AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal and Great Society Era – Federalism

Opinion of the Court to the Governor in the Matter of the Constitutional Convention, 55 R.I. 56 (RI 1935)

The state of Rhode Island continued to operate under its colonial charter well after the American Revolution. Finally, a state constitution was drafted and ratified in 1843. That constitution provided in Article I that the "rights and principles" marked out that document "shall be established, maintained, and preserved and shall be of paramount obligation in all legislative, judicial, and executive proceedings" and also that the constitution is "sacredly obligatory upon all" until it is "changed by an explicit and authentic act of the whole people." While the legislature was given the power to "pass all laws necessary to carry this constitution into effect," it was only explicitly given in Article XIII the power to initiate constitutional amendments. The constitution made no provision for constitutional conventions.

In 1883, the state supreme court advised that constitutional amendments were the exclusive method of altering the 1843 constitution. A "legal constitutional convention is an impossibility in Rhode Island." In April 1935, the state governor asked the judges of the state supreme court for an advisory opinion on the possibility of calling a constitutional convention. For the first time since the Civil War, the Democratic Party had captured the governorship and the legislature, and the possibility of constitutional reform was very much on their minds. Among the first acts in the "Bloodless Revolution" was the removal of the incumbent Republican judges from the state supreme court and appointment of a new court. In 1935, the newly constituted Democratic state supreme court overturned its long-established precedent and concluded that the legislature could call a constitutional convention. One judge dissented over the subsidiary question of whether a popular vote endorsing the idea was a necessary precondition for the legislature to act. Contrary to the earlier court, the New Deal-era judges concluded that the legislative obligation to "pass all laws necessary to carry this constitution into effect" included the power to call forth a constitutional convention to replace the constitution. The Democrats in the legislature were unable to agree among themselves on how seats in the constitutional convention were to be apportioned, and sufficient popular and political support for a constitutional convention never materialized.

How did the judges conclude that the legislature is empowered to call a constitutional convention? Should it matter whether other state legislatures had such a power? Under what circumstances should the constitutional amendment power be regarded as the exclusive means for altering the constitution? Is the right of the people to alter their form of government consistent with the legislature initiating a convention process? To what degree can the legislature control the constitutional convention?

To His Excellency, Theodore Francis Green, Governor of the State of Rhode Island and Providence Plantations:

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These questions raise an issue that has long troubled the people of our state. That issue simply put is whether Article XIII of our constitution prescribes an exclusive method of altering the constitution

either in part or as a whole. If it does, then a legal constitutional convention is an impossibility in Rhode Island. . . .

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The constitution contains no mention of a constitutional convention or of any method of constitutional change except as above set forth. The title given in the constitution to Article I, namely, "Declaration of Certain Constitutional Rights and Principles," shows that the right which is set forth in the first section is a constitutional and not a revolutionary right. It states in substance and effect that one of the fundamental rights, which, as the preamble of this article says, "shall be established, maintained, and preserved, and shall be of paramount obligation in all legislative, judicial, and executive proceedings," is the right of the people "to make and alter their constitutions of government" by any "explicit and authentic act of the whole people." It is a recognized principle of free institutions that the normal and regular way for the people to act on any matter submitted to them, unless some other way is clearly and validly prescribed, is by the votes of a majority of the duly qualified electors who vote on such matters, such votes then constituting an "act of the whole people."

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If the sentence ["The general assembly shall pass all laws necessary to carry this constitution into effect."] were intended to apply only to the transition period [of launching the new constitution], it would naturally be placed in Article XIV, which deals with that subject. Instead of being so placed, it follows immediately after the sentence "This constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void." This evidently applies to the whole period during which the constitution shall be in operation and says that the general assembly cannot validly pass any laws which are inconsistent with the constitution. The most natural conclusion is that the sentence which follows, namely, "The general assembly shall pass all laws necessary to carry this constitution into effect" was intended to cover the same period and to make it the duty of the general assembly, not only to refrain from passing any law which is contrary to the constitution, as provided in the first sentence, but also to pass all laws which shall be necessary from time to time to make effective at all times the provisions of the constitution, including those in Article I, the "Bill of Rights." For these reasons it is our opinion after careful consideration that it is the duty of the general assembly to pass whatever laws may be needed, at any time or from time to time, to enable the people by an explicit and authentic act to make a new constitution or to alter the present one.

The method of doing this, which had been recognized as the regular and ordinary method and which had been used before 1843 by many states, when there was no provision for it in their constitutions, was first, by the holding of a convention under a legislative enactment, second, by the framing of a new constitution or the revision of the existing one and third, by the adoption of such new constitution or revision by the people at an election provided for by law. It is also well settled that no other method can be legally employed for amending or revising a constitution or substituting another one for it, unless such other method is expressly provided for in the constitution itself.

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Before 1842 there had been for more than twenty years great agitation and discussion of the matter of the framing and adopting of a constitution, and the general assembly had responded by calling conventions for the purpose in 1824, 1834, 1841 and 1842, the last one of which framed our present constitution adopted in 1842. When the convention placed in that constitution the statement that the people of Rhode Island had an unquestionable right to make and alter their constitution, it had in mind the manner in which this first constitution was made and it intended to reserve that right to the people for all time. . . .

. . . . It is our opinion, in view of these legislative precedents up to and including 1842, that under this language the general assembly, unless prohibited elsewhere in the constitution, has the constitutional power to pass a law providing for the calling and holding of a convention to revise the existing constitution or to frame a new one.

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There is in our constitution no express prohibition of the exercise by the general assembly of a power to provide for a constitutional convention, and the only part of it which has ever been relied upon as impliedly prohibiting the exercise of such a power is Article XIII, above quoted, which provides that the general assembly may propose amendments to this constitution by following a certain required procedure and that such proposals, thus made, may be ratified by three-fifths of the electors voting thereon. One power which a legislature has cannot properly be held to be impliedly prohibited by the grant to it of another power, unless the two powers are inconsistent with each other. . . . The two powers are suitable for different purposes, the former to a general revision of a constitution or the making of a new one, the latter to the making of a special and particular amendment or a few of them, where the matter is relatively simple. . . .

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The power granted to the general assembly by Article XIII can naturally and reasonably be viewed as an additional rather than an exclusive power and the recognized rule is that if two constructions of a constitutional provision are reasonably possible, one of which would diminish or restrict a fundamental right of the people and the other of which would not do so, the latter must be adopted. . . .

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. . . . [When a convention is called by the legislature alone] the legislature summons the convention without permitting the people to limit the power of their delegates or to prescribe the manner in which they shall proceed to perform the task entrusted to them. Under such circumstances, to permit the general assembly to set bounds to the authority of the convention is to exalt the legislature, the agent, above its principal, the people. This cannot be. In such a case the general assembly is held to have summoned the people to sit, by their delegates, in convention untrammeled by rules or restraints of any kind that will interfere with the performance of its proper functions. This is the prevailing view of the authority of such conventions and appears to be the logical view.

[The other possibility is that] the legislature summons the convention only after the people have expressed their will to this effect. If, at the time the question of calling the convention is submitted to them, the people are informed of the scope of the convention and the manner in which it is to conduct its deliberations, and report its results by virtue of the act of the general assembly specifying such matters, then a convention called in this manner will be limited as therein set forth and the convention will then be bound to confine itself within the stated limits of the act of the assembly. . . .

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. . . . As the legislature under the existing government has the power over the purse strings and exercises the legislative authority to define offenses and prescribe their punishment, neither of which powers is inherent in a constitutional convention, it is clear to us that the legislature from a practical viewpoint is the only body that can order a referendum election [to ratify the constitution] and make provision for the necessary appropriations therefor, and prescribe the punishment for offenses that may be committed thereat. Without this an orderly election would be difficult, if not impossible. . . .

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If . . . it is essential to the legality of the call [for a convention that the people first endorse such a call in a referendum], then that makes necessary four popular elections, before their power of alteration can be effective. That is, they must first elect a legislature that will pass the necessary legislation; second, they must vote in favor of a convention; third, they must elect delegates to a convention that after examining the constitution will frame and submit to the people the alteration desired; and finally at a fourth election the people must vote in favor of the alteration. The first, third and fourth of these elections are obviously necessary for legally altering the constitution by the convention method; and obviously again, the adoption by the people of the alteration recommended by the convention ratifies all that has gone before, according to all the authorities on the subject. The requirement of the second election clearly

impedes rather than facilitates the exercise by the people of their power to control their governmental institutions.

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Our opinion is that the general assembly clearly has the power to pass a law calling a constitutional convention without obtaining the approval of the people for the calling of such convention, and that whether the exercise of that power at any particular time is advisable or proper is for the general assembly alone to decide, giving such weight as it may deem proper to the existing circumstances, to the usual but by no means universal custom of legislatures to ask such consent and to the fact that the great majority of constitutions now require it.

BAKER, J., dissenting in part.

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In one particular, however, I am unable to concur with the holding of the majority opinion, and that relates to the necessity of the submission to the people by the general assembly of the question of the calling of a constitutional convention before the general assembly actually proceeds to make the call.

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. . . . As early as 1820, Chancellor Kent of New York, in writing a report for the Council of Revision of that state, to whom had been submitted an act passed by both houses of the New York Legislature in connection with the calling of a constitutional convention, used the following language: "It is worthy, therefore, of great consideration, and may well be doubted, whether it belongs to the ordinary legislature, chosen only to make laws in pursuance of the provisions of the existing Constitution, to call a Convention in the first instance, to revise, alter, and perhaps remodel the whole fabric of the government, and before they have received a legitimate and full expression of the will of the people that such changes should be made."

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[I]t is noticeable that in the various state constitutions expressly permitting the calling of constitutional conventions (the number of such constitutions being well over thirty) in all but a very few the provision is contained that the question be submitted to the people for their approval before the convention is called. This state of facts reveals clearly the present trend and development in constitutional law on this point.

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. . . . In 1824, 1834, 1841 and 1842, the general assembly proceeded to call conventions without first asking the approval of the people. It is clear therefore that prior to 1843 the general assembly, whether rightly or wrongly, exercised the power of calling constitutional conventions directly.

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. . . . The language of section 1, Article I and its preamble should be broadly construed. The intent is clear to reserve in the sovereign people all powers in connection with altering and making their fundamental law, except what is granted to the legislature under Article XIII relating to amendments. The language and intent of the reservation seems wide enough to require that the sovereign people be consulted and their favorable opinion obtained before the legislature proceeds to call a constitutional convention. The people should be entitled to a participation in all the incidents and steps connected with the proceedings instituted to set up a constitutional convention, which are included in the full exercise of the right to make and alter their constitutions of government.

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If historical precedents are of any value, we find that twice in 1853 the general assembly submitted to the people the question of whether a constitutional convention should be called. This action was ten years after the present constitution went into effect and, while not conclusive, would seem to have some value as an example of more or less contemporaneous construction.

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In view of the above considerations, it is my opinion that the right reserved to the sovereign people in section 1 of Article I of the constitution operates as a prohibition to the exercise by the general assembly of the power to call directly a constitutional convention under section 10 of Article IV of the constitution, and that there is, therefore, nothing in our existing constitution which prevents the application of what seems to be the sounder principle of the law relating to the calling of constitutional conventions by the legislature.

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