

CONNECTICUT'S CONSTITUTIONAL CONVENTION:
What's Really Going On?

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October 20, 2008

The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.

– Justice Joseph Story

By State law, every 20 years Connecticut voters are asked the following question: “Shall there be a Constitutional Convention to amend or revise the Constitution of the State?” The 20-year period has run, and the question will appear on the ballot this November 4. Because of the efforts of those groups that strongly favor or oppose a constitutional convention, voters may know that the question will be on the ballot, but they probably do not know what they really are being asked to do, or what the consequences of their decision might be. Simply put, voters are being asked to approve a convention where the delegates would have the power to propose changes to the Constitution. Supporters of the convention would like to amend the Constitution to include a “ballot initiative” process, which on its face would give citizens the ability to propose new laws, but in practice would simply be another tool for special interests to use to push their agendas. The voters of Connecticut should not disrupt our Constitution for this purpose.

First, some background: A constitutional convention is one of two ways to change our State Constitution - the document on which our State government is based, and through which the people of the State give the government the power to make and enforce laws. The more usual way to change the Constitution is for a member of the State Senate or House of Representatives to propose an amendment. Three-fourths of the members of each house of the

General Assembly must approve the proposed amendment for it to be placed on the ballot. The citizens of the State would then have the opportunity to approve it by a simple majority vote in favor. Our current Constitution was adopted in 1965, and this process has been used to change it 30 times since then.

The constitutional convention is an alternative to the amendment process. A convention can be called in two ways: by a two-thirds vote of both houses of the General Assembly, or by a majority vote approving the question that is set to appear on the ballot this November. If a convention is called under either procedure, the General Assembly will determine the manner of selecting the delegates to the convention and will set the dates for the convention. The delegates are otherwise free to set their own rules to determine what proposals will or will not be considered by the convention and the manner of approving or rejecting those proposals. If the convention produces any proposals to amend or revise the Constitution, they will be submitted to the voters of the State and become a part of the Constitution upon a majority vote in favor. A constitutional convention has been called only three times in State history, in 1818, 1902 and 1965. Changes were made in 1818 and 1965, while the voters rejected the proposed changes in 1902.

These methods are neither unique nor remarkable. The constitutions of a number of other states as well as the U.S. Constitution also are amendable in both of these ways; although no federal constitutional convention has been called since the U.S. Constitution was drafted in 1787. Both methods reflect the concern of the Framers that amending the Constitution – the underlying framework of our government – should be possible but not easy. As James Madison explained in the Federalist, No. 43, the Constitution's amendment procedures were designed to protect

“equally against that extreme facility, which would render the Constitution too mutable, and that extreme difficulty, which might perpetuate its discovered faults.”

Thus, in the face of the careful scheme for changing the Constitution, what is notable about the current convention proposal is not that the Connecticut Constitution might be changed, but the *kind* of change being sought. Although no specific constitutional amendment will appear on the ballot, it is no secret that advocates of a constitutional convention hope to change the Constitution to add a “direct initiative” or “public referendum” procedure. A referendum process would allow citizens to petition proposed constitutional and statutory changes onto the ballot, where they could be adopted by a majority vote. This process would allow statutes to be enacted into law without going through the normal legislative process. It also would circumvent both the amendment procedure and the constitutional convention process, making constitutional change easier. We should not expose our Constitution to the uncertain results of a convention for the purpose of making it even easier to change in the future.

The problem is that, as the Framers recognized centuries ago, constitutional change should never be easy. The Constitution is the foundation of our government. It creates and defines the roles of the executive, legislative and judicial branches and provides the *only* authority for those branches to exercise the power that the people of the State have conferred upon them. It sets forth certain basic and immutable rights that we have established as necessary to a free society. While political parties and special interest groups struggle with each other – each arguing in favor of laws that further their own interests – the Constitution defines the playing field and sets the rules. Because it does, these competitors for control over the direction of State government can engage in partisan politics without upsetting the fundamental structure

which is essential to securing the rights of the people and to a properly functioning government. The current convention proposal would undermine that constitutional safety net.

It is important to remember that amending the Constitution is not like amending a statute or other law (although many people assume it is). Statutes are adopted with a simple majority vote of the Assembly and the approval of the Governor. They are designed to deal with everyday issues and to fill in the details of our government. Necessarily flexible, statutes provide specific rules covering everything from our criminal justice system to roadway safety to worker's compensation insurance. The legislative process through which statutes become law – with lawmakers adding or removing terms after negotiation - affords the compromise necessary in our representative system of government, where laws must not only protect the interests of those loudly and actively calling for them, but also take into account the will of the less influential (or less vocal) minority. This process also protects against the *very vocal* minority forcing its agenda on the populace.

But the Constitution is not designed to deal with the everyday laws and functions of government. It *creates* the government, and defines the parameters in which the government may act, both with respect to its administrative functions and to the civil rights of its citizens. It is because of our constitutional framework that the representative process works to protect the interests of the State and its citizens. In 1795, the eminent Connecticut jurist and legal scholar Zephaniah Swift, after eloquently demonstrating that Connecticut had a Constitution long before it was set down in writing as such in 1818, recognized the importance of this point when he said that the Constitution “should contain nothing but the outlines of the government, and leave it to the legislature to fill up the minuter parts” Zephaniah Swift, *A System of the Laws of the State of Connecticut* (1795), Vol. 1, p. 62.

Like the foundation of a house, then, the Constitution must remain secure and stable in order to do its job. It should only be altered when the fundamental structure cannot effectively serve its purpose to support and anchor the rest of the building. That has been the case on the two prior occasions that Connecticut's Constitution has been changed by convention. First, the 1818 Convention was called to codify the Constitution in written form (there was no single document called a Connecticut "Constitution" prior to that time), and to disestablish the Congregational Church as the official State Church – both important and necessary steps. Likewise, a convention was necessary in 1965 because Connecticut's antiquated system of appointing members of the State House of Representatives was clearly in violation of the U.S. Constitution's representation requirements – the "one person, one vote" rule. (See *Butterworth v. Dempsey*, 237 F.Supp. 322 (D. Conn.), affirmed, 378 U.S. 564 (1964)).

There is no such fundamental crisis today. Instead, various groups are seeking a constitutional convention to further their individual agendas. Some want to limit taxes, others to legalize the use of marijuana. Some want to restrict the government's ability to take property by eminent domain, and some want to lower the voting age. By far, the most vocal proponents of a constitutional convention would change the law to prohibit same-sex couples from marrying. But these issues properly should be addressed by the General Assembly, either by statute or the constitutional amendment process, if a majority of citizens are concerned about them. They are not of such a universal and fundamental nature that they necessitate exposing the Constitution to the potential for wholesale change by convention.

Advocates of a constitutional convention acknowledge but do not emphasize the individual agendas they want to pursue through referendum and initiative. Instead, they use populist language to broadly argue that the constitutional convention (and the direct initiative

process they hope will come out of the convention) will give “the people” a more direct influence on the laws that govern them. But this is somewhat disingenuous. First, the people have plenty of influence on their laws; they have direct access to their elected representatives and can vote those representatives out of office if they act in a way not in accord with the people’s wishes. Our representative democracy is designed to accommodate the wishes of the populace by identifying and furthering the goals of the majority, while applying checks and balances to ensure the basic rights and needs of those not in the majority. The fact that the State Constitution has been amended 30 times since 1965 (while the U.S. Constitution has only been amended 27 times since 1787) is a testament to Connecticut’s ability to effect change through the representative system when necessary.

Second, the ballot initiative process favors politically organized, politically vocal groups that feel strongly about an issue, whether or not a majority of the people in the State feel the same. It is the members of these groups who would be appointed by the General Assembly as delegates to a constitutional convention, and it is these groups who would organize and lobby in favor of their chosen issue. While there is nothing wrong with politically active groups per se, there also is no reason to think that the average Connecticut citizen would have more influence over the efforts of these groups to have laws passed than he or she would have over a state representative. Indeed, our elected representatives are subject to oversight through laws requiring a certain level of transparency in government activities, and are accountable through the election process. Private special interest groups, on the other hand, are not subject to any such controls. So while the elected official is bound to give consideration to the wishes of her constituents, if for no other reason than to keep her job (though here are many other reasons), the

politically influential private group can organize and lobby while ignoring the wishes of “the people”, or the people with whom the group disagrees at least, with impunity.

Therein lies the biggest problem. Most of the groups advocating a constitutional convention, who fall on opposite sides of the political aisle, have one significant thing in common: they support issues that probably do not have the support of a majority the State’s citizens or elected officials and are unlikely to become laws in the normal fashion (otherwise, they would have no need for the ballot initiative process). As a result, these groups want to avoid the messy compromise and negotiation involved in the normal legislative process, and they see the convention (and referendum) procedure as a short cut to accomplishing their goals.

Under a referendum process, the ballot question is submitted to the voters and the choice is only “yes” or “no,” with no opportunity to alter the language to meet the needs of different sectors of our populace. What this means is that if the proponents of a ballot initiative can attract a majority vote on a conceptual idea, it becomes the law, even if the majority hasn’t taken the time to analyze the law and fully grasp its potential effects. There is no check in place to prevent the majority from voting on the basis of misleading, irrelevant or incomplete information provided by proponents, and there is no way to tell if the majority is a majority simply because those who would not support the proposal either are not motivated or do not have enough information to understand its significance and the importance to them of voting against it.

Thus, while our current system seeks to protect us from laws that are vigorously sought by the few but not broadly approved by the majority, the ballot initiative system lends itself to the passage of precisely such laws. It is easy to imagine, in fact, that the ballot initiative process would encourage groups to push laws to a vote while providing as little information and opportunity for inquiry as possible. Obviously, a proposed law will be easier to “sell” as a

general concept than as a specific rule that must be applied to the wide diversity of circumstances experienced by the people of our State. While we could hope that initiative proponents would avoid such tactics, history reveals that they do not.

A recent initiative in Maine is a good example. The Christian Civic League of Maine submitted a ballot proposal with this inoffensive sounding caption: “An Act to Protect Marriage and Preserve Equality.” After reviewing the proposal, several groups intervened with the Maine Secretary of State to force the initiatives’ proponents to change the name of the proposal to reflect its actual intent. The name was changed to “An Act to Remove Protections Based on Sexual Orientation from the Maine Human Rights Act, Eliminate Funding for Civil Rights Teams in Public Schools, Prohibit Adoptions by Unmarried Couples, Add a Definition of Marriage, and Declare Civil Unions Unlawful.” Proponents dropped the proposal after the name change, recognizing that they could not get enough petition signatures to push it onto the ballot.

In response to these concerns, advocates suggest that direct initiative is a truer form of pure democracy, where the people can vote on everything (without the legislative compromise that they see as a negative). But, as University of Pennsylvania Professor and former Chairwoman of the U.S. Commission on Civil Rights, Mary Frances Barry, said years ago in response to an effort to call a federal constitutional convention, “the Founding Fathers created not pure democracy, but a republican form of government in which the people govern through their representatives and with checks and balances, including a check on the majority’s impulses.” Mary Frances Barry, *Amending the Constitution: How Hard It Is To Change*, New York Times, September 13, 1987. That check applies equally to the impulses of the majority *and* of the loud, organized minority.

With respect specifically to the Constitution, the direct initiative system would simply circumvent the careful amendment process the Framers put in place. For the reasons described above, since the founding of our Nation and of our State, constitutional change has been intentionally difficult. Where the passage of a law normally requires the approval of a simple majority, changing the Constitution normally requires the consent of a “supermajority” – in Connecticut’s case, three-fourths of the General Assembly. To change this system because some people think eminent domain or property taxes are bad, or that pot smoking is good, not only undermines the framework of our government, but trivializes the constitutional principles of representative democracy that our nation was founded upon.

The Constitution should not be subject to the varying winds of political change. The advocates of the current convention proposal are not alone in their desire to bend the law to their world view. Any quick review of newspaper columns or internet blogs, or that most aggressive advocate of partisanship – talk radio, will reveal countless groups on the left and the right who would pull the Constitution in all possible directions if given the chance. While the statutes and regulations properly passed in the everyday course of the legislative process can withstand - and often are designed to further – those political agendas, the Constitution, as the foundation of everything our government does, should not change every time a new political party comes into power, or a new idea gains favor. Certainly, it should not change simply because a very vocal minority wants it to. In the words of Professor Berry:

Because our Constitution can be amended, we can repair tears in our social fabric and try different strategies and tactics to resolve problems. Because our Constitution cannot be amended easily, we can preserve the stability and continuity that lasting republican government requires.

Berry, *supra*.

At the end of the day, we should not subject our laws to the whims and political gamesmanship of a ballot initiative process, and we should not change our Constitution to allow the wishes of the loud few to dominate the will of the people of our State.