AMERICAN CIVIL LIBERTIES UNION
Rhode Island

128 Dorrance Street, Suite 400
Providence, RI 02903
Phone: (401) 831-7171
Fax: (401) 831-7175
www.riaclu.org
info@riaclu.org

TESTIMONY SUBMITTED TO THE CONSTITUTIONAL CONVENTION PREPARATORY COMMISSION
August 20, 2024

The ACLU of Rhode Island wishes to express its strong opposition to the calling of a constitutional convention. We believe that the calling of a convention places the rights of minorities and marginalized individuals and groups at serious risk, and fails to contain many of the safeguards that are present in the legislative process for proposing constitutional amendments.[1]

One of the great strengths of a Constitution is its protection of certain inalienable individual rights that, at least in theory, the majority should not be able to transgress. But the state constitutional convention process can easily lead to the weakening of civil liberties because the convention is, ultimately, a majoritarian political process. Unlike the method for amending the federal Constitution, no super-majorities are needed to pass state constitutional amendments. Thus, the protection of individual rights and those of disfavored minorities can easily be undermined. Further, because these are constitutional amendments, the process for undoing a change adopted by this process is extremely difficult and cumbersome.

While a super-majority is not needed to pass amendments through the General Assembly either, the dynamics and processes are fundamentally different. There is a political accountability that legislators face every two years in their run for re-election, an accountability that is missing for convention delegates who run solely for purposes of this one-time convention. The

[1] This testimony is a summary and expansion of the verbal testimony that we recently provided to the commission. A few specific recommendations about the content of the commission's report appear at the very end.

accountability is diffused even more by the nature of the off-season special elections that take place for constitutional convention seats, where delegates can be (and have been) elected by small pluralities of the electorate. In the 1985 delegate election, fewer than 18% of eligible voters went to the polls, and a number of delegates were elected by less than 25% of that already small number of people actually voting in their district. In fact, *only one-quarter* of the delegates in 1986 were elected by majority vote. Almost half of the delegates were elected by fewer than 40% of those who voted, with one-fifth elected with less than 30% of the votes cast in their race.

The legislative process also has the important check, often taken for granted, of *two* Houses reviewing, debating and needing to pass the identical resolution, unlike a unicameral constitutional convention. Similarly, in the General Assembly, constitutional amendments have time to percolate and be refined over the course of a few years. Time is short in the constitutional convention process, which compresses consideration of critical changes to the state's most fundamental legal document in the space of a few months.[2] And, finally, the legislature is in the general business of passing laws, not constitutional amendments. Passage of such amendments is thus done sparingly and only for extremely good cause. But since the convention's sole purpose is to amend the Constitution, its productivity is focused solely on that goal.

From the ACLU's perspective, the issue is not whether there might be some useful constitutional amendments to propose. We could think of any number of amendments that would strengthen civil liberties. Of course, other advocates have other ideas for amendments that are less friendly to civil rights. The point is that our state Constitution, and the rights contained within it, should not so easily be subject to change, especially due to the danger it presents to minority rights. That is why comments made by some convention supporters that any amendments approved by a convention still must earn the voters' support hardly provides solace to the disadvantaged groups most likely to be subject to harmful constitutional revisions.

---

[2] To be fair, it should be noted that was not the case when a state convention was called in 1964. That convention lasted for almost five *years*.

While the legislative process for bringing constitutional amendments to the voters can be slow – sometimes painfully so – it works. It is worth noting that three proposed "government reform" amendments that came out of the 1986 convention were rejected by the voters, but later approved by them after being presented in revised form by the General Assembly.[3]

As the commission has been advised, once a convention is called, there are no limits to the topics that they can consider or the amendments they can propose. As a result, conventions can effortlessly be used to promote particular agendas. Some may be benign, some may not, but this open-ended approach to amending our Constitution will rarely promote the goal of protecting the rights of those less politically powerful. Oliver Wendell Holmes once noted that "a page of history is worth a volume of logic," and we believe the history of the last state constitutional convention fully bears out our concerns.

The 1986 convention will probably most be remembered for the incredibly divisive battle it generated over the issue of abortion. The convention's decision to recommend a constitutional amendment declaring that life begins at conception only highlighted the very political and wide-open nature of the process. And although, after a lengthy, expensive and time-consuming campaign, that amendment was defeated, a second anti-abortion amendment, drafted in less extreme terms, was approved by the voters and remains in our Constitution to this day.[4]

---

[3] Those amendments addressed judicial selection, legislative pay, and four-year terms for state officers. The General Assembly has also seemingly acted against its best interests in bringing other constitutional amendments to the voters. It was the legislature, not a convention, that approved a "separation of powers" amendment to the Constitution, and while the 1986 convention approved an amendment establishing an ethics commission, it was General Assembly action that led to passage of a further amendment making legislators subject to that commission's jurisdiction.

[4] Some convention supporters have criticized opponents for raising abortion as a concern, claiming that any amendment seeking to ban abortion would surely be defeated. But this time around, anti-choice activists would be much more likely to propose restrictions more subtle than a complete prohibition on the procedure. In fact, since the General Assembly has now staked out a position in support of reproductive rights, a constitutional convention is the only real opportunity for opponents to seek any change in those laws, providing extra incentive for them to use this opportunity to do so. Indeed, just in the past few years, they attempted to use the anti-abortion language that *was* added in 1986 to argue that the Reproductive Privacy Act passed by the General Assembly was unconstitutional.

The convention and the voters also approved two other constitutional changes that were extremely damaging to the rights of people of color. One amendment authorized denying the right to bail to people charged with certain drug offenses. As commission members are aware, the statistics are clear: people of color are no more likely to use, possess or distribute illegal drugs than whites, but they are disproportionately arrested, convicted and imprisoned for these crimes. There can be little question that this constitutional amendment not only eviscerated a basic constitutional right, but has disproportionately affected racial minorities.

A second approved amendment, with a similar impact, significantly expanded the number of people who lost their right to vote because of a criminal record. Before 1986, only persons incarcerated for felonies lost the right to vote. However, the 1986 amendment disenfranchised *any* person convicted of a felony – including individuals who received suspended sentences or probation – until their sentence or probation was completed. By vastly increasing the number of people losing their right to vote after a criminal conviction or plea, this amendment made Rhode Island the most restrictive state in New England in terms of felons' voting rights. Again, its effect was felt the most – and quite heavily – in minority communities. Ironically, it took *General Assembly* action twenty years later to undo this damage by approving for voter consideration a constitutional amendment to reverse the 1986 vote.

These results from 1986 are not as surprising as they might first appear. A "friend of the court" brief filed by political scientists in a U.S. Supreme Court case in 2014, the same year as this state's last convention vote, made the specific point that "years of empirical research demonstrate that statewide ballot initiatives pose serious obstacles to minority interests that are not present with respect to ordinary political processes such as elections for public officials."[5]

[5] In that case, the Court upheld a Michigan voter referendum amending that state's Constitution to bar affirmative action in state university admissions.

The threat of these types of anti-civil rights amendments only continues to grow, as the politics over hot-button social issues – helped in part by court decisions liberating spending in political campaigns – have only gotten uglier in the past four decades. Across the country, attacks on affirmative action, LGBTQ+ rights, and the rights of immigrants have consistently become fodder for expensive statewide voter referenda campaigns.

In 2014, an unofficial count we made of referenda recently appearing on ballots across the country included at least 18 amendments to restrict women's reproductive freedom, four limiting the use of affirmative action, 11 amendments seeking to bar state participation in the Affordable Care Act (Obamacare), eight far-reaching anti-immigrant measures, five amendments to divert public education aid to private schools, nine amendments designed to limit the rights of public employees, and 19 proposals to restrict the rights of the LGBTQ+ community.[6]

Another important development over the past 40 years that cannot be ignored is the increased role of money in politics. There is no limit on the amount of money that outside special interests can spend to persuade delegates to support pet constitutional amendments on ideologically driven social issues. And for any questions the convention places on the ballot, there is no limit to the money that these outside special interests can then spend to try to get those amendments approved. An open-ended constitutional convention is virtually certain to encourage this type of activity. Grassroots groups wishing to compete for the attention of voters will easily be priced out of the market in trying to make their voices heard once questions from a convention appear on the ballot. This is not speculation. In fact, literally *hundreds of millions of dollars* are now routinely spent every election cycle on voter initiatives and referenda across the country.

---

[6] We do not have the records from 2014 that specify the states where these referenda took place. But we know what *did* happen in Rhode Island in 1986 in terms of socially controversial amendment proposals. If there is any doubt about the continued spillover of controversial social issues to a convention process, it is worth noting that among the most vocal supporters of a "yes" vote for the last constitutional convention ballot question that took place in Connecticut were groups wanting to overturn court decisions authorizing same-sex marriage.

While supporters of a convention may often talk of a need to bypass the politics associated with the General Assembly, it must be emphasized that a convention does not occur in a vacuum, but inevitably has the same political intrigue of any legislative session. In its own way, the convention process is just as political as the legislative process. Anybody who reviews the history of the 1986 convention would have to acknowledge this simple truth, and public officials freely acknowledged it at the time. Whether that is good or bad is beside the point – it is simply not the "people's convention" that so many of the individuals supporting one envision.

Consider the make-up of the 1986 convention. Legislators made a vow that none of them would run for a seat at the convention, and they were true to their word. But who did run and get elected? By our review of the biographies of the delegates published at the time: at least seven former legislators; the relatives of four sitting legislators, including the son and sister of the Speaker of the House; at least 8 people who had previously held another political office; and at least 10 current or former Democratic or Republican party committee members.

But this limited biographical review likely represents only the tip of the iceberg. According to a news article at the time, the voters elected "about 40 delegates with distinct Democratic backgrounds and about 20 who have been active in Republican affairs." In addition, no fewer than seventeen delegates used the convention as a steppingstone to run for the General Assembly the same year that the convention was being held, and at least six more ran for other state or municipal offices that fall.

The political maneuverings of that convention, where even the order of the ballot questions was mired in politics, were also widely reported at the time. For example, the proposal to ban abortion was deliberately placed last on the ballot on the theory that voter fatigue might lessen the number of people ending up voting againt the measure. And the second anti-abortion amendment – which ultimately got approved – was deliberately hidden from the voters. Neither the ballot question itself nor the voter handbook that was provided to all households even mentioned the presence of that anti-abortion language in the amendment being proposed.

There are also practical problems that arise from the convention approach to revising the Constitution. If you bring a group of people together to work on amending the Constitution, they will find innumerable things to amend. In the past month alone, before this commission and in other public forums, convention supporters have already proposed, by our count, almost three dozen amendments for consideration. But this is clearly just the beginning.

In 1986, *over 300 resolutions* were introduced at the convention. Ultimately, the convention proposed submitting *twenty-five separate constitutional amendments* to the voters for approval. In light of the sheer volume of proposed amendments, the convention was forced to bundle some of them together for voting purposes, leading to 14 actual questions on the ballot. As a result, the ACLU found itself in the odd position, for example, of opposing a ballot question adding a "free speech clause" to our state Constitution, because it was bundled with other constitutional amendments, including the stealth anti-abortion amendment, that we could not support.

Thus, voters were faced not only with weighing the merits of individual, and often complex, constitutional amendments, they also had to weigh the benefits and drawbacks of different amendments in the context of one "yes or no" ballot vote.

Some of the amendments being bandied about as reasons for holding a new convention were introduced back in the 1986 constitutional convention as well. For example, giving line-item veto power to the Governor was the subject of much talk prior to the 1986 convention and a rationale often mentioned for holding one. But no such amendment came out of the convention. Instead, as mentioned earlier, a topic that was not the subject of *any* pre-convention discussion – abortion – ended up dominating the convention.

As with the 1986 convention, there is good reason to believe that ideologically tinged issues will once again come to the forefront while many reform measures that are being touted will be buried. In going to the polls in November, voters should know that – based on history, not speculation – there are strong and legitimate grounds for fearing the results of a constitutional

convention addressing issues that do not appear on the various wish lists for reform that this commission has heard. Protestations to the contrary simply ignore this history.[7]

Indeed, it is quite disconcerting to hear convention supporters so casually – and somewhat callously – dismiss concerns about the dangers a convention poses to civil liberties and civil rights when the organizations that are directly representing communities most at risk feel so strongly otherwise. The list of the more than three dozen organizations that have joined to oppose the convention question speaks for itself as a response to this patronizing dismissal of those fears. That list of convention opponents includes such varied groups as the RI Coalition Against Domestic Violence, the RI Commission for Human Rights, the RI Black Business Association, Fuerza Laboral, the Latino Policy Institute, GLBTQ Legal Advocates & Defenders (GLAD), the RI National Association of Social Workers, the NAACP Providence Branch, the Women's Health and Education Fund, and Black Lives Matter RI PAC.

Approximately a dozen other states have a constitutional provision similar to Rhode Island's, periodically requiring a plebiscite on whether a state constitutional convention should be held. It is noteworthy that not one other state has voted to do so since Rhode Island's convention. At the hearing at which we testified to this fact, Commissioner Larisa suggested that was because voters in those states had a separate process – voter initiative – that they could use to get constitutional questions on the ballot. But that is not accurate. Based on our research, a majority of the states that have a "convention question" requirement do not provide for voter initiative. It is further worth pointing out that, of those that do, their initiative and referenda processes often bar certain important issues – such as state appropriations – from being the subject of this procedure.

[7] It is ironic, but also much to the point, to consider the origins of the constitutional amendment requiring a vote every ten years on whether to hold a convention. It was approved at a constitutional convention in 1973 where the amendment's sponsor has publicly admitted that he got it passed only through "some sleight of hand," since the convention was not supposed to consider amendments like that.

Finally, we know there has been some debate among commission members as to whether an estimated price tag for holding a convention should be included in the commission's report. In such fiscally difficult times for the state, this is clearly a legitimate factor that voters should have the opportunity to weigh before making that decision. Some may believe the cost is irrelevant, but that belief should not override the views of others who may find the fiscal costs to be a meaningful factor to consider.

As for what should be included in the commission's report, we recognize that its goal is to educate the voters, so it would be misleading for the report to suggest that the convention process, as presented by supporters, points in only one direction – towards an opportunity for important governmental reform. Voters should be apprised of the possibility that amendments feared by convention opponents could be considered at a convention as well. We believe the report should also make readers aware of the procedural differences between the legislative and convention processes for considering constitutional amendments to be submitted to the voters, and avoid any misleading suggestions that a convention process is more contemplative or a way to rise above politics. Finally, the report should address the financial costs associated with running a special election and holding a convention.

We hope the commission will consider presenting these viewpoints in its report, and that it finds the background information contained in this testimony helpful.

Thank you for considering our views.

Submitted by: Steven Brown, Executive Director
American Civil Liberties Union of Rhode Island