Written by **Joe Wolverton, II, J.D.** on January 3, 2014

The Nullification Alternative

The right of states to nullify unconstitutional federal laws was until recently almost unknown to today's generation of Americans. But that has been changing in recent years, as growing numbers become aware that under the 10th Amendment of the U.S. Constitution states retain the power to stop federal unconstitutional encroachments — from ObamaCare to gun control — at the state border.

Much of the awareness has been created through liberty-minded alternative media and organizations. But more and more the nullification issue is being reported by the mainstream media — and sometimes favorably.

On December 27 the *Washington Times* published in its "Communities" section an important opinion piece by Michael Lotfi that makes the case for using nullification to fight back against federal usurpations. But the author, who is the Tennessee associate director of the Tenth Amendment Center, does much more than that in his article. He also refutes the proposal "for an Article V constitutional convention of the states as salvation." That proposal is now being promoted by celebrity "conservative" Mark Levin, among others.

Lotfi begins his article by acknowledging Levin's influence in conservative politics:

> Mark Levin has one of the top-rated syndicated talk radio shows in the country. No one can deny that the lawyer and *New York Times* bestselling author commands major clout in conservative politics.
>
> However, should this clout serve as a warrant for millions of Americans to blindly follow him?

Indeed, it should not. Levin, after all, is notorious among many segments of the conservative spectrum for his assertion that the president of the United States has power to "make war." If he is wrong regarding the power to declare war — which under the U.S. Constitution is a *congressional* power — could he also be wrong regarding his trumpeting of a constitutional convention? Lotfi does not make this particular point in his article, but he does make very clear that Levin is wrong regarding the con-con issue. "Not only is an Article V constitutional convention not the right answer, it is the bullet to a loaded revolver pointed at the Constitution," Lotfi writes.

Of course, Levin is not the only celebrity "conservative" leading the con-con charge. Others include Sean Hannity, Rush Limbaugh, and most recently, Glenn Beck.

For his part, Beck is a recent convert to the claque of "conservatives" clamoring for a con-con. He seems to be a true believer, though, going so far as to "bury the hatchet" with Levin and make a joint video praising the Compact for America (CFA) and other pro-Article V efforts.

On his website, Beck offers his fans "some additional reading materials so [they] can learn more about" the Article V movement. One of documents provided by Beck is by Indiana State Senator David Long.

This writer faced Senator Long during testimony I gave before the Indiana State Senate committee he

chairs. Sadly for citizens of the Hoosier State and for his new promoter, Glenn Beck, Long doesn't understand nullification, and he works consistently to keep his state from exercising its constitutional and moral obligation to hold as null, void, and of no legal effect any unconstitutional act of the federal government.

The particular provision of the Constitution relied on by the con-con proponents is Article V. In relevant part, Article V states:

> 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.

One of the "evils" Levin and his cohorts claim would be eliminated by an Article V con-con is the runaway federal spending spree. In fact, Nick Dranias (one of the heads of the CFA) and others have pushed for a con-con that would be empowered specifically and exclusively to consider a Balanced Budget Amendment (BBA).

Before state legislatures vote for an Article V con-con proposal that could cause real and radical damage to our Constitution, they should first consider whether a balanced budget amendment is necessary and whether it would actually steer our Republic away from the fiscal problems we are facing.

The fact is that determined citizens and state legislators could rescue the United States from its financial peril without resorting to opening up the Constitution to tinkering by state-appointed delegates, many of whom would likely be bought and paid for by powerful lobbyists and special interest groups.

Furthermore, there is no historical proof that a balanced budget amendment would drive Congress back to within its constitutional corral. Even the most conservative estimates indicate that about 80 percent of expenditures approved by Congress violate the U.S. Constitution. That fact wouldn't change by adding an amendment to the Constitution.

Whether these bills spend our national treasure on unconstitutional and undeclared foreign wars, billions sent overseas in the form of foreign aid, expanding the so-called entitlement programs, or redistributing wealth via corporate and individual welfare schemes, none of these outlays is authorized by the Constitution.

Perhaps the most critical consideration that must be made by well-intentioned Americans anxious to do something to change the current course and to restore this country to its constitutional foundations is the indisputable threat to liberty posed by an Article V con-con as proposed by Mark Levin in his new book.

Remember, regardless of any state or congressional legislation requiring them to consider only a balanced budget amendment, the assembled delegates to a new constitutional convention would possess unlimited, though not unprecedented, power to propose revisions to the existing Constitution, based on the inherent right of the People in convention to alter or revise their government.

The prospect of a convention endowed with power of this magnitude, populated by politicians

determined to tinker with the precision gears that give movement to works of our mighty Republic, is frightening and should give pause to everyone considering enlisting in the forces fighting for a con-con.

Lotfi's *Washington Times* piece makes a similar warning:

> Congress is now controlled almost exclusively by lobbyists. States essentially lost all control over the federal government with the implementation of the Seventeenth Amendment. Hardly a federal delegate in Congress feels the need to report to their respective state legislators. The risk for a runaway convention, by which our current Constitution could be completely shredded, is of paramount concern.

Rather than expose the Constitution to the whims of special interest groups, political action committees, corporations, and the politicians they pay for, why not enforce the Constitution as written?

Wouldn't the country's economic outlook be improved by forcing our federal representatives to obey the limits on their power as provided by the Constitution, rather than allowing the delegates to a new constitutional convention (and the powerful interests many of them would be financially beholden to) to produce some document that not only would do nothing to restrain the federal government, but could potentially rewrite our Constitution?

Fortunately, there is another way for states to exercise their collective authority on the federal government without resorting to a constitutional convention. It is the concept described by Thomas Jefferson as the "rightful remedy" for any and all unconstitutional acts of the federal government: nullification.

Simply stated, nullification is a concept of legal statutory construction that recognizes each state's right to nullify, or invalidate, any federal measure that a state deems unconstitutional.

Nullification is founded on the assertion that the sovereign states formed the union, and as creators of the compact, they hold ultimate authority as to the limits of the power of the central government to enact laws that are applicable to the states and the citizens thereof.

As for the position taken by con-con proponents that James Madison later rejected nullification as a remedy for federal overreach, please see this reporter's article published recently by *The New American*).

With these facts in mind, it would seem that our nation's fiscal and political well-being is better served by governors jealous of their states' sovereignty and their rightful role as "shelters against the abuse of power," signing into law state bills nullifying unconstitutional federal measures (including those that have propelled our national indebtedness into the stratosphere) than by a constitutional convention with unchecked power to amend our Constitution out of existence in the name of balancing the budget.

Finally, in a "Stop the Con Con" video featuring its CEO Arthur R. Thompson, The John Birch Society makes a critical point — one always avoided by the Article V advocates:

> Many view a con-con as a quick way to pass amendments they think will stop the big-government juggernaut. Why would politicians suddenly start following an amended Constitution after ignoring and violating the Constitution for so long? The remedy so desperately needed to return our country to good government is to enforce the Constitution, not amend it.

In other words: Follow it, don't fix it!

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