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TESTIMONY BEFORE THE CONSTITUTIONAL CONVENTION PREPARATORY COMMISSION
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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 only denigrates the significance of the Constitution as a document and places the rights of minorities at serious risk.

One of the great strengths of a Constitution is in 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 federal constitutional amendment process, no super-majorities are needed to pass state constitutional amendments. Thus, one of the major goals of a Constitution – the protection of minorities – can be easily undermined. Further, because these are constitutional amendments, the process for undoing a change adopted by this process is extremely difficult and cumbersome.

Of course, the same is theoretically true of the amendment process through the General Assembly. Only a majority of legislators are needed to bring a constitutional amendment to the voters. But the dynamics and process are very different. There is a political accountability that legislators face every two years in their run for re-election, but that accountability is missing for convention delegates who run solely for purposes of this one-time convention. The accountability is diffused even more by the nature of the special elections for a constitutional convention, 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 fewer than 25% of that already small number of voters actually voting in their district.

The legislative process also has the important check, often taken for granted, of two Houses needing to pass the identical bill, 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. 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 good cause. But the convention's sole purpose is to amend the constitution, and thus 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 liberties. The point is that our state Constitution, and the rights contained within it, should not so easily be subject to change.

As Commission members know, there is a legislative process for bringing constitutional amendments to the voters. While it 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 the voters after being presented in revised form by the General Assembly.

A convention – with no limits on the issues it addresses – can easily 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 one of the purposes of a Constitution – to protect 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 largely bears out our concerns.

That convention will probably most be remembered for the incredibly divisive battle it generated over the abortion issue. The Convention's decision to recommend a constitutional amendment declaring that life begins at conception only highlighted the very political and open-ended 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.

The convention and the voters also approved two constitutional changes that were extremely damaging to the rights of racial minorities. One authorized denying the fundamental right to bail to people charged with certain drug offenses. As you are probably 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 disproportionately affected people of color.

A second 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. In fact, a "friend of the court" brief filed this year by some political scientists in a U.S. Supreme Court case 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." (In that case, the Court upheld a Michigan voter referendum amending the 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 – has only gotten uglier in the past three decades. Across the country, other social issues – like attacks on affirmative action, gay rights, and the rights of immigrants – have consistently become fodder for expensive statewide voter referenda campaigns.

An admittedly unofficial count of those referenda include at least 18 amendments to restrict women's reproductive freedom, 4 amendments limiting the use of affirmative action, 11 amendments seeking to bar state participation in the federal health care act, 8 far-reaching anti-immigrant measures, 5 amendments to divert public education aid to private schools, 9 amendments designed to limit the rights of public employees, 14 amendments to prohibit same-sex marriage, and 5 additional proposals to otherwise restrict the rights of the LGBT community.

Lest there be any doubt, it is also worth noting that among the most vocal supporters of a "yes" vote for recent constitutional convention ballot questions in two other states (Connecticut 2008 and Iowa 2010) were groups wanting to overturn court decisions authorizing same sex marriage. In both states, the vote to hold a convention was defeated.

Another important development over the past 30 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.

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 witnessed the 1986 convention would have to acknowledge this simple truth.

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 many things worth amending. In 1986, a total of *fourteen* ballot questions, which included *twenty-five actual constitutional amendments,* came out of the Convention. In light of the sheer volume of proposed amendments, the Convention bundled certain some of them together for voting purposes. 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 an 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.

It is easy to come up with a list of changes to our Constitution that many people might find helpful and forward-thinking. In fact, a number of the amendments being bandied about as grounds for holding a new convention were actually introduced in the 1986 constitutional

convention as well. As with the 1986 convention, however, there is strong reason to believe that amendments like those will once again get lost amid efforts to promote more ideologically tinged issues. In going to the polls in November, it is important that voters be made aware that there are strong and legitimate grounds for fearing the results of a constitutional convention notwithstanding enticing wish lists for reform.

Finally, in issuing its report, we urge the Commission to include an estimated price tag for the voters if a convention were to be held. In such fiscally difficult times for the state, this too is a legitimate factor that voters should have the opportunity to weigh before making a decision as to whether a convention should be held.

Because of the extremely serious dangers to basic civil rights posed by the Constitutional Convention process, the ACLU urges the Commission not to recommend that one be called. At the very least, it is critical that the Commission's report point out the genuine and realistic concerns about the potentially serious downsides of such a convention.

Thank you for considering our views.

Submitted by: Steven Brown, Executive Director
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