specific and exclusive purpose” of Type 9.

In summation, all resolutions within a “Type” may be consolidated together, with the exception of the three resolutions in Type 10. Because Georgia’s Type 7 resolution only “recommends” a convention with a limited scope, it could be aggregated with any other resolution. The only other Types which can clearly be aggregated with one another are Types 4 and possibly 8 (depending upon whether Congress decides to rely on the argument that Type 8 resolutions are not ripe for a convention call because it is still possible for Congress to propose an amendment first). If aggregated, Types 4 and 8 would result in an aggregation of 10 resolutions if Georgia’s Type 7 is included as well. These 10 resolutions could also be aggregated along with Maryland’s to call a convention to consider Maryland’s pre-drafted amendment. Accordingly, at most, there are a maximum of 11 resolutions which Congress would aggregate at the present time.⁶ Again, I have only presented the most obvious distinctions and incongruities with respect to these resolutions and it should be expected that anyone attempting to defeat aggregation will argue for further divisions based upon other, less obvious differences and perhaps less compelling arguments.

This analysis has far reaching implications for those advocating the BBATF approach. In the event Congress takes the position outlined in this paper, many citizens will be

⁶ Because the BBATF has been advancing the Type 5 resolution in its recent efforts to sign on additional states, the BBATF advocates would likely prefer a convention based on a Type 5 resolution rather than a convention focused solely on whether to propose Maryland’s predrafted amendment. If so, BBATF advocates would likely use the eight Type 5 resolutions along with the Type 7 resolution and wait for an additional 25 states to adopt a Type 5 resolution rather than seek aggregation of 33 Type 4 (and Type 8) resolutions with Maryland’s. Though beyond the scope of this paper, the utilization of Type 5 resolutions to accomplish a convention raises many questions. How would the amendment’s language prevent Congress from over estimating revenues in order to justify increased spending? What will prevent Congress and/or the President from declaring a constant state of “national emergency” in order to circumvent the amendment’s requirements? How will the convention close all loopholes to ensure the intended result of the amendment is realized?

greatly disappointed having been led to believe that a convention to consider and propose a balanced budget amendment was so close at hand. Many of the state legislatures which have bought into the BBATF approach will be chagrined that they have participated in an effort which has led to a dead end. Many individuals and national politicians who have lead the effort will likely be embarrassed that their efforts have failed to deliver the promised result. Any effort to revive the project would require revisiting state legislatures in an attempt to obtain revised resolutions, political efforts to persuade Congress to reconsider its position on aggregation, or litigation over the aggregation question. None of these alternatives are attractive. All of them imply extensive delay.

Those interested in advancing the cause of a state induced amendment would be wise to focus their efforts on an approach that involves the adoption of identical applying resolutions from the participating states such as *The Compact for America* and *The Convention of States*. Both of these efforts are employing an effective strategy to avoid any question as to whether the participating states' resolutions are properly aggregated in order to constitute an "application" for the limited convention they seek. By creating an application which is truly a joint product of the states that participate acting in concert, rather than an awkwardly conjoined montage of distinct and often unrelated resolutions, both of these efforts eliminate an obvious obstacle which Congress could otherwise emplace to defeat the convention call.

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