

**House Federal and State Affairs Committee**  
**March 13, 2019**  
**HCR 5009**

**To: Chairman Barker and Committee Members**

**From: Bill Rich, James R. Ahrens Professor of Law**

**Re: Opposition to Proposal for an Article V Constitutional Convention  
Verbal Testimony**

A year ago, when the Kansas Senate considered and rejected a proposal for an Article V Constitutional Convention, a state senator told me that he did not have strong views on the topic but would vote in favor because of letters from his constituents. I hope no current members of this body share those views. It is difficult to imagine a decision that carries with it more profound long-term implications than an open-ended call for amendment or replacement of the United States Constitution. Individuals with legislative experience should understand the problems with such a proposal better than those who lack that perspective and should be careful to make decisions reflecting their experience.

Having taught Constitutional Law for almost forty years, and having studied constitutions from around the globe, I have difficulty imagining anything worse than a second U.S. constitutional convention. Those who think they "know" what would come out of such a convention are either misinformed or kidding themselves. What I do know, however, is that under current constitutional norms, federal courts generally defer to the elected branches of government when dealing with most federalism and budget-related issues. In contrast, virtually all constitutional convention proposals I have seen would, at their core, transfer authority from the people of this nation and our elected representatives to a judicial branch charged with enforcing a new set of potentially rigid constraints.

A balanced-budget amendment to the constitution is a particularly bad example. Such a constraint on the national level would bear no resemblance to familiar state constitutional provisions that require balanced budgets. For comparison, ask: How would our government respond in a time of war? Would our military have been depleted because of extended budget constraints? Would the elderly lose their Social Security if Congress and the President failed to meet a constitutional obligation to balance the budget? Would our children lose access to basic health care? Would misguided economic theory cripple potential national government responses to a future recession or depression? More importantly, should judges rather than elected representatives make decisions about whether to protect the military, the elderly, the children, or the nation's economy?

For additional comparison, think about current issues we are dealing with in this state. Some Kansans believe that our Supreme Court should not be making education funding decisions. Imagine how much more political power the judicial branch could wield with a revised national constitution that took key budgeting decisions out of legislative hands.

A constitutional convention would not necessarily be tied to a single issue. What would happen if such a convention became captured by a well-financed special interest group? Should

views of such a group control our children and their children, regardless of the changes that take place in the world around us?

What rules would govern a new constitutional convention? Would each delegate have a vote based upon state population size, or would each state have an equal voice? Would a simple majority determine the outcome? Article V does not answer such questions. And although Article V requires ratification by three-quarters of the states, the Philadelphia convention in 1787 ignored such constraints when participants chose to promulgate a new constitution rather than just amend the Articles of Confederation. Is there an assurance that the same would not happen today?

What we do know is that a modern constitutional convention would look nothing like the convention of leaders who met in 1787; conversations related to calls for a new convention frequently identify specific targets for change that would replace the broad principles embodied by our current constitution. Studies have shown that constitutions endure when they are either broad and flexible or detailed but easily amended. Our current constitution exemplifies the former, but nothing guarantees that an altered text would retain that vitality. I can only hope that Kansas legislators will have enough common sense to avoid that risk.