



# The Path to a Constitutional Convention

August 7, 2014

## INTRODUCTION

"Shall there be a convention to amend or revise the Constitution?"

The Rhode Island constitution requires the Secretary of State to place such a question on the ballot every 10 years. In 2004, this ballot initiative was narrowly defeated, 52:48 percent.<sup>1</sup> In 1984, Ocean State voters did approve a convention. This year, the RI Center for Freedom & Prosperity expects a similar ballot question — to convene a statewide constitutional convention — to be approved by Ocean State voters in the upcoming 2014 November elections.

If the question is approved by voters in 2014, the rules that will govern the constitutional convention (more simply referred to as the “ConCon”) will be determined by the state’s General Assembly in 2015, beginning with how delegates will be elected — at least one for each of the 75 House districts — in a specially scheduled general election. The convention will then convene for a specified length of time, with various constitutional amendment measures to be considered and approved by delegates. Finally, all ConCon-approved amendment measures will be put forth for approval from voters as future ballot initiatives.

### Is a ConCon Warranted?

It is commonly held that the state’s single-party, special-interest dominated legislature is incapable of enacting the massive reforms necessary to put

Rhode Island on a new path towards prosperity ... leaving a ConCon, for many, as the only possible path to change. We see the constitutional convention ballot question as likely to pass in 2014 for four reasons:

- **Dismal economic outlook.** Voters understand that Rhode Island has regressed into an even worse economic and jobs condition than where it stood in 2004 and that our state is even less competitive when it comes to attracting and retaining families and businesses. (Our Center’s 2014 Report Card on RI’s Competitiveness confirms this sentiment.<sup>2</sup>)
- **Little faith in government-led reform.** Voters also seem to have lost faith in the traditional legislative and political processes to amend this situation on their own. Persistent secret insider deals have not only harmed the state’s economy, but also diminished voter confidence that their government is one that is geared to work for all Rhode Islanders. A ConCon is the most significant (if not the only) way to effect much-needed reform.
- **Grassroots advocacy.** Good-government groups are more numerous and better organized in the state, most of them having already signaled that they will aggressively support this ballot measure and will openly advocate for voters to vote “Yes” on the ballot question.
- **Public polling.** In January 2013, a Public Policy Polling survey found that 40% of Rhode Islanders supported holding a constitutional convention, while only 25% opposed.<sup>3</sup>

## A ConCon Gives a Direct Voice to the People

The ConCon process provides the public with the opportunity to vote whether or not to hold a convention. Voters, as always, also elect the legislators who will determine the rules and parameters to govern the ConCon. Then, voters select the actual ConCon delegates in a special election. Finally, they must also vote to approve any constitutional amendments proposed by the full convention.

Contrast this fourfold process of direct democracy with the traditional legislative process, in which voters' input is limited to the election of legislators and the governor, who then can determine state law without any further authority from the public, which is limited to testimony and personal activism.

Direct democracy is not a stable governance structure in the long term, but under certain circumstances (like those currently facing Rhode Island), it can be a powerful opportunity for course correction. If Rhode Islanders want their government to work better for them, a ConCon offers the most opportunity for direct input to influence the state's future, and it is permitted, even encouraged, in the state constitution itself.

## HOW TO AVOID AN “INSIDER POLITICS AS USUAL” CONCON

Despite the many reasons to support a ConCon, legitimate apprehensions could lead voters to stick with the devil they know. If enough citizens believe that a ConCon will be nothing more than politics as

### Recommendation

*The 2015 General Assembly should pass a statute ensuring that party affiliation is not officially required or highlighted for those running as a ConCon delegate.*

usual, with the same old cronies and insiders pulling the strings, the ballot measure is doomed to fail. Conversely, some Rhode Islanders may fear that radical minorities might hijack the process.

However, there are precautions that can be taken to help ensure that a “clean” convention can take place, one that represents the best interests and the will of the people rather than the status quo special interests or shadowy political forces. It is therefore vital that the public becomes comfortable that a ConCon in Rhode Island will not be just more of the same insider politics as usual.

### Nonpartisan Elections

ConCon delegate elections, likely to be held in late 2015, should be nonpartisan. Allowing delegate candidates to run under a party affiliation will only invite more politics into the process and will turn off many voters. Even with the “master lever” presumably being put out of commission for a 2015 election, party politics can only degrade the purity of the discussions that should be part of the delegate

campaigns and the actual convention, itself. The terms “Democrat” or “Republican” should never be part of any sentence discussing the ConCon.

## No Elected Officials

One of the primary reasons for supporting the ConCon idea is to initiate a process whereby the people can bypass the failures of the normal legislative and political process to respond to their needs. It is therefore imperative that those officials who’ve mastered the electoral process in Rhode Island be barred from participation in the ConCon process.

There also appears to be legal precedent in Rhode Island case law whereby individuals elected to the ConCon are restricted from simultaneously running for or holding elected office. If a sitting elected official wishes to run as a convention delegate, he or she would likely be required to first resign any current seats. (More on this in a moment.)

Rhode Islanders and their elected officials should begin considering where this line ought to be drawn. Should people holding appointed office, or otherwise employed by the state, be barred? What about officials at the city and town level?

## Professional and Community-Driven ConCon Leadership

It is likely that many well-known, highly respected business and community leaders would be interested in serving as ConCon delegates, involved in enormously important deliberations about the future amendments to the Ocean State’s constitution. Once all delegates are elected, they

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*The 2015 General Assembly should pass a statute that bars any elected official or declared candidate at the state or municipal level from running as a ConCon delegate.*

would elect their own ConCon leadership team among themselves.

The unique nature of the ConCon — as an additional opportunity for public involvement — would create space in our governance for people not currently in office, and perhaps not interested in running for long-term offices or pursuing political careers. Apart from creating a separate channel to bring change, the process could tap a more diverse well of experience.

In order to build public confidence in the ConCon idea, prior to the November elections, it would be very helpful if such individuals interested in running for a delegate seat make their potential candidacies known, well ahead of the vote. Many highly respected figures have privately expressed their interest in running to the Center. We believe that public announcement of their potential interest to run as delegates — as well as their intention to serve in the ConCon leadership — will increase comfort among the electorate and increase the chances that the ConCon ballot measure will be approved.

## Transparency

The Internet, social media, and a now much-more-accessible Capitol TV would ensure that all ConCon meetings and hearings can be held with complete transparency to the public.

Also, last minute hearings and alterations to bills, an all too familiar a ploy of special interests in Rhode Island politics, will be less likely to occur in a ConCon, for which all measures are expected to have months and months of public scrutiny and open debate.

Special interest groups are often successful in the legislative process because they can operate behind closed doors, while in an open and transparent ConCon, all deliberations will be open to the public.

## Attention to Details

Other circumstances and rules that would help build public confidence include:

- **Block funding.** All funds allocated by the General Assembly to conduct the ConCon should be provided in a single “block grant,” without any strings or restrictions from the political class. The elected leadership of the ConCon delegates should have full authority to decide how to spend the allocated funds.
- **Nonpartisan staff.** The staff appointed and hired to support the ConCon must be free from any obvious connection to any political party or special interest cause.
- **Reasonable timetable.** The period of time by which the ConCon must report its recommended constitutional amendments should be relatively short. In 1986, the convention made its recommendations within one year. Allowing the

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ConCon too much time would only serve to extend the failed status quo to the point where the public could lose interest in the work and findings of the convention, tilting the advantage back to insiders.

## Legal Argument Against Allowing Sitting Elected Officials to Serve as ConCon Delegates

A strong argument exists that an elected public official would be legally prohibited from retaining an elected office while serving simultaneously as delegate to a constitutional convention.

In 2009, the Rhode Island Supreme Court ruled that an individual could not simultaneously serve on a town council and a school committee. In *Felkner v. Chariho Regional School Committee*, 968 A.2d 865, 874 (RI 2009), the court applied the doctrine of incompatibility to reach this conclusion. (Id. at

872-875.) The court stated that holding two public offices at the same time is incompatible if a person is physically unable to engage in the duties of both offices at the same time or if one office is subordinate to the other or where the functions of the two offices are inherently inconsistent and repugnant. (Id. at 872.)

It could be argued that a General Assembly member or a local elected official could not serve in a constitutional convention because the convention could consider constitutional amendments that alter or reduce the powers of the General Assembly or local cities, towns, and school committees.

Since 2005, individuals cannot be candidates for two state or local offices at the same time. (R.I.G.L. Section 17-14-2(b).) Although the election for a constitutional convention would likely be on a different date than the election for other state or local offices, R.I.G.L. Section 17-14-2(b) suggests a clear public policy in Rhode Island that individuals not be allowed to serve in two elected offices at the same time.

In the event the voters approve of holding a constitutional convention, the General Assembly should avoid litigation and enact legislation making it clear that delegates to the constitutional convention cannot simultaneously retain other elected offices. In 1985, the last time an election of delegates to a constitutional convention was conducted, Common Cause recommended such a prohibition, but the General Assembly did not adopt it, ostensibly based on concerns about its legality (*Providence Journal* 3/2/1985). The decision in *Felkner* and the recent amendment to R.I.G.L. Section 17-14-2(b) show that such a prohibition would be deemed legally permissible.

## POTENTIAL CONCON AMENDMENTS

There are many areas in which constitutional amendments can guide our government to work better for all citizens rather than for special interests. Insider deals have dominated many public policy issues over the decades, resulting in some of the many disastrous boondoggles for which our state has become infamous : 38-Studios, Deepwater Wind, and the 1991 RISDIC banking crisis.

Major policy reforms that could put the Ocean State on a new trajectory and that would not likely see the light of day in the General Assembly, may include the following. Some of these issues are an annual tradition in General Assembly committee hearings, distracting valuable resources in government and among those who strive to keep an eye on its activities. In such cases, a ConCon would be an opportunity to take issues off the table — one way or another — and let legislators devote their time to issues that are more appropriate to their role in our government.

- **Tax & spending:**
  - Strengthen the ability of the executive branch to balance out the legislature by instituting a “line item veto”
  - Require supermajorities for any general tax increases
  - Establish a fully empowered office of the inspector general as a check on state spending
  - Eliminate the municipal car tax
  - End moral obligation bonds, which bypass specific voter approval

- Prohibit taxpayer funding of private ventures such as 38 Studios and other insider and corporate welfare arrangements
- Prevent constitutionally mandated spending requirements for any cause or interest
- **Education & health:**
  - Ensure equal access to adequate educational opportunities and parental choice for our children
  - Increase free-market competition and reduce governmental control in the state's healthcare industry
- **Ethics:**
  - Implement real ethics reforms for public officials that hold them accountable for illicit, illegal, or insider actions
  - Bar public officials and their families from bidding on state or municipal contracts.
- **Labor:**
  - Make a definitive statement on whether teachers should have access to binding arbitration
  - Determine if collective bargaining for public employees should be expanded or trimmed
  - Codify the principle of whether pension agreements are binding contracts
- **Elections:**
  - Codify elimination of the “master lever” into the state's constitution
  - Change the rules for redistricting so politicians can no longer ensure their own re-election by picking who will vote for them
  - Implement term limits
- **Other:**
  - Resolve some thorny cultural issues — one way or another — though the mechanism that most clearly represents the will of the people

## TIMELINE

The entire ConCon process — from initial voter approval in November 2014 to final voter approval of ConCon-recommended amendments via ballot initiative — could take two to three years. Our best estimate of how the entire ConCon process may unfold is:

- **2014**
  - **August/September:** specially appointed General Assembly ConCon Commission meets and hears public testimony, issuing a recommended “Voter Guide” report, prior to the November elections
  - **November:** ConCon ballot measure is approved by voters in the general election
- **2015:**
  - **January to June:** General Assembly determines various rules regarding delegate elections, funding, staffing, and timing, as well as other related issues
  - **November:** special election to select ConCon delegates
- **2016:**
  - **January:** ConCon is convened and holds leadership elections, committee formations, hearings, and plenary votes on proposed constitutional amendment measures
  - **June:** ConCon reports recommended and approved constitutional amendments
  - **November:** each recommended constitutional amendment listed as an individual ballot question for voter approval during the general elections of 2016

## Conclusion

Although it often depends whether or not they have the advantage in a given circumstance, activists on both the left and the right see the risk of direct democracy as a general principle on which to base government. However, for some issues, and at some points in history, letting the people make final decisions is appropriate, the best available option, or even absolutely necessary.

The Ocean State is at such a point in history, with many Rhode Islanders feeling that the solutions are as obvious as the problems are intractable. A

constitutional convention would present an opportunity to settle some of the relevant questions.

With some prudent ground rules — which the state seems to have a uniquely strong legal environment to implement, just now — a ConCon could be the game changer for which so many Rhode Islanders long, without the risk that opening up the state constitution for debate might otherwise entail.

Commentators occasionally lament the apathy of Rhode Island voters. If they vote this November to convene a ConCon, simply by that act, they may be recognizing a problem as the first step to fixing it.

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<sup>1</sup> [http://ballotpedia.org/Rhode\\_Island\\_Question\\_2,\\_Constitutional\\_Convention\\_\(2004\)](http://ballotpedia.org/Rhode_Island_Question_2,_Constitutional_Convention_(2004))

<sup>2</sup> <http://www.rifreedom.org/RIReportCard/>

<sup>3</sup> [http://www.publicpolicypolling.com/pdf/2011/PPP\\_Release\\_RI\\_131.pdf](http://www.publicpolicypolling.com/pdf/2011/PPP_Release_RI_131.pdf) - see Question 23