**Testimony of Professor David A. Super**
**In Opposition to HCR 5009**

**Committee on Federal and State Affairs**
**House of Representatives**
**State of Kansas**
**March 13, 2019**

Chairman Barker and Members of the Committee:

I appreciate the opportunity to submit this written statement for your hearing on HCR 5009, which would have Kansas apply to Congress for the convening of a convention under Article V of the United States Constitution. Although I am unable to be present to testify in person, I feel strongly that an Article V convention would pose a grave threat to the liberties that Kansans, like other Americans, have long taken for granted.

**Personal Background**

I am Professor of Law at Georgetown University Law Center. I have written several scholarly articles on federal and state constitutional law. I also have written articles on Article V that have appeared in *The Los Angeles Times*, *The Denver Post*, *The Hill*, and other publications. I have been invited to speak on Article V on a nationally syndicated *Intelligence Squared* debate and on a program at the National Constitution Center.

**Reasons for Opposing HCR 5009**

The Framers intended Article V's provision on calling a new convention as an emergency measure to restore the Republic when Congress has firmly blocked the mechanisms of democracy. This allows the People, acting through the states, to restart the country if Congress has stopped holding elections. This power should not be invoked cavalierly.

Although Congress's performance is roundly criticized by voters across the political spectrum, elections continue to occur. And those elections have consequences: the presidential elections of 2000, 2008, and 2016 each profoundly changed the country's direction. Control of at least one chamber of Congress has changed hands in four of the last seven biennial elections. The main obstacle to the achievement of most political agendas is that those agendas are not broadly shared among the electorate. Should the People unite for a particular kind of social change, we have no evidence that the political system would steadfastly obstruct that change. Putting all of our constitutional liberties at stake, rather than seeking to convince our reluctant fellow citizens of the merits of our positions, is an unjustified risk under the circumstances.

Although proponents of Article V resolutions commonly elevate one or a few specific objectives – as HRC 5009 does – nothing in Article V confines a convention to the items listed in state resolutions. In all their protestations that a convention would not expand its agenda, proponents of an Article V convention cannot point to any binding legal authority that would restrict the convention's agenda much less any entity that would be empowered to enforce such restrictions on a convention. Supporting an Article V convention while citing one or a few priorities is no different from supporting a convention on every possible issue in the Constitution. For this reason, I am equally opposed to liberal and conservative Article V resolutions because they all do precisely the same thing: throw the entire U.S. Constitution open to amendment or wholesale rewriting.

If any proponents of HRC 5009 try to tell the Committee that an Article V convention's agenda could be limited, I respectfully suggest that they be asked to specify the source of the legal authority on which they ask the Committee to rely.

**The Risks of a Runaway Convention**

Advocates of calling a new constitutional convention under Article V of the United States Constitution insist without foundation that we face no danger of a "runaway convention" that would amend the Constitution in unanticipated ways. The proponents cannot point to anything in Article V itself that authorizes limiting the scope of a convention nor does anything empower either Congress or the states to do so. The U.S. Supreme Court has declared that the process of amending the Constitution is a "political question" into which courts may not intervene.[1] It strains credulity to imagine that the well-funded special interest groups that so pervade our public life will suddenly abandon an opportunity to enact their agendas into permanent law. As Chief Justice Warren E. Burger said, a "Constitutional Convention today would be a free-for-all for special interest groups, television coverage, and press speculation."[2]

Perhaps the most powerful evidence that a runaway convention is possible, indeed likely, is the sole historical precedent we have for such a convention: the one that met in Philadelphia, Pennsylvania, in 1787 to draft our current Constitution. Because the states have never invoked Article V's provision for a constitutional convention, we have had no subsequent occasion to see a constitutional convention into action. And as much as we may admire the document it produced, the 1787 Convention unquestionably disregarded not only its charge but also the very constitutional arrangement to which all states had then subscribed.

As Chief Justice Burger noted, it "ignored the limit placed by the Confederation Congress [to meet] 'for the sole and express purpose'"[3] of proposing amendments to the Articles of Confederation. Instead, early in its deliberations, it decided to discard the Articles and write an entirely new constitution that shifted vastly more power to the central government. Thus, if a new constitutional convention decided to rewrite our Constitution from the ground up, it could claim that it is doing nothing more radical than the revered framers did in 1787.

Less widely understood, and even more ominous, the 1787 Convention also disregarded the rules for ratifying amendments set out in the Articles of Confederation. Article XIII stated that:

> the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

By contrast, the 1787 Convention declared that "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."[4] Nine of the thirteen states then in the union was a mere two-thirds, not even the three-quarters that Article V requires for approval of subsequent amendments. The 1787 Convention also bypassed states' elected legislatures and authorized state conventions to make the final decision on ratification. Thus, if a new constitutional convention writes a new constitution and declares that it will become binding on states that ratify it upon the approval of two-thirds of the states – defying Article V's ground rules – it could cite the 1787 Convention as precedent. Indeed, even making a new constitution binding on ratifiers after half of the states have approved would not be that great of a departure.

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[1] Coleman v. Miller, 307 U.S. 433 (1939).
[2] Letter of retired Chief Justice Burger to Phyllis Schlafly, June 22, 1988.
[3] *Id.*
[4] U.S. CONSTITUTION, Art. VII.

The most charitable possible interpretation of the 1787 Convention's ratification rules is that it was inviting states to withdraw from the Articles of Confederation and enter into a new union, founded on the new Constitution. But that is something all states expressly gave up the power to do in the Articles of Confederation. Art. VI, para. 2, of the Articles of Confederation stated that:

> No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

Thus, without Congress's consent, the states ratifying the Constitution had no authority to make it effective among themselves. States also had surrendered their right to question Congress's authority to determine whether to authorize a new constitution. Article XIII stated that: "Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them." Nor were the states free to secede from the Articles of Confederation: as noted, Article XIII stated that "the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual".

In response, proponents try to parse state resolutions finding that the 1787 Convention's aggressive course was consistent with some states' desires. Whether or not this is true, this was legally irrelevant: in the Articles of Confederation the states expressly had given up the right to ignore or abandon the Articles. Proponents also like to cite various meetings of the states held prior to 1787 and a non-Article V meeting held in 1861 as supposed evidence that a new constitutional convention would not be a runaway. This is absurd: meetings held before Article V was promulgated obviously could not violate its terms, and the "Peace Convention" of 1861 did not purport to have the powers of an Article V convention. If all the proponents want is a non-Article V convention like that held in 1861, they are free to call one at any time.

**What an Article V Convention Might Do**

Our Constitution is, by design, difficult to change. Thus, many of us take for granted key provisions without realizing how controversial they are with many people in this country. These provisions on which the Supreme Court's doctrine is heavily criticized would be among those most at risk in any Article V convention.

The First Amendment, as revered as it is by many, is in fact highly controversial across the political spectrum. President Donald Trump has argued that journalists should face consequences for stories critical of his Administration. Justice Clarence Thomas recently questioned whether the First Amendment supports *New York Times v. Sullivan.* Others have condemned critical reporting of military and anti-terrorism actions. Some religious groups argue that the Court's doctrine on the separation of church and state go too far, while some liberals believe a sharper line is required. Many liberals reject the protection of campaign spending the Court found in *Citizens United*, *Buckley v. Valeo*, and other cases. Many liberals also criticize the Court's protection of commercial speech. Some liberals believe the Court's public forum cases skew public discourse in favor of the affluent. With this much criticism, it is difficult to believe that any Article V convention would not see concerted efforts to modify the First Amendment.

The Second Amendment, too, remains highly controversial. Many liberals would like to do away with it altogether; others would limit gun rights to participants in organized state militia efforts. On the other hand, some gun rights groups are impatient with the Supreme Court's Second Amendment jurisprudence and would like to get the government out of this area of regulation. Here again, in any Article V convention we can expect serious efforts to change the tenor of gun rights in this country.

An Article V convention also could improve the chances for ratification of its amendments by combining several themes into one proposed amendment. Several of our existing amendments embrace more than one theme. For example, the Fifth Amendment discusses grand juries, double jeopardy, self-incrimination, due process of law, and takings of private property for public use. The Sixth Amendment addresses speedy and public trials, juries, venue for trials, access to criminal charges, confrontation of

adverse witnesses, compulsory process, and the right to counsel. The Eighth Amendment regulates bail, fines, and cruel and unusual punishment. Most compound of all, the Fourteenth Amendment provides for birthright citizenship, privileges and immunities, due process of law, equal protection, the right to vote, apportionment of representatives, disqualification of former confederates from public office, the U.S. public debt, confederate debts, slaveholders' claims, and Congress's legislative power.

No one can reliably predict what would happen if an Article V convention put forward similarly compound proposed amendments, each with some features attractive to liberals and others playing to conservatives. For example, would this country ratify an amendment creating a national security exception to the First Amendment while limiting Second Amendment protections to official militia activities? What about one overriding *Citizens United*'s protection of campaign spending and capping federal spending far below current levels? Or an amendment eliminating the Electoral College, declaring that this country is a Christian Nation, and prohibiting all affirmative action?

This country's politicians have done a great deal to perfect the art of logrolling since 1787. Once a convention began, any number of potential coalitions could form among single-issue groups willing to sacrifice the general good to their own agendas.

Not surprisingly, jurists from across the jurisprudential spectrum have sounded the alarm about an Article V convention. Retired U.S. Supreme Court Justice Arthur Goldberg wrote in 1986: "one of the most serious problems Article V poses is a runaway convention. There is no enforceable mechanism to prevent a convention from reporting out wholesale changes to our Constitution and Bill of Rights. Moreover, the absence of any mechanism to ensure representative selection of delegates could put a runaway convention in the hands of single-issue groups whose self-interest may be contrary to our national well-being." Retired Chief Justice Warren E. Burger wrote in 1988 that a "Constitutional Convention today would be a free-for-all for special interest groups, television coverage, and press speculation." And Justice Antonin Scalia said in 2014: "I certainly would not want a constitutional convention. I mean whoa. Who knows what would come out of that?"

**Conclusion**

In sum, nothing in law or history would constrain a new constitutional convention to the agenda its proponents are promoting. Although clear law does require that three-quarters of the states ratify any amendments proposed by such a convention, the Supreme Court is unlikely to find that law enforceable and the only relevant historical precedent suggests that a new constitutional convention may disregard existing ratification procedures if it believes they will frustrate the convention's purpose.

The risks of an Article V convention are far too great for this risk to be worth running. If the country supports the ends that HCR 5009 espouses, pressure on Congress to propose such amendments to the states through the usual amendatory process will suffice. We have recently seen that transformative elections are, indeed, quite possible. If the country does not support these changes, then HCR 5009 will not bring them about and will instead unnecessarily open the U.S. Constitution to mischievous amendments serving altogether different political agendas.

Either way, HCR 5009 poses an excessive, dangerous risk to the U.S. Constitution that plays such a fundamental role in making this country what it is today.

Thank you very much again for the opportunity to testify on this important legislation.