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CONVERGING ON THE CORE SOLUTION; DIVERGING ON EFFICACY

Comparing the Balanced Budget Compact's State-of-the-Art Amendment Against Natelson's Discussion Piece

By Byron J. Schlomach, PhD

Retired law professor Robert G. Natelson has authored a balanced budget amendment (BBA) proposal for the U.S. Constitution (see appendix) to spark further discussion about the merits of various constitutional reform ideas.[1] His proposal incorporates an important policy innovation proposed in two other proposals that have been floated in recent years; namely, involving state legislatures in approving any increase in the federal debt. Professor Natelson also laudably takes a stab at attempting to control unfunded liabilities. Obviously, Professor Natelson considers his draft to have certain advantages over other BBA proposals, including Compact for America's (CFA) proposal, which is the Balanced Budget Amendment embedded in the Compact for a Balanced Budget (see appendix).[2] So, in the spirit of the professor's intention to continue the conversation with discussion of advantages and disadvantages of different BBA proposals, what follows is a comparison and contrast between the Natelson and CFA BBAs.

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Debt

The CFA BBA might best be characterized as a constitutional debt limitation whose happy side effect will be balanced budgets. It specifically contemplates a constitutional debt limit (authorized debt, in the draft's terminology). The CFA BBA defines an initial limit as of final ratification that allows the federal government to incur additional debt equal to no more than five percent of already-outstanding debt. This window of debt has the advantage that as of passage of the amendment, there is no need for Congress to immediately apply to the states for permission to incur additional debt. There is time for federal lawmakers to plan for the new restriction, to obtain legal opinions about its effects where necessary, and to prepare new processes for obtaining states' permission to incur additional debt, if necessary. (More on state approval below.)

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The Natelson BBA (NBBA) simply states that "any measure" that would increase debt would require approval from state legislatures. While it does not specifically contemplate a debt limit scenario whereby Congress would request a limit in excess of existing debt that would only be reached over a period of time, it seems clear that Natelson anticipates that is how the amendment would be used. The alternative would be that every spending measure that might result in increased debt would have to be approved by state legislatures, which would intimately involve the states in the federal budgeting process. Although it seems obvious that Natelson does not contemplate such a potentially chaotic scenario, the NBBA does leave that possibility open.

Debt Definition

The CFA BBA explicitly defines debt with only a single definition, which is "any obligation backed by the full faith and credit of the United States." This is an all-encompassing term for any debt instrument, piece of paper, or contract that is backed by a guarantee from the people of the United States to make good on a financial claim against them. Natelson might point out that the term, obligation, does not appear anywhere else in the Constitution. He identifies the use of new words as a weakness of other BBA drafts. However, much as he argues about debt the meaning of obligation is clear in the context of the CFA BBA even though the precise use of the word has marginally changed over time.

The CFA BBA takes the precaution of being very specific in prohibiting any excess of expenditures over receipts by the U.S. government from being financially covered in any way except by debt as defined in the amendment. States have demonstrated a remarkable ability get around debt limits and balanced budget requirements using all manner of subtle definitional loopholes, using IOUs instead of bonds, special-issue bonds that supposedly do not have recourse to general funds, and creating quasi-governmental organizations that are supposedly legally separate from the state itself. The CFA BBA disallows such games. It could be that loopholes will be found or created at some point, but the wiggle room has been severely limited.

Natelson's definition of debt is two-part, which introduces potential complications along with a new and interesting innovation. The NBBA leaves public debt undefined. Natelson points out that the term is used elsewhere in the Constitution. The meaning intended is likely the same as debt defined in the CFA BBA. However, modern discussions of U.S. debt often distinguish between gross federal debt, debt held by the public and intragovernmental holdings. Only occasionally is the term "public debt" used with clarity to refer to gross federal debt. Often it is hard to discern whether the use of the term "public debt" means gross federal debt or "debt held by the public."

Given modern usage, clarity might actually not be served by the use of public debt. Natelson might be completely correct in the term's clarity from a lawyer's perspective, but Treasury Secretaries and voters do not have to be attorneys. How the two terms public debt and debt held by the public might get conflated from a legal, technical, and politically practical perspective in the future is a matter of speculation, but such speculation is not unreasonable for an amendment passed in the 21st century. If public debt were to be interpreted as debt held by the public, this would introduce a whole new gaming opportunity for elected officials to strategically take advantage of agency cash flows to avoid a constitutional debt limit. The courts could very well give in to a fait accompli wherein a future president claims debt held by the public is a proper interpretation, acts accordingly, pays no political price for doing so, and creates the potential for chaos if the courts refuse to agree, thereby backing the courts into a corner.

Additionally, we already know from gamesmanship in the states that using the undefined term "debt" is inadequate. To sustain spending in excess of constitutional or local governmental debt limits and balanced budget requirements, many state courts have excluded from the meaning of "debt" at the state level: (a) the short-term nonpayment of obligations, (b) the issuance of special fund debt, (c) so-called moral obligation no-recourse bonding (which still has an implicit guarantee), and (d) the incurrence of liabilities. Over the years, these judicial decisions have enabled state governments or their special funds, instrumentalities and political subdivisions to engage in as much borrowing as the political and financial market will bear through: (a) delaying payment of obligations into the next fiscal year through budget "rollovers," (b) the sale of state assets through sale-leaseback schemes, (c) the "floating" of warrants or outright issuance of IOUs, (d) the diversion of receipts meant for pension or other programs involving incurred liabilities or quasi-trust fund obligations; and (e) the creation of special purpose instrumentalities to handle borrowing for what would otherwise be debt-limited general fund expenditures.

A modern balanced budget amendment cannot hope to survive more than a couple of fiscal years in Congress without

acknowledging and counteracting this reality both by defining debt and by coupling a debt limit with an express spending limit that limits spending to taxes, unencumbered proceeds and authorized debt, as does the CFA BBA.

The innovative second part of Natelson's definition for debt is contingent debt, which he explicitly defines as "secondary public liabilities of the United States." It is unclear what liabilities would fall into this category. Certainly a contractual liability incurred by the United States would seem to fall within the category, but that is probably not the intention of the provision. Presumably, the drafter of the provision would want to distinguish between liabilities incurred with government operations and liabilities such as retirement benefits or loan guarantees shouldered by the federal government in a variety of programs such as student loans and housing programs. But that distinction is not made textually. Moreover, no one has previously proposed that retirement benefits or loan guarantees be included in a BBA. However, such programs do present a risk for the federal budget and taxpayers, especially in a world where balanced budgets are constitutionally required.

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Unfortunately, Natelson's innovation likely opens his BBA to gaming of the system. One can imagine ways to shift public debt into contingent debt and possibly even vice versa. This has the potential of creating wider constituencies for increasing one form of debt or the other which could then be converted and potentially used to create pressure to increase the other form of debt. While there will be many constituencies seeking to increase the federal debt in order to preserve spending programs or avoid taxation (or both), there is certainly no reason to provide potentially manipulative tools for them to exploit.

The NBBA's apparent advantage over the CFA BBA in developing a new debt definition, contingent debt, to be included as a further form of debt limitation, is likely not an advantage at all. In fact, despite the NBBA's apparent simplicity, judging by its brevity, the concept of contingent debt being added into the mix only complicates matters in a way that makes the NBBA less effective rather than more effective.

State Approval

The NBBA and the CFA BBA both include a requirement that states approve additional federal debt. Professor Natelson's recognition of the good idea to involve state legislatures in a system to constitutionally require balanced budgets is welcome. Unfortunately, he adds a new wrinkle that is likely to only complicate matters should the NBBA ever be ratified.

The CFA BBA lays out four broad conditions as part of the process for increasing authorized debt, the equivalent of today's congressionally-determined debt limit, but with the teeth that increasing the debt limit is more onerous than a simple majority vote of approval in Congress. First, a majority of state legislatures (26) must approve the new limit. Second, the vote in each state legislature must only be on whether or not to approve a new level of authorized debt. Third, there can be no conditions or quid pro quo involved as consideration on the part of a state legislature in determining its vote. And fourth, if a majority of states has not approved a new authorized debt level within 60 days, the request by Congress for an increase in authorized debt is automatically considered disapproved.

The CFA BBA is only the second BBA proposal to include a state role in approving additional federal debt. As with the previously-drafted National Debt Relief Amendment, the concept is to diffuse the power to incur debt for which future generations of Americans are ultimately responsible. Most state legislatures are highly constrained by their state constitutions as to how readily they can incur debt. State legislatures have also seen their budget priorities usurped by federal priorities through the power of the federal purse made possible by the federal government's seemingly limitless borrowing capacity. With federal spending constituencies forced to lobby 50 state legislatures, the American people whose progeny will ultimately have to take financial responsibility will have a greater chance of prevailing in favor of financial prudence.

The CFA BBA contains safeguards to prevent Congress from making promises of largesse to states in order to effectively buy their support for an increased debt limit. Toward

that end, individual states are prohibited from packaging a vote on the debt limit with other measures in order to prevent Congressional or Presidential horse trading and to prevent vote trading among a state's legislative members. Finally, a 60-day time limit for approval of a debt limit increase ensures that individual state approvals are not gained under a set of circumstances that no longer prevail by the time a majority is obtained.

The NBBA also lays out four broad conditions for approving measures that will increase the public debt or the contingent public debt. First, Congress must gain Presidential approval of a request to the states to approve debt-increasing measures as required by Article 1, Section 7 of the U.S. Constitution. Second, a majority of state legislatures (26) must approve such measures. Third, the states whose legislatures have approved debt-increasing measures must contain a majority of the U.S. population as of the last census. And fourth, measures that increase the public debt may not be combined with measures that increase contingent debt for approval by the states.

Consider first the last NBBA debt-approval condition listed. Prohibiting measures from considering both public and contingent debt at the same time appears to be a way to prevent logrolling. However, it makes the two forms of debt appear unrelated when they are very much related. If contingent debt is approaching some sort of legal limit, this brings pressure on Congress to increase public debt as an alternative. Conceivably, pressure could run in the opposite direction as well. Instead of policy being driven more single-mindedly by a need to keep a single form of debt under control, Congress will be encouraged to jockey between the two. And, without the explicit prohibition of quid pro quos that is contained in the CFA BBA, Congress can wheel and deal with state legislatures, playing them against each other.

Wheeling and dealing with the states when 26 are required to approve additional federal debt measures is always a danger. That is why the CFA BBA explicitly prohibits Congress providing incentives to states in order to purchase the votes of marginal states, or state legislators, who are the last to vote in a situation where a debt measure is on the verge of passage. The NBBA creates additional quid pro quo opportunities by imposing a majority-population requirement in addition to a 26-state requirement. One can imagine more than 26 states voting in favor of increasing the debt, but needing an additional key state to meet the population requirement. Or, the opposite could occur. States could find themselves in a position of being heavily courted for their votes under multiple scenarios.

The CFA BBA requires that states only consider single-subject measures to increase federal authorized debt. There is nothing in the NBBA prohibiting a state from linking the construction of a bridge to a federal debt measure.

The NBBA's majority-population requirement is, no doubt, intended to make passage of measures to increase the federal debt difficult to pass. But, without the prohibition of inducements or quid pro quos, it is not clear that the added condition is actually a higher hurdle. It is almost certain that it will make measures to increase debt much more financially costly to attain.

While the NBBA prohibits measures to increase public debt and contingent debt to be packaged together by the states, it does not prohibit other measures from being packaged with debt-increasing measures. The CFA BBA requires that states only consider single-subject measures to increase federal authorized debt. There is nothing in the NBBA prohibiting a state from linking the construction of a bridge to a federal debt measure.

Finally, the NBBA would allow a debt-increase measure to languish indefinitely if it is not approved by the states. Deadlines and certainty play an important part in bringing closure to all parties involved in a vote. The CFA BBA's 60-day limit for states to approve an increase in authorized debt provides a deadline, past which the process starts over. This prevents the trading of favors that might occur under-the-table if more time were afforded, and creates certainty that once the 60 days are done, so is the potential for increased debt. The NBBA contains no such time constraint.

Soft Landing

The CFA BBA contains a provision whereby the President is required, under threat of impeachment, to impound funds in order to slow spending once actual debt reaches an amount equal to 98 percent of authorized debt so as to prevent actual debt from exceeding actual debt. Since budgeting is always

done behind a veil of ignorance with respect to the amount of revenues that will actually be received, this safeguard prevents the federal government from blowing past a debt limit and then declaring it an accident and a fait accompli. It also prevents spending crises, allows for planning and debate, and provides a financial cushion of sorts.

There is no such soft landing provision in the NBBA. Consequently, the NBBA is far more subject to a future constitutional crisis wherein the provisions of the NBBA are flouted and the only price to be paid by Congress and the President will be political. Once presented with such a crisis, the Supreme Court would likely be powerless, having no real power to enforce the NBBA's provisions once they are already rendered moot. While there is nothing in the CFA BBA requiring the conviction of a President, but only his possible impeachment, for failing to impound funds, the issue will have arisen well in advance of actual debt surpassing its authorized limit, allowing for full debate and consideration of every legal recourse.

Tax Protection

A relatively easy way for Congress to balance a budget, considering the large and noisy constituencies pushing for more spending, would be to increase taxes. The CFA BBA only allows for general income and sales tax increases with a two-thirds vote of the memberships of both houses of Congress, preserving the current simple majority requirement for flattening tax codes, replacing the income tax with a consumption tax or increasing tariffs. The NBBA contains no such protections for the nation's taxpayers.

A Critique of Natelson's Criteria

Professor Natelson specifies nine criteria that he believes a balanced budget amendment draft should exhibit. In simplified form, these include: 1) use of language style consistent with the existing Constitution, 2) brevity, 3) use of words already used in the Constitution, 4) language to minimize manipulation and evasion of limits, 5) avoidance of allowing for exceptions to limits, 6) minimization of judicial involvement, 7) avoidance of unrelated constitutional issues, 8) avoidance of ineffective or counterproductive provisions, and 9) avoidance of provisions that prevent formation of a ratifying coalition.

In regard to Natelson's first three criteria, it is true that the CFA BBA uses style and some terminology that are not already in the Constitution; but it carefully defines its terminology using language that a founding father would have no difficulty understanding were he transported in time. While the CFA BBA falls relatively short on brevity as compared to the NBBA, it is nevertheless actually well-within the length of congressionally proposed amendments.[3] In any event, given the complex nature of finances, brevity might not be the best criterion to pursue. Preciseness and efficiency in language might be the better substitute criteria. After all, it is not a virtue to achieve brevity through the use of vague terminology. Nor is preserving the original style of the Constitution more important than grappling with the fact that a modern amendment requires modern language to overcome the verbal gamesmanship used over nearly 200 years to evade balanced budget requirements and debt limits in the states. In contrast, the NBBA language almost encourages manipulation and evasion of limits and virtually guarantees the judiciary will get involved at some point; as it nearly guarantees a constitutional crisis at some point in the future.

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Consequently, there is good reason to challenge the merits of these first three criteria. The aesthetics of the Constitution's original style and verbiage have been violated many times. Nearly every amendment uses terminology and language that is alien to the main body of the Constitution. A few existing amendments, such as the Twelfth Amendment, are almost incomprehensible. The CFA BBA is a model of clarity and, in comparison to nearly every existing amendment, an homage to the original text of the Constitution.

In regard to Natelson's seventh, eighth and ninth criteria, someone might contend that the CFA BBA's tax protection

element is extraneous to the purpose of a balanced budget amendment or debt limit, counterproductive, or likely to prevent the formation of a ratifying coalition. But there is no way to avoid taking a stand on tax policy in connection with a balanced budget amendment or debt limit. This is because, in reality, sovereign debt policy is tax policy that is time displaced; i.e., a sovereign debt today is a tax tomorrow if we intend to pay it back. For this reason, from the perspective of embedding policies for an eternity, which is what the Founders aimed at in drafting the Constitution, the divide between limiting the debt and limiting taxation is an artificial one. The real choice is between taxes today and taxes tomorrow.

The CFA BBA's tax limit attempts to strike a balance to ensure that taxes are not excessively raised today in order to protect future generations from taxes tomorrow. The NBBA simply ignores the issue. But not making a choice on embedding tax policy in an amendment is a choice. Debt limit or balanced budget amendments that lack a tax limit are actually biased in favor of current taxation over future taxation. This is an inferior policy position compared with the CFA BBA's effort to strike an equitable balance between excessive current and future taxation concerns. It is actually also a heavier political lift in most states (because current generations don't want to be taxed and future generations don't yet have a voice). For this reason, there is every reason to believe that the CFA BBA's tax limit provision will enhance the prospects of generating a ratifying coalition. Indeed, it is the only amendment proposal that has actually garnered a ratification commitment from any state, let alone the current five states that are members of the Balanced Budget Compact.

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Even if these characteristics of the CFA BBA were regarded as weaknesses relative to the NBBA, none are particularly damaging either in terms of gaining passage or in terms of how the amendment might work. To the contrary, they are offset by great strengths in regard to Natelson's remaining criteria—as discussed above, the CFA BBA's text deters manipulation/evasion, exceptions, other constitutional issues, and judicial involvement.

Conclusion

Professor Natelson's draft of a potential BBA is welcome as a debating tool. He has clearly come to the conclusion that involving the states in determining whether the federal government should take on more debt is a good idea. However, serious shortcomings in his BBA are overcome in the CFA BBA, which has better anticipated the numbers and power games Congress might play in trying to get the states to agree to increased federal debt. The NBBA therefore carries with it seeds not purposely sown of its own irrelevance were it to become the law of the land.

Endnotes

1. Natelson, Robert G., *A Proposed Balanced Budget Amendment* (Arlington Heights, IL: Heartland Institute Policy Brief, July 17, 2017), https://www.heartland.org/publications-resources/publications/a-proposed-balanced-budget-amendment.

2. In the interest of full disclosure, this author has been involved in a small way (taking no significant credit) in the development of both of these earlier proposals. These are the NDRA, which Professor Natelson references in his paper, and its successor, the Compact for America's proposed BBA.

3. *Elegant and Concise: The Compact's Balanced Budget Amendment* (Houston, TX: Compact for America Educational Foundation, October 4, 2014), http://www.compactforamerica.org/single-post/2014/10/04/Elegant-and-Concise-The-Compacts-Balanced-Budget-Amendment

Appendix1: Robert Natelson's Proposed Balanced Budget Amendment

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.

Appendix 2: Compact for America's Balanced Budget Amendment

Section 1. Total outlays of the government of the United States shall not exceed total receipts of the government of the United States at any point in time unless the excess of outlays over receipts is financed exclusively by debt issued in strict conformity with this article.

Section 2. Outstanding debt shall not exceed authorized debt, which initially shall be an amount equal to 105 percent of the outstanding debt on the effective date of this article. Authorized debt shall not be increased above its aforesaid initial amount unless such increase is first approved by the legislatures of the several states as provided in Section 3.

Section 3. From time to time, Congress may increase authorized debt to an amount in excess of its initial amount set by Section 2 only if it first publicly refers to the legislatures of the several states an unconditional, single subject measure proposing the amount of such increase, in such form as provided by law, and the measure is thereafter publicly and unconditionally approved by a simple majority of the legislatures of the several states, in such form as provided respectively by state law; provided that no inducement requiring an expenditure or tax levy shall be demanded, offered or accepted as a quid pro quo for such approval. If such approval is not obtained within sixty (60) calendar days after referral then the measure shall be deemed disapproved and the authorized debt shall thereby remain unchanged.

Section 4. Whenever the outstanding debt exceeds 98 percent of the debt limit set by Section 2, the President shall enforce said limit by publicly designating specific expenditures for impoundment in an amount sufficient to ensure outstanding debt shall not exceed the authorized debt. Said impoundment shall become effective thirty (30) days thereafter, unless Congress first designates an alternate impoundment of the same or greater amount by concurrent resolution, which shall become immediately effective. The failure of the President to designate or enforce the required impoundment is an impeachable misdemeanor. Any purported issuance or incurrence of any debt in excess of the debt limit set by Section 2 is void.

Section 5. No bill that provides for a new or increased general revenue tax shall become law unless approved by a two-thirds roll call vote of the whole number of each House of Congress. However, this requirement shall not apply to any bill that provides for a new end user sales tax which would completely replace every existing income tax levied by the government of the United States; or for the reduction or elimination of an exemption, deduction, or credit allowed under an existing general revenue tax.

Section 6. For purposes of this article, "debt" means any obligation backed by the full faith and credit of the government of the United States; "outstanding debt" means all debt held in any account and by any entity at a given point in time; "authorized debt" means the maximum total amount of debt that may be lawfully issued and outstanding at any single point in time under this article; "total outlays of the government of the United States" means all expenditures of the government of the United States from any source; "total receipts of the government of the United States" means all tax receipts and other income of the government of the United States, excluding proceeds from its issuance or incurrence of debt or any type of liability; "impoundment" means a proposal not to spend all or part of a sum of money appropriated by Congress; and "general revenue tax" means any income tax, sales tax, or value-added tax levied by the government of the United States excluding imposts and duties.

Section 7. This article is immediately operative upon ratification, self-enforcing, and Congress may enact conforming legislation to facilitate enforcement.

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