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February 13, 2018

The Honorable Bud Estes
Chair, Senate Committee on Federal and State Affairs
Kansas State Capitol
300 SW 10th St., Room 136-E
Topeka, KS 66612

RE: Testimony In Support of Senate Concurrent Resolution 1611

Chairman Estes and Members of the Committee:

Thank you for the opportunity to testify in support of Senate Concurrent Resolution (S.C.R.) 1611.¹ Please accept this document as my written testimony in support of S.C.R. 1611 and in rebuttal to opponents of an Article V Convention of States.²

I support S.C.R. 1611 for at least three reasons. First, I believe that constitutional amendments contemplated by S.C.R. 1611 are necessary. For example, I personally believe it necessary to “impose fiscal restraints on the federal government”³ by constitutional amendment for several reasons. At the time of the writing of this phrase, the total outstanding public debt of the United States exceeds \$20 trillion,⁴ and recent U.S. Office of Management and Budget publications project trillions of dollars in deficit spending from 2015 through 2026.⁵ Further, the Constitution does not prohibit Congress from appropriating funds in excess of actual federal revenue.⁶ Thus, unless Congress reverses course and exercises fiscal restraint and prudence, the ratification of an amendment proposed by an Article V Convention will likely be necessary to fiscally restrain Congress.⁷

Second, Kansas is not the only state to have considered an Article V application such as S.C.R. 1611. In fact twelve other states have issued Article V applications that in relevant operative part are substantially similar to S.C.R. 1611: Alabama,⁸ Alaska,⁹ Arizona,¹⁰ Florida,¹¹ Georgia,¹² Indiana,¹³ Louisiana,¹⁴ Missouri,¹⁵ North Dakota,¹⁶ Oklahoma,¹⁷ Tennessee,¹⁸ and Texas.¹⁹ I must here unfortunately note that important and necessary language has been omitted from S.C.R. 1611.²⁰ The combined total population of these states as of 2010 exceeded 93,000,000.²¹ Thus, states other than Kansas and millions of Americans other than Kansans support holding an Article V Convention to propose amendments to the Constitution that align with the terms of S.C.R. 1611.

Third, Congress could not as easily deem substantially similar Article V applications insufficiently similar to be aggregated (and, if aggregated, constituting a sufficient number of applications for a Convention).²² S.C.R. 1611 is at least in part opposed to the interests of Congress: an amendment designed to “impose fiscal restraints on the federal government”²³ could, among other things, prohibit Congress from deficit spending.²⁴ In other words, as S.C.R. 1611 is (and other Article V applications substantially similar thereto are) focused on limiting and restraining the “federal government,”²⁵ and as Congress is an entity of the federal government,²⁶ Congress has an interest in maintaining its power by blocking a Convention arising from Article V applications such as S.C.R. 1611. Congress could block such a Convention by, among other things, construing as significant insignificant variances between Article V applications so as to improperly deem Article V applications non-matching²⁷ and thus non-aggregating under Article V.²⁸ Thus, it is important to issue an Article V application that in relevant operative part is substantially similar to other Article V applications.

The arguments and claims of opponents of an Article V Convention are for several reasons either without merit or unpersuasive. Opponents imply that the Constitution’s omission of parliamentary procedural rules to govern an Article V Convention²⁹ and a lack of precedent for such a Convention³⁰ will yield a chaotic or uncontrolled Convention process.³¹ This seems unlikely. As the possibility of a Convention is significantly politically controversial, an actual Convention would most likely be subjected to intense public scrutiny.³² Such scrutiny would likely motivate participating delegates to select and closely abide by an authoritative system of parliamentary procedure.³³ Also, delegates could (and possibly would) consult the procedural rules adhered to and the examples provided by the First and Second Continental Congresses,³⁴ the Constitutional Convention of 1787,³⁵ and various other congresses and conventions (and documents underlying the same) of the colonial and founding eras.³⁶ Finally, lack of precedent itself does not necessarily justify refraining from acting.³⁷

Opponents assert or imply that delegates will transcend or disregard the terms of the states’ respective Article V applications³⁸ thereby bringing about a “runaway convention”³⁹ in which delegates “essentially do what they want.”⁴⁰ However, a “runaway convention” is unlikely, preventable, or, even if not preventable, likely inconsequential. A “runaway convention” is unlikely because, due to the intense public scrutiny to which an Article V Convention likely would be subject,⁴¹ and in contrast to the dependence of late-eighteenth century Americans on the slowly published written word,⁴² today’s Americans would, given today’s amazing communications technology, very quickly learn about a “runaway convention.” A reasonably intelligent and politically astute delegate would foresee this and refrain from acting so as to elicit an angry and possibly violent response from constituents. A “runaway convention” is preventable, or likely to be stymied, in at least two ways. First, an Article V application, such as S.C.R. 1611, can use words such as “impose,” “limit,” and “restraint.”⁴³ Each word can connote constraint or restriction (especially “impose” and “restraint”),⁴⁴ and the context of an Article V application such as S.C.R. 1611 confirms that each word was intended to connote constraint or restriction (and not, for example, permissiveness or open-endedness).⁴⁵ Second, within its Article V application, a state could preemptively reject and deem illegal and void any action or proposed amendment inconsistent with the terms of the application.⁴⁶ Finally, a “runaway convention” likely would be inconsequential because any amendment proposed by the Convention must ultimately be approved by “three fourths” of the states, either by the respective legislatures or the respective conventions thereof.⁴⁷ This “high hurdle”⁴⁸ imposed by Article V is not to be easily overcome.⁴⁹

Opponents assert that simple obedience to the Constitution would obviate any need for an Article V Convention. Specifically, if the government simply obeyed the Constitution, the United States would not, for example, have accumulated \$20 trillion in public debt, and an Article V Convention, at least to address the fiscal and budgetary issues of the United States, would be unnecessary.⁵⁰ However, as noted earlier, the Constitution does not prohibit Congress from appropriating funds in excess of actual federal revenue.⁵¹ Further, contrary to the implications of some,⁵² the words “gold” and “silver” appear only once in the Constitution,⁵³ and the provision in which they appear clearly and expressly applies to and limits the states (not the United States).⁵⁴ Moreover, the Constitution nowhere expressly prohibits Congress from either issuing non-asset backed paper currency⁵⁵ or chartering a bank.⁵⁶ Thus, as noted above, unless Congress reverses course and exercises fiscal restraint and prudence in various ways, the ratification of an amendment proposed by an Article V Convention will likely be necessary to fiscally restrain Congress.⁵⁷

Finally, the assertion that simple obedience to the Constitution would obviate any need for an Article V convention overlooks the reality of interpretation and interpretational philosophy as applied to disputes as to the meaning of the Constitution. For example, in the noted U.S. Supreme Court (hereinafter “Court”) case *District of Columbia v. Heller*,⁵⁸ the late Justice Antonin Scalia, writing for the majority, held that “[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”⁵⁹ Justice John Paul Stevens rejected Justice Scalia’s interpretation and dissented.⁶⁰ In arriving at his opinion, Justice Scalia arguably employed an originalist approach.⁶¹ In arriving at his opinion, Justice Stevens arguably at least in part employed an originalist approach.⁶² Justice Scalia was joined by five justices.⁶³ Justice Stevens was joined by four.⁶⁴ The membership of the Court could have been different at the time *Heller* was decided. Justice Stevens could have written the *Heller* majority opinion.⁶⁵ In that hypothetical outcome, little recourse would be available to those who side with Justice Scalia’s interpretation of the Second Amendment. How can U.S. Supreme Court Justices who “hold . . . [o]ffice during good [b]ehaviour”⁶⁶ be “h[e]ld . . . accountable”?⁶⁷ Waiting patiently for their retirement and hoping for both a President to nominate to the Court an originalist in Justice Scalia’s mold and an alteration of the jurisprudential or interpretational philosophy of the Court would be of little comfort if the wait is lengthy and occurs in a state not friendly to firearms ownership. Also, in the event that they recognize a “right”⁶⁸ that leads to the death of millions,⁶⁹ how can U.S. Supreme Court Justices who “hold . . . [o]ffice during good [b]ehaviour”⁷⁰ be “h[e]ld . . . accountable”?⁷¹ Other than attempting to utilize the processes provided by Article V, what recourse is available to proponents of life? Furthermore, in the event that, through the law, they extend the reach of an institution⁷² beyond its proper application,⁷³ how can U.S. Supreme Court Justices who “hold . . . [o]ffice during good [b]ehaviour”⁷⁴ be “h[e]ld . . . accountable”?⁷⁵ Other than attempting to utilize the processes provided by Article V, what recourse is available to those who subscribe to traditional Judeo-Christian values?

Therefore, for the reasons set forth above, I respectfully urge the committee to recommend S.C.R. 1611 favorably for passage.

¹ Page 1, lines 1-4 (Kan. 2018), available at http://www.kslegislature.org/li/b2017_18/measures/documents/scr1611_00_0000.pdf (“making application to the Congress of the United States to call a

convention for the purpose of proposing amendments to the Constitution of the United States that impose limits on the federal government”).

² See U.S. Const. art. V, reprinted in *The Constitution of the United States of America, As Amended*, H.R. Doc. No. 110-50, at 9-10 (United States Government Printing Office, Washington, D.C. 2007) [hereinafter “H.R. Doc. 110-50”], available at <https://www.gpo.gov/fdsys/pkg/CDOC-110hdoc50/pdf/CDOC-110hdoc50.pdf> (providing for two Constitutional amendatory processes one of which consists in two-thirds of the states applying to Congress to call Convention of states in or through which the states propose amendments). *Accord United States v. Sprague*, 282 U.S. 716, 730 (1931).

³ S.C.R. 1611, *supra* note 1, at page 1, line 25.

⁴ *The Debt to the Penny and Who Holds It*, <https://www.treasurydirect.gov/NP/debt/current> (last visited Feb. 13, 2018) (“[\$]20,669,079,408,408.12”).

⁵ Table S–1. Budget Totals, in U.S. Office of Management and Budget, *Budget of the U.S. Government: A New Foundation for American Greatness: Fiscal Year 2018* at 25 (United States Government Publishing Office, Washington, D.C. 2017), available at <https://www.gpo.gov/fdsys/pkg/BUDGET-2018-BUD/pdf/BUDGET-2018-BUD.pdf>; Table S–1. Budget Total, in U.S. Office of Management and Budget, *Budget of the U.S. Government: Fiscal Year 2017* at 115 (United States Government Printing Office, Washington, D.C. 2016), available at <https://www.gpo.gov/fdsys/pkg/BUDGET-2017-BUD/pdf/BUDGET-2017-BUD.pdf>.

⁶ See U.S. Const. art. I, § 7, cl. 1; U.S. Const. art. I, § 8, cl. 1, 2, 5, and 18; U.S. Const. art. I, § 9, cl. 7; U.S. Const. art. I, § 10, cl. 1. See also *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987) (discussing the limits of Congress’s power to spend generally and in connection with the imposition by Congress of conditions on states’ acceptance of federal funds); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 Chap. L. Rev. 195, 196-97 & nn.6-10 (2001) (implying that there is no meaningful limitation to Congress’s spending power).

⁷ See ALEC Model Legislation for an Article V / BBA Resolution / Memorial, <http://bba4usa.org/wp-content/uploads/2015/12/BBA-Model-Legislation-1.pdf> (last visited Feb. 13, 2018) (“proposing an amendment . . . requiring that in the absence of a national emergency the total of all Federal outlays made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year”). Other language, such as the following, could be employed: “No appropriation either by itself or in combination with any other past, current, or future appropriation shall exceed federal revenue.”

⁸ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), with H.J.R. 112, Reg. Sess., at ¶ 6 (Ala. 2015), available at <http://arc-sos.state.al.us/PAC/SOSACPDF.001/A0010857.PDF> (“That the Legislature of the State of Alabama hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments 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.”).

⁹ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), with H.J.R. 22, 28th Leg., 2d Reg. Sess., ¶ 6 (Alaska 2014) (“BE IT RESOLVED that, under art. V, Constitution of the United States, the Alaska State Legislature respectfully applies to the United States Congress to call a convention of the states for the sole purpose of 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 of federal government officials[.]”).

¹⁰ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), with H.C.R. 2010, 53rd Leg., 1st Reg. Sess., ¶ 6 (Ariz. 2017), available at http://apps.azsos.gov/apps/publicservices/LegislativeFilings/PDFs/2017/53rd_Legislature_1st_Regular_Session/HCR_2010.pdf (“That, pursuant to Article V of the Constitution of the United States, the Legislature of the State of Arizona formally applies to the Congress of the United States to call a convention of the states 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 federal officials and for members of Congress.”).

¹¹ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), with S.M. 476, 23rd Leg. Reg. Sess., p. 3119 (Fla. 2014) (“(1) That the Legislature of the State of Florida does hereby make application to Congress pursuant to Article V of the Constitution of the United States to call an Article V convention for the sole purpose of proposing amendments to the Constitution of the United States which: (a) Impose fiscal restraints on the Federal Government. (b) Limit the power and jurisdiction of the Federal Government. (c) Limit the terms of office for federal officials and members of Congress.”).

¹² Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), with S.R. 736, 152d Gen. Assemb., Reg. Sess., p. 895 (Ga. 2014) (“NOW, THEREFORE, BE IT RESOLVED BY THE GENERAL ASSEMBLY OF GEORGIA that the General Assembly of the State of Georgia hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the United States Constitution 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.”).

¹³ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), with S.J.R. 14, 119th Gen. Assemb., 2d Reg. Sess., § 1 (Ind. 2016) (“The legislature of the State of Indiana hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the Constitution of the United States that impose fiscal restraints of 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.”).

¹⁴ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), with S.C.R. 52, Reg. Sess., ¶ 6 (La. 2016), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=1006951> (“THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby memorialize and apply to the United States Congress for the calling of a convention of the states limited to proposing amendments to the U.S. Constitution to limit the power and jurisdiction of the federal government, impose fiscal restraints upon its activities, and limit the terms of office that may be served by its officials and by members of Congress.”).

¹⁵ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), with #####. S.C.R. 4, 99th Gen. Assem., 1st Reg. Sess., ¶ 6 (Mo. 2017) (“Now, Therefore, Be It Resolved by the members of the Missouri Senate, Ninety-ninth General Assembly, First Regular Session, the House of Representatives concurring therein, hereby apply to Congress, under the provisions of Article V of the United States Constitution, for the calling of a convention of the states limited to proposing amendments to the United States Constitution 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 members of Congress[.]”).

¹⁶ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), with H.C.R. 3006, 65th Leg. Assemb., Reg. Sess., ¶ 6 (N.D. 2017) (“That the Sixty-fifth Legislative Assembly urges the Congress, under the provisions of Article V of the United States Constitution, to call a convention of the states limited to proposing amendments to the United States Constitution which 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[.]”).

¹⁷ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), *with* S.J.R. 4, 55th Leg., 2d Reg. Sess., § 6 (Okla. 2016) (“The Legislature of the State of Oklahoma hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the United States Constitution 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.”).

¹⁸ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), *with* S.J.R. 67, 109th Gen. Assemb., ¶ 7 (Tenn. 2016), *available at* <http://publications.tnsosfiles.com/acts/109/resolutions/sjr0067.pdf> (“[T]hat this legislative body does hereby apply to Congress under the provisions of Article V of the United States Constitution for the calling of a convention of the states, limited to proposing amendments to the United States Constitution 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.”).

¹⁹ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), *with* S.J.R. 2, 85th Leg., Reg. Sess., ¶ 8 (Tex. 2017), *available at* <http://www.legis.state.tx.us/billlookup/text.aspx?LegSess=85R&Bill=SJR2> (“That the 85th Texas Legislature apply to Congress to call a convention under Article V of the United States Constitution for the limited purpose of proposing one or more amendments to the constitution to impose fiscal restraints on the federal government, to limit the power and jurisdiction of the federal government, and to limit the terms of office of federal officials and members of Congress[.]”).

²⁰ Compare S.C.R. 1611, *supra* note 1, at page 1, lines 23-27 (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States [sic] 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[.]”), *with* H.C.R. 5005, page 1, lines 24-30 (Kan. 2017), *available at* http://www.kslegislature.org/li/b2017_18/measures/documents/hcr5005_00_0000.pdf (“The legislature of the state of Kansas hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, **for the calling of a convention of the states 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[.]”) (emphasis added). See also *supra* endnotes 8-19 to compare S.C.R. 1611 with twelve Article V applications.

²¹ 2010 Census Interactive Population Search, <https://www.census.gov/2010census/popmap/ipmtext.php?fl=48:47:40:38:29:22:18:13:12:04:02:01> (last visited Feb. 12, 2018) (providing the 2010 population statistics of Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Louisiana, Missouri, North Dakota, Oklahoma, Tennessee, and Texas) (93,292,656); Table 16. Resident Population by Age and State: 2010, *in* U.S. Census Bureau, Statistical Abstract of the United States: 2012 at 21, 21 (131st ed., United States Government Printing Office, Washington, D.C. 2011) (same) (93,293,000).

²² See Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 Va. L. Rev. 1509, 1527, 1568 (2010).

²³ S.C.R. 1611, *supra* note 1, at page 1, line 25.

²⁴ See Rappaport, *supra* note 22, at 1549 (That “a balanced budget amendment” would fail “to pass Congress is not surprising since it would operate to restrain Congress's power to deficit spend.”) (footnote omitted).

²⁵ See S.C.R. 1611, *supra* note 1, at page 1, lines 23-27.

²⁶ See U.S. Const. art. I, *reprinted in* H.R. Doc. 110-50, *supra* note 2, at 1.

²⁷ See Rappaport, *supra* note 22, at 1527, 1568.

²⁸ See U.S. Const. art. V, *reprinted in* H.R. Doc. 110-50, *supra* note 2, at 9 (conditioning the calling of a Convention “on the Application of the Legislatures of *two thirds* of the several States”) (emphasis added).

²⁹ See U.S. Const. art. V, *reprinted in* H.R. Doc. 110-50, *supra* note 2, at 9-10 (providing no parliamentary procedure to govern an Article V Convention); James Madison, Saturday, September 15, 1787, *reprinted in* 2 The Records of the Federal Convention of 1787 at 622, 629-30 (Max Farrand ed., 1911) (reproducing the initial version of Article V, which is substantially similar to the current text of Article V, and indicating that James Madison foresaw “difficulties . . . as to the form, the quorum &c.” of a state-called Article V convention).

³⁰ See Congressional Research Serv., *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 112-9, at 1000 (United States Government Publishing Office, Washington, D.C. 2016) [hereinafter “S. Doc. 112-9”], available at <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2016/pdf/GPO-CONAN-REV-2016.pdf> (indicating that an Article V Convention has never occurred) (footnote omitted).

³¹ See, e.g., Center on Budget and Policy Priorities, *Testimony Regarding House Concurrent Resolution 5005 Submitted to the House Committee on Federal and State Affairs* ¶ 5 (Feb. 10, 2017), available at http://www.kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170213_10.pdf (“The constitution . . . provides no guidance on the operating rules for a convention. Further, because a convention has never been called under Article V, there is no precedent upon which to base a shared understanding of the operating rules.”); Kansas Center for Economic Growth, *House Concurrent Resolution 5005 Testimony* ¶ 2 (Feb. 13, 2017), available at http://www.kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170213_09.pdf (“The Constitution provides no guidance whatsoever on even the most basic format of a convention, such as the delegate selection procedure or the required number of votes to adopt amendments.”)

³² The possibility of an Article V Convention has been discussed within the pages of, for example, *The New York Times*: See Michael Wines, *Inside the Conservative Push for States to Amend the Constitution*, ¶ 4, N.Y. Times (Aug. 22, 2016), <https://www.nytimes.com/2016/08/23/us/inside-the-conservative-push-for-states-to-amend-the-constitution.html> (pertaining to calling a Convention under “Article V of the Constitution”). The possibility of a Convention has also elicited noteworthy support and opposition. See, e.g., Endorsements, <https://conventionofstates.com/endorsements> (last visited Feb. 11, 2018) (indicating that politically prominent persons support the Convention of States Project, an organization that advocates for a Convention); Arthur J. Goldberg, *The Proposed Constitutional Convention*, 11 *Hastings Const. L.Q.* 1, 4 (1983) (indicating that Goldberg, a former Associate Justice of the U.S. Supreme Court, opposed a Convention); More Than 200 Organizations Oppose Calls for New Constitutional Convention, Warn of Dangers, <https://www.commondreams.org/newswire/2017/04/14/more-200-organizations-oppose-calls-new-constitutional-convention-warn-dangers> (last visited Feb. 11, 2018) (referring to a Convention and providing a link to a PDF copy of an opposition letter apparently subscribed to by numerous organizations).

³³ Delegates would likely select from among the following authoritative and established parliamentary procedural systems: Mason’s Manual of Legislative Procedure, Thomas Jefferson’s Manual of Parliamentary Practice for the Use of the Senate of the United States, or Robert’s Rules of Order. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 789 n.11 (1983) (citing Mason’s); *Nevada Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 123 (2011) (Jefferson’s); *New Process Steel L.P. v. NLRB*, 560 U.S. 674, 687 (2010) (Robert’s); Using *Mason’s Manual of Legislative Procedure: The Advantages to Legislative Bodies* ¶ 1, <http://www.ncsl.org/research/about-state-legislatures/masons-manual-for-legislative-bodies.aspx> (“Seventy of the 99 legislative chambers in the United States use Mason’s Manual as their parliamentary authority. Thirteen use Jefferson’s Manual, and only 4 use Robert’s Rules of Order.”).

³⁴ See Tuesday, September 6, 1774, *reprinted in 1 Journals of the Continental Congress 1774-1789* at 25, 25-26 (Worthington C. Ford ed., United States Government Printing Office, Washington, D.C. 1904) (reproducing the “rules of conduct to be observed in debating and determining the questions[] that come under consideration” to which the delegates agreed); Thursday, May 18, 1775, *reprinted in 2 Journals of the Continental Congress 1774-1789* at 55, 55 (Worthington C. Ford ed., GPO 1905) (“Upon Motion, *Resolved*, That the Rules of conduct to be observed in debating and determining questions laid down by the last Congress be adopted and observed by the present Congress.”) (footnote omitted).

³⁵ See Monday, May 28, 1787, *reprinted in 1 The Records of the Federal Convention of 1787* at 7, 7-9 (Max Farrand ed., 1911) (reproducing the initial “Rules [of parliamentary procedure] to be observed as the standing Orders of the Convention”)

³⁶ See Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments”*, 65 *Fla. L. Rev.* 615, 624-28 and 632-74 (2013).

³⁷ Cf., e.g., *Ecclesiastes* 3:1 (“There is an occasion for everything, and a time for every activity under heaven[.]”) (Holman Christian Standard Bible).

³⁸ See, e.g., Blake Branson, *Opponent Written Testimony on HCR 5005* at ¶¶ 6 and 8-10 (Feb. 13, 2017), available at http://www.kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170213_07.pdf; Center on Budget and Policy Priorities, *supra* note 31, at ¶ 4; Kansas Center for Economic Growth, *supra* note 31, at ¶ 2.

³⁹ Goldberg, *supra* note 32, at 2 (internal quotation marks omitted).

⁴⁰ Branson, *supra* note 38, at ¶ 9.

⁴¹ See *supra* note 32.

⁴² Cf. Charles R. Kesler, *Introduction to The Federalist Papers* vii, ix (Charles R. Kesler & Clinton Rossiter eds., New American Library rev. ed. 2003) (1961) [hereinafter “Federalist Papers”] (indicating that the Federalist Papers “appeared in New York newspapers” in “1787”); Charles S. Hyneman & Donald S. Lutz, *Preface to 1 American Political Writing During the Founding Era, 1760–1805*, at xi, xi (Charles S. Hyneman & Donald S. Lutz eds., 1983) (referring to the voluminous quantity of “books, pamphlets, and letters to newspapers written in the last quarter of the eighteenth century”); Jenni Parrish, *Law Books and Legal Publishing in America, 1760-1840*, 72 *Law Libr. J.* 355, 358-62 (1979) (discussing printers, publishers, and booksellers).

⁴³ S.C.R. 1611, *supra* note 1, at page 1, lines 23-27.

⁴⁴ See 7 *The Oxford English Dictionary* 730-31 (2d ed. 1989) [hereinafter “7 OED”] (defining “impose”); 8 *The Oxford English Dictionary* 964-65 (2d ed. 1989) [hereinafter “8 OED”] (“limit”); 13 *The Oxford English Dictionary* 757-58 (2d ed. 1989) [hereinafter “13 OED”] (“restraint”).

⁴⁵ For example, to “*impose* fiscal *restraints on* the federal government,” S.C.R. 1611, *supra* note 1, at page 1, line 25 (emphasis added), is arguably to forcibly control or limit the federal government’s ability to spend. See 5 *The Oxford English Dictionary* 962 (2d ed. 1989) (defining “fiscal”); 7 OED, *supra* note 44, at 730-31 (“impose”); 13 OED, *supra* note 44, at 757-58 (“restraint”). Given that the Constitution imposes no term limits on members of Congress, see U.S. Const. art. I, §§ 1-6, *reprinted in* H.R. Doc. 110-50, *supra* note 2, at 1-4; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 782-87, 837-38 (1995), to “*limit* the terms of office . . . for members of Congress,” S.C.R. 1611, *supra* note 1, at page 1, lines 26-27 (emphasis added), is arguably to confine or restrict the number of terms a person may serve in Congress. See 8 OED, *supra* note 44, at 964 (defining “limit”). Further, in the context of limiting the number of terms a person may serve as a member of Congress, to “*limit* the power and jurisdiction of the federal government,” S.C.R. 1611, *supra* note 1, at page 1, line 26 (emphasis added), is arguably to confine or restrict the federal government’s power and jurisdiction. See 8 OED, *supra* note 44, at 964 (defining “limit”).

⁴⁶ See Rappaport, *supra* note 22, at 1568-70 (2010) (discussing and providing model limiting language for use in an Article V application). For example, the following language (or something like the following language) could possibly be inserted into S.C.R. 1611 on page 2, beginning at the end of line 3:

.....
presiding officers of each of the legislative chambers in the several states-; and
Be it further resolved: That the Legislature and the People of the state of Kansas hereby preemptively reject, disregard, and deem illegal, void, and of no effect whatsoever any action taken by any delegate of the state of Kansas [and / or] any amendment proposed by the Convention that is inconsistent with the terms of this continuing application; and
Be it further resolved: That this continuing application is revoked and withdrawn, nullified, and superseded to the same effect as if it had never been passed, and retroactive to the date of passage, if it is used for the purpose of calling a convention or used in support of conducting a convention to amend the Constitution of the United States for any purpose other than imposing fiscal restraints on the Federal Government, limiting the power and jurisdiction of the Federal Government, or limiting the terms of office for federal officials and members of Congress; and
Be it further resolved: No delegate of the state of Kansas may act in any manner or propose or agree to any amendment contrary to the terms of this continuing application, and the state of Kansas reserves the right to recall and dismiss from service as a delegate any such delegate of this state who acts in any manner or proposes or agrees to any amendment that is contrary to the terms of this continuing application.

See also *supra* notes 8-19 (citing Article V applications issued by states other than Kansas many of which employ limiting language).

⁴⁷ U.S. Const. art. V, *reprinted in* H.R. Doc. 110-50, *supra* note 2, at 9-10 (indicating that amendments proposed by an Article V Convention are “valid . . . when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof”). *Accord Hawke v. Smith* (No. 1), 253 U.S. 221, 226 (1920).

Some opponents seem to claim that an Article V Convention would have the power to alter the amendment ratification process prescribed by Article V without the prior approval of three-fourths of the states as required by Article V. See Kansas Center for Economic Growth, *supra* note 5, at ¶ 2 (“A convention could . . . adopt a new ratification process[.]”). However, to do so would clearly be void and illegal: the Constitution cannot be altered (i.e., amended) unless such alteration (i.e., amendment) is first ratified by three-fourths of the states. U.S. Const. art. V, *reprinted in* H.R. Doc. 110-50, *supra* note 2, at 9-10; *Hawke*, 253 U.S. 226.

⁴⁸ Neomi Rao, *The President's Sphere of Action*, 45 *Willamette L. Rev.* 527, 532 (2009).

⁴⁹ See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 Const. Comment. 427, 473 (2007).

⁵⁰ John Axtell, Opponent Written and Oral Testimony on HCR 5005 at ¶¶ 1-4 (Feb. 13, 2017), available at http://www.kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170213_06.pdf

⁵¹ See *supra* endnote 6.

⁵² See Axtel, *supra* note 50, at ¶ 8.

⁵³ See U.S. Const. art. I, § 10, cl. 1, reprinted in H.R. Doc. 110-50, *supra* note 2, at 6; H.R. Doc. 110-50, *supra* note 2, at 49 and 72; The Exhaustive Concordance to the United States Constitution 27 and 108 (Dennis Bizzoco ed., 1994).

⁵⁴ See U.S. Const. art. I, § 10, cl. 1, reprinted in H.R. Doc. 110-50, *supra* note 2, at 6 (“No *State* shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts.”) (emphasis added); S. Doc. 112-9, *supra* note 30, at 403.

⁵⁵ U.S. Const. art. I, §§ 8-9, reprinted in H.R. Doc. 110-50, *supra* note 2, at 4-6; *Legal Tender Cases (Knox v. Lee)*, 79 U.S. (12 Wall.) 457 (1871).

⁵⁶ U.S. Const. art. I, §§ 8-9, reprinted in H.R. Doc. 110-50, *supra* note 2, at 4-6; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁵⁷ See *supra* endnote 7.

⁵⁸ 554 U.S. 570 (2008).

⁵⁹ *Id.* at 572, 595.

⁶⁰ See *id.* at 637 (Stevens, J., dissenting):

Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

See also *id.* at 638-40 (Stevens, J., dissenting) (appearing to reject the assertion “that the Second Amendment . . . protect[s] the right to possess and use guns for purely private, civilian purposes”) (citations omitted)

⁶¹ See *id.* at 576-77:

In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague*, 282 U. S. 716, 731 (1931); see also *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

Justice Scalia then interpreted the phrase “‘right of the people’” by comparing it to other provisions of the Bill of Rights and the unamended Constitution. See *id.* at 579-81. Justice Scalia thereafter interpreted the phrase “‘keep and bear Arms’” in light of extrinsic colonial and founding era authorities. See *id.* at 581-85.

⁶² Justice Stevens rejected the majority’s holding based on his analysis of, among other things, the text of the Second Amendment (particularly the prefatory clause thereof), founding era state documents, the text of the Constitution, other amendments included in the Bill of Rights, and various documentary sources dated from before, during, and after the founding era. See *id.* at 640-43, 644-48, 662-72, and 680 (Stevens, J., dissenting).

⁶³ *Id.* at 572.

⁶⁴ *Id.* at 636 (Stevens, J., dissenting).

⁶⁵ In light of that hypothetical outcome, the Second Amendment should possibly be amended as follows:

~~A well regulated Militia, being necessary to the security of a free State, t~~The right of the people to keep and bear Arms; shall not be infringed.

⁶⁶ U.S. Const. art. III, § 1, reprinted in H.R. Doc. 110-50, *supra* note 2, at 8.

⁶⁷ Axtel, *supra* note 50, at ¶ 10.

⁶⁸ See *Roe v. Wade*, 410 U.S. 113, 152-54 (1973).

⁶⁹ See Abortion Surveillance — United States, 2014, https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1.htm?s_cid=ss6624a1_w (last visited Feb. 13, 2018).

⁷⁰ U.S. Const. art. III, § 1, *reprinted in* H.R. Doc. 110-50, *supra* note 2, at 8.

⁷¹ Axtel, *supra* note 50, at ¶ 10.

⁷² *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

⁷³ *See Genesis* 2:20-24; *Matthew* 5:17-20 and 19:3-6.

⁷⁴ U.S. Const. art. III, § 1, *reprinted in* H.R. Doc. 110-50, *supra* note 2, at 8.

⁷⁵ Axtel, *supra* note 50, at ¶ 10.