

Washington Law Review

Volume 45 | Number 3

5-1-1970

Convening a Constitutional Convention in Washington Through the Use of the Popular Initiative

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John W. Hempelmann, Comment, *Convening a Constitutional Convention in Washington Through the Use of the Popular Initiative*, 45 Wash. L. Rev. 535 (1970).

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COMMENTS

CONVENING A CONSTITUTIONAL CONVENTION IN WASHINGTON THROUGH THE USE OF THE POPULAR INITIATIVE

INTRODUCTION	535
SUMMARY OF PROPOSITIONS	540
I. THE UNDERLYING THEORY	541
A. <i>Need for Legitimacy</i>	541
B. <i>According To Traditional Legitimacy Theory Change Must Be Expressly Authorized</i>	543
C. <i>The Flexible Principles of Popular Sovereignty Have Supplanted Traditional Legitimacy Theory</i>	545
II. THE EFFECT OF PARTICULAR CONSTITUTIONAL PROVISIONS ON CHANGES BY OTHER LAWFUL MEANS ...	551
A. <i>Methods for Determining the Will of the Electorate</i>	551
B. <i>Can a Convention be Called Only by the Legislature?</i>	553
C. <i>Expressio Unius Est Exclusio Alterius</i>	556
D. <i>Rejection of Limitations on Popular Sovereignty</i>	560
III. USE OF THE WASHINGTON POPULAR INITIATIVE TO CONVENE A CONSTITUTIONAL CONVENTION	576
A. <i>Use of the Initiative as a Granted Legislative Power</i>	577
B. <i>Use of the Initiative as an Inherent Legislative Power</i>	581
C. <i>Construction of Provisions for Initiatives</i>	583
CONCLUSION	586

INTRODUCTION

The Washington State constitution, adopted in 1889, has never been comprehensively revised.¹ Written during the height of the populist

¹For many years civic, political, legislative, and professional organizations have been producing detailed proposals for a complete revision of the Washington State constitution. Some of the more recent studies have been: WASHINGTON (STATE),

movement, it is long, detailed, and intentionally shackles state government. Among other restrictions, the legislature is limited to a single, short, biennial session and the power of the executive is scattered among many independently elected executive officers and dozens of near-autonomous boards and commissions.

The state constitution may be revised by amendment and, between 1889 and 1969, the legislature proposed and the electorate approved fifty-four single-subject constitutional amendments.² These amendments were only a few of the hundreds considered. The constitution of 1889 also provides that the legislature may propose a constitutional convention to revise or amend the constitution.³ However, the legislature, for various political reasons, has consistently refused to submit the convention issue to the electorate. Bills to convene a constitutional convention have been introduced in nearly every session for the past thirty years but the legislature has only voted on the issue once. In 1965, the House of Representatives approved a convention proposal by the requisite two-thirds vote. That bill was allowed to die in the Senate. Legislative proposals for a "gateway amendment"—a device that would enable the legislature to initiate broad constitutional revi-

CONSTITUTIONAL ADVISORY COUNCIL, REPORT (1966); WASHINGTON STATE DIVISION, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, A CONSTITUTION FOR THE STATE OF WASHINGTON (1967); University of Washington School of Law, Papers of The State Constitutional Revision Conference, June 13-14, 1968 (unpublished product of national conference with substantial focus on the Washington experience—available from Professor of Law Ralph W. Johnson); Reports and Working Papers of the Washington State Constitutional Revision Committee, 1968-69 (unpublished material available from Commission Executive Director, George A. Condon, Washington State University); University of Washington School of Law, Legislation Seminar, Papers on Washington State Constitutional Revision, 1969 (unpublished papers in the University of Washington Law School Library).

For some of the past reports see REPORT OF THE ADVISORY CONSTITUTION REVISION COMMISSION OF THE STATE OF WASHINGTON (1935); and, E. CAMPBELL, THE BACKGROUND OF CONSTITUTIONAL REVISION IN THE STATE OF WASHINGTON (1949).

²See WASH. REV. CODE Vol. O for the texts and dates of passage of the fifty-four amendments to the Washington constitution. WASH. CONST. art. XXIII, § 1, as presently interpreted by the Washington Supreme Court, restricts constitutional amendments to a single subject. *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595 (1915). This interpretation prevents substantial constitutional revision through the amendment process.

³WASH. CONST. art. XXIII, § 2 which reads:

Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote at the next general election, for or against a convention, and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session, provide by law for calling the same; and such convention shall consist of a number of members, not less than that of the most numerous branch of the legislature.

Constitutional Convention by Initiative

sions through the amendment procedure—have been similarly unsuccessful.⁴

Because of this legislative recalcitrance,⁵ Washington advocates of general constitutional revision turned, in 1968, to the initiative petition in an attempt to place the convention issue before the people.⁶ While this initiative movement failed, the possible success of a similar future effort presents a complex legal issue which has never been squarely faced by any court.⁷ As noted, the constitution of 1889

⁴ A "gateway amendment" was passed by the Washington House of Representatives on February 19, 1969. It languished in the Senate Constitution Committee for nearly three months since Committee Chairman John McCutcheon, the Senate's oldest member, felt constitutional amendment was unnecessary. On May 9, an attempt was made to discharge the bill from the Committee. On the first vote the discharge motion passed 22 to 19. However, Senator R. R. Greive, the Democratic majority leader, demanded a call of the Senate to regroup conservative forces. On the second roll call the discharge motion was defeated 21 to 23. Four "establishment" Democrats made the difference. Senators Martin Durkan, Al Henry, Robert Bailey and Gordon Sandison effectively killed the "gateway amendment" for the 1969 session. *Seattle Post-Intelligencer*, May 10, 1969, at 3, col. 2.

⁵ As one observer has suggested: "The Initiative has been looked upon as an expedient of last resort, to be used in those instances in which the legislature could not be prevailed upon to move." Crouch, *The Constitutional Initiative in Operation*, 33 AM. POL. SCR. REV. 634, 637 (1939).

Others advise that an initiative is not necessary:

If the legislature, possessing these powers of government [to propose a convention], be unwilling to pass a law to take the sense of the people, or to delegate to a convention all the powers the people desire to confer upon their delegates, the remedy is still in their own hands; they can elect new representatives at will.

Wells v. Bain, 75 Pa. 39, 47 (1874).

Hoar disagrees:

[T]he legislature may stand in the way of fulfillment of the popular will, just as the legislatures have in some cases nullified constitutional provisions by refusing to pass an enabling act thereon. The remedy of electing new representatives, as suggested by the Pennsylvania Supreme Court, is not sufficient.

R. HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 76 (1917).

⁶ The full text of Initiative 241 is reproduced in the Appendix. The sponsor of the initiative was the Committee to Call a Constitutional Convention comprised of: Wes Rainey, Jr., President, Washington State Jaycees; Mrs. Ivar Spector, Past-President, Washington Division of the American Association of University Women; S. Lynn Sutcliffe, President, Young Washington, Inc.; and Mrs. Mortimer H. Thomas, President, League of Women Voters of Washington.

Initiative 241 was not placed on the November, 1968, general election ballot since supporters of the initiative, delayed by litigation, succeeded in gathering only 60,000 of the 102,000 signatures required by the Constitution.

⁷ The unique legal issue is whether a constitutional convention can be convened by initiative. The Washington State Supreme Court refused to consider this issue in the 1968 litigation that surrounded Initiative 241. That litigation arose when the Secretary of State refused to file and number the proposed Initiative, arguing that a convention could not constitutionally be convened by initiative. The Supreme Court issued a writ of mandamus to compel the Secretary of State to perform his "ministerial" duty of filing and numbering the Initiative. Though both parties argued that the Court should decide the broad constitutional issue, the court felt that it was being asked for an

authorizes the legislature to propose a constitutional convention; but the legislative initiative provision, inserted into article II of the constitution in 1912 by the seventh amendment, does not expressly authorize placing a convention enabling act on the ballot.⁸ Thus, the issue

advisory opinion on a theoretical question. "[W]e cannot pass on the constitutionality of proposed legislation," the court said, "whether by bills introduced in the House or Senate, or measures proposed as initiatives until . . . the bill or measure has been enacted into law." *State ex rel O'Connell v. Kramer*, 73 Wn. 2d 85, 87, 436 P.2d 786, 787 (1968).

It is now likely that a court will have to decide this issue. In 1968, 60,000 Massachusetts voters signed an initiative petition that would authorize a 1970 state election on the question of calling a 1971 Massachusetts constitutional convention. The initiative was framed as a legislative initiative with convention proponents hoping to exercise the Massachusetts legislature's prerogative to submit the convention call issue to the electorate. In the November 1968 general election this initiative was approved by the people: 885,455 to 619,392. However, opponents of the initiative and the convention brought suit to invalidate the initiative and to restrain the Secretary of the Commonwealth from placing the convention call proposition on the 1970 ballot. Opponents of the initiative argued that the Massachusetts legislative initiative could not be used to place the convention issue before the electorate. On February 18, 1969, the Supreme Judicial Court for Suffolk County (the single Justice session in Equity) reserved decision and reported the cases for determination before the full bench of the Supreme Judicial Court of Massachusetts. *Cohen v. Att'y Gen.*, No. 14,403 and *Cohen v. Sec. of the Commonwealth*, No. 14,404 (Mass., filed Aug. 14, 1969). These cases were argued on February 4, 1970, but no decision has yet been reached. See also Gallagher, *New Action in Reform Battle*, Boston Herald, Jan. 8, 1969, at 24. EDITOR'S NOTE: These cases were decided shortly before publication—see Editor's note on page 591 *infra*.

⁸ WASH. CONST. art II (including the initiative provisions) provides in part:

Article II LEGISLATIVE DEPARTMENT

Section 1. LEGISLATIVE POWERS, WHERE VESTED—The legislative authority of the State of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. . . . [Note: Signature requirements superceded by Art. 2, Sec. 1(A), AMENDMENT 30.] Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall transmit the same to the legislature as soon as it convenes and organizes. Such initiative measure shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measure shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative

Constitutional Convention by Initiative

posed is: *May the popular initiative be employed to place before the Washington voters the question of holding a constitutional convention?*⁹

It is submitted that the initiative provisions of the Washington State constitution provide a legal means for calling a constitutional convention.¹⁰ The propositions that support this conclusion are summarized below as an outline for the discussion which follows.

petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. . . .

(d) . . . The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular elections, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: *Provided*, That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. . . . The whole number of electors who voted for governor at the regular gubernatorial election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. . . . All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

(L. 1911, p. 136, Sec. 1.) AMENDMENT 7. Approved November, 1912.

Section 1(A). INITIATIVE AND REFERENDUM, SIGNATURES REQUIRED—Hereafter, the number of valid signatures of legal voters required upon a petition for an initiative measure shall be equal to eight per centum of the number of voters registered and voting for the office for governor at the last preceding regular gubernatorial election. . . . These provisions supersede the requirements specified in section 1 of this article as amended by the seventh amendment to the Constitution of this state. (L. 1955, p. 1860, S.J.R. No. 4). AMENDMENT 30. Approved November, 1956.

WASH. CONST. art. II, § 41 (relating to amendment of initiatives) provides:

Section 41. LAWS, EFFECTIVE DATE. INITIATIVE, REFERENDUM—AMENDMENT OR REPEAL. No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided*, That any such act, law or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house. . . . But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon. . . . (L. 1951, p. 959, S.J.R. No. 7.) AMENDMENT 26. Approved November, 1952.

⁹When reference is made in this paper to "constitutional convention" the reference is to a convention that has authority to propose revisions in a state constitution. This reference should not be misconstrued to mean a convention that is "constitutionally instituted." This latter matter is the topic of the comment itself.

¹⁰While the research supporting this conclusion involved dozens of books and articles, several secondary sources of particular importance require special identification at this

SUMMARY OF PROPOSITIONS

I. THE UNDERLYING THEORY

Alterations in governmental structure must conform to some notion of legitimacy. The traditional conception of legitimate change requires that the existing government specify in its constitution some procedure by which the form of government may be altered. Changes in government not conforming to the specified procedure would not be recognized. However, the traditional notion of constitutional change has been supplanted by tenets of popular sovereignty. According to popular sovereignty theory, the people retain the inherent right to alter their government however and whenever they desire, and provisions for change in existing constitutions neither create nor restrict this inherent right.

II. THE EFFECT OF PARTICULAR CONSTITUTIONAL PROVISIONS ON CHANGES BY OTHER LAWFUL MEANS

The Washington constitution of 1889 provides that the legislature shall determine when to place the issue of constitutional reform before the voters. The State Supreme Court has not ruled whether this pre-

point. First, there have been three major studies of state constitutional conventions:

- 1) J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING (4th ed. 1887) [hereinafter cited as JAMESON]. This comprehensive study (684 pages) is discussed in great detail in note 19, *infra*.
- 2) W. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS (1910) [hereinafter cited as DODD]. While Jameson's work emphasizes both history and theory, Dodd's study is mainly historical. According to Hoar, Dodd was influenced by the fact that he wrote in Illinois, where the only conventions were those authorized by the Constitution. HOAR, *infra* this note, at 165.
- 3) R. HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWER, AND LIMITATIONS (1917) [hereinafter cited as HOAR]. Like Jameson, Hoar considered both history and theory. Because of the facts discussed in note 19, *infra*, Hoar's book must be considered the soundest from a theoretical standpoint.

In addition, reference should be made to some recent unpublished studies of the specific issue of calling a constitutional convention by initiative. These studies were prepared by advocates of calling a convention by initiative. Though the reasoning in all three is sound, their bias must be kept in mind.

- 4) ATTORNEY GENERAL, STATE OF WASHINGTON, CONSTITUTIONAL CONVENTION INITIATIVE (Tentative Draft, August 18, 1967) (Available from Office of Attorney General, Olympia, Washington) [hereinafter cited as ATT'Y. GEN. DRAFT].
- 5) S. L. Sutcliffe, Calling a Constitutional Convention by Initiative in Washington (unpublished manuscript, University of Washington, School of Law 1967.)
- 6) Brief for Relator, State *ex rel.* O'Connell v. Kramer, 73 Wn. 2d 85, 436 P.2d 786 (1968) [Hereinafter cited as ATT'Y. GEN. BRIEF].

Constitutional Convention by Initiative

scribed procedure is exclusive; however one state court and some scholars have relied on the maxim, *expressio unius est exclusio alterius*, to implement the traditional notion of legitimacy requiring absolute adherence to the one prescribed method.¹¹ More recent court decisions have rejected this traditional doctrine.¹² There are two major grounds for this rejection. First, the initiation of a constitutional convention is viewed as an inherent legislative power that cannot be restricted by affirmative constitutional provisions proclaiming a single method of revision. Specific provisions for revision are seen as additional rather than as exclusive methods for effecting constitutional reform. Second, the use of legislative power to convene a constitutional convention is viewed as an exercise of the people's reserved power of sovereignty and not as an exercise of power delegated and restricted by the constitution.

III. USE OF THE POPULAR INITIATIVE TO CONVENE A CONSTITUTIONAL CONVENTION

The Washington State Supreme Court has said that the people, as a sovereignty, may exercise all legislative power through the popular initiative.¹³ Whether convening a convention is held to be a granted or an inherent legislative power, the electorate, through the initiative, may exercise this power. Though no court has ever decided this issue, the authorities suggest that a constitutional convention may be called by initiative.¹⁴

I. THE UNDERLYING THEORY

A. *Need for Legitimacy*

Before approaching directly the obstacles to convening a constitutional convention by initiative, it should prove useful to study the

¹¹*In re* The Constitutional Convention, 14 R.I. 649 (1883) overruled by *In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433 (1935).

¹²*Gatewood v. Matthews*, 403 S.W.2d 716, 721 (Ky. 1966); *Board of Supervisors v. Attorney Gen.*, 246 Md. 417, 229 A.2d 388, 396-97 (1967); and *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474, 479 (1969).

¹³*State v. Paul*, 87 Wash. 83, 90, 151 P. 114, 116 (1915); *Love v. King County*, 181 Wash. 462, 467, 44 P.2d 175, 177 (1935).

¹⁴*Dodd* at 54; *Hoar* at 58; A. STURM, *METHODS OF STATE CONSTITUTIONAL REFORM* 84 n.2, 120 (1954). See also White, *Amendment and Revision of State Constitutions*, 100 PA. L. REV. 1132, 1139 (1952).

theoretical underpinnings since, possibly with regard to this controversy more than others, political philosophy has been the determining factor in the decisions of judges, legal scholars and political observers.

The theoretical starting point for discussions of constitutional reform is the assumption that alterations of the structure of government must conform to notions of legitimacy. Generally, legitimate means lawful, so as conceptions of lawfulness change, the requirements for what constitute legitimate alterations in the form of government will also change. The meaning of legitimacy will be rooted in the community's philosophy as of a given time in history.¹⁵ Whatever the community's conception of legitimacy at a particular time, alteration of the structure of government must conform to that conception or else the alteration will be deemed revolutionary, the courts will declare it unlawful and void, and the existing government will ignore it.¹⁶

There are many conceptions of legitimacy, each relating to the manner in which the change in governmental structure occurs. For example, a change by an authorized procedure is legitimized by the charter or constitution of the existing government. Or, change made in some unauthorized manner may be legitimized by the affirmative will of the people expressed in a lawful fashion.¹⁷

¹⁵ See generally H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* (1950) and Parsons, *Authority, Legitimation, and Political Action* in C. FRIEDRICH, *AUTHORITY* 197 (1958).

¹⁶ An example of the problems that attend an illegitimate change in government can be seen in the constitutional struggle in Rhode Island in 1841 and 1842. This struggle, popularly known as the Dorr War, grew out of dissatisfaction with the extremely undemocratic suffrage qualifications established under the 1663 Charter of Charles II by which the State was still being governed in 1841. Since the state legislature had a vested interest in the existing structure it had ignored repeated pleas for relief. The populace formed political associations and convened a constitutional convention—a convention totally unauthorized by the existing Charter or government. The new constitution drafted by this convention was approved in an irregular election by the majority of the state's male citizens. When the newly elected governor, Thomas Dorr, tried to form a government under this constitution, armed conflict ensued with the Charter government. In one of the famous incidents of this struggle, Luther Borden, a militiaman of the Charter government, arrested one Martin Luther, a Dorr supporter, for treason. The conflict was ended when President Tyler threw the support of the United States behind the Charter government. For an exciting account of the Dorr War, see A. MOWRY, *THE DORR WAR* (1901). See also *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

¹⁷ Hoar saw three ways people can change their government: "(1) by some authorized procedure; (2) by a lawful act of the whole people in their sovereign capacity; or (3) by the spontaneous act of an unrepresentative part of the people." HOAR at 15. He explains in more detail that change by some authorized procedure means change by "some method provided by the charter or constitution under which the State in question is governed, or by the express permission of some sovereign government . . ." as in the case where Congress authorizes a territory to form a new government as a

Constitutional Convention by Initiative

B. According to Traditional Legitimacy Theory Change Must Be Expressly Authorized

The traditional conception of legitimate change requires that the existing government specify in its constitution some procedure by which the form of government may be altered. To merit the badge of legitimacy all change must strictly conform to the specified procedure. As Professor Cooley, an eminent constitutional scholar of the nineteenth century, once observed: “[T]he written instrument comes into existence with the understanding and purpose that its several paragraphs and provisions shall mean exactly what they mean when adopted; and if a change is to take place in the constitution, it must be brought about by steps which in the instrument itself are provided for. . . .”¹⁸

The foremost proponent of the traditional notion of legitimate change was Judge John Alexander Jameson, author of *A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING*.¹⁹ Jameson found this theory a logical extension of the

prerequisite to statehood. *Id.* Change by a lawful act of the whole people in their sovereign capacity means an extraconstitutional change deriving its validity from the inherent power of the people. *Id.* at 221. Change by the spontaneous act of an unrepresentative part of the people means a change or attempted change by “a part of the people or even a majority [who have no power] . . . except by force to bind those who do not join the movement.” *Id.* at 16.

Similar classifications were propounded by the court in *Wells v. Bain*, 75 Pa. 39, 47 (1874).

¹⁸T. COOLEY, *MICHIGAN: A HISTORY OF GOVERNMENTS* 345 (5th ed. 1890). Cooley is best known for *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* (7th ed. 1903). Though now largely dated by its theory, the work is still occasionally cited to support conservative theories of constitutional interpretation. As Cooley noted there:

By the constitution which they [the sovereign people] establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law.

T. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 56 (7th ed. 1903).

¹⁹Jameson, a judge of the Chicago, Illinois, Superior Court, first published his treatise in 1867. It was the authoritative source of the period. Even today, Jameson’s work is the most comprehensive historical and theoretical source in the field though, HOAR *supra* note 10, is sounder from a theoretical standpoint. The problem with Jameson’s book is, as Dodd observes:

Judge Jameson’s work constructed a theory regarding constitutional conventions, which conformed more or less closely to the facts, but in which the facts were subordinated to the theory.

DODD *supra* note 10, at vi.

Judge Jameson’s work may be said to have been written to disprove the theory that a convention has sovereign power, and under these conditions the theory assumed in his mind a much more important position than it ever attained in fact.

Id. at 77 n.10.

Under Judge Jameson’s theory . . . [t]he convention is made subordinate to an

"legitimacy of blood" rule used to sustain European monarchical succession. In Europe, the legitimacy of governments depended upon the personal legitimacy of the occupant of the throne. Thus, to render a government legitimate it was the rule that the successor to power had to be the offspring of the reigning monarch and his queen, conceived and born in lawful wedlock during their joint occupancy of the throne. The importance of the rule was made apparent by the European wars of succession that occurred before the rule was established.²⁰ As Jameson saw it, the doctrine of legitimacy was applicable in the United States in similar terms and for the same reasons. He stated: "[T]o be lawful or legitimate, successive forms of government must be the offspring, regularly and lawfully begotten, the later of the earlier. . . . A system of government . . . must itself govern . . . the matter of reproducing or repairing itself. . . ." ²¹

organ of the existing government. . . . The convention loses a large part of its usefulness as an organ of the state if it be treated as strictly subject to control by the regular legislative body.

Id. at 77, 79.

Others were more blunt. According to Hoar, Jameson wrote "to support a pre-conceived theory, in the interests of which theory [he] freely distorted both law and facts." HOAR at vii. Van Host, the author of VERFASSUNG UND DEMOKRATIE DER VEREINGTEN STAATEN, wrote in Sybel's 32 HISTORISCHE ZEITSCHRIFT that Jameson "has allowed himself to be led astray in his political thinking by the history of secession." JAMESON at 656. Jameson admits that this criticism is well-founded. JAMESON at 656-57. His book was what the Germans call a *tendenz* work, one "written to maintain a particular thesis"—in this case "the subordination of the constitutional convention to the law of the land." Every work on history or constitutional law, Jameson observed, was written "from some special point of view to establish truths, of which the author was strongly convinced . . ." As to his own book, the author righteously concedes:

This work was written whilst our armies were fighting the rebellion, and to maintain the same thesis for which they fought,—that these States are a nation, that State rights in the Southern sense were a political heresy, and that secession was treason; written, in short, every line of it, literally, to the beating of the Union drums.

Id. at 657.

Because Jameson felt that the people of the South had been stampeded to revolt by the secessionist constitutional conventions he felt compelled to proclaim the "true principle, that a government, once established, represents the sovereign, and that . . . while that government survives" only its legislature can call a constitutional convention which "shall meet, if at all, under conditions prescribed by such legislature . . ." *Id.*

²⁰ JAMESON at 99-100. See generally J. FIGGIS, THE DIVINE RIGHT OF KINGS (2d ed. 1914).

²¹ JAMESON at 100. Strictly speaking there is a theoretical distinction between legitimacy as Jameson understood that notion in early European political thought and the more modern political significance of the doctrine. In fact, Max Weber saw three categories: 1) "charismatic" legitimacy—a popular hero's claim to authority; 2) "traditional" legitimacy—authority springing from dynastic succession; and 3) "rational" legitimacy—the prevailing notion that legal theorists often understand to mean legality and which Weber described as "acquiescence in enactments that are formally correct and which have been made according to established procedure." Weber, *Wirtschaft*

Constitutional Convention by Initiative

Applying this legitimacy theory to constitutional alteration, Jameson concluded that a constitutional convention initiated by "unofficial persons . . . by persons acting as private citizens, but giving expression, perhaps, to a general desire," would be "illegitimate."²² Such a convention "has nothing official in it, and can bind no one by its proceedings. If it affect to frame a law or a Constitution, and put it in force, its action is revolutionary."²³ According to Jameson, the legitimate mode of calling a constitutional convention was by "an authentic act of the sovereign body acting through some branch of the existing government representing it" and this branch was the legislature.²⁴

This legitimate manner of initiating a constitutional convention was set out in the constitution itself. In most cases, according to Judge Jameson, the constitutionally prescribed modes for altering the constitution were "permissive, pointing out modes in which Conventions may be called . . . without terms of restriction, or allusion to other possible modes." But, Jameson continued:²⁵

However liberal these provisions may seem to be, restriction is really the policy and law of the country. By the common law of America . . . it is settled, that amendments to our Constitutions are to be made only in modes pointed out or sanctioned by the legislative authority The mode usually employed is that of summoning a Convention; and it is clear that no means are legitimate for the purpose indicated but conventions, unless employed under an express warrant of the Constitution. The idea of the people thus restricting themselves in making changes in their Constitutions is original, and is one of the most signal evidences that amongst us liberty means, not the giving of rein to passion or to thoughtless impulse, but the exercise of power by the people for the general good, and therefore, always under the restraints of law.

C. The Flexible Principles of Popular Sovereignty Have Supplanted Traditional Legitimacy Theory

The traditional theory of legitimate constitutional change, requiring strict adherence to an authorized procedure, never attained a position

und Gesellschaft in M. RHEINSTEIN, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 3, 9, 336-7 (1954). Note: references to "traditional legitimacy theory" in this paper are not references to Weber's second category; rather, they are references to a type of Weber's third category.

²² JAMESON at 104-5.

²³ *Id.* at 105.

²⁴ *Id.* at 106, 109-11.

²⁵ *Id.* at 548-49.

of pre-eminence. Even during the height of the doctrine in the latter part of the nineteenth century, courts were relying instead on notions of popular sovereignty to facilitate constitutional revision by procedures other than those provided for in the state constitutions.²⁶ By the twentieth century, legal theorists and courts alike had rejected the traditional theory of legitimacy as a basis for restricting popularly ordained constitutional changes.²⁷ Indeed, since the doctrine of popular sovereignty had become embedded in American political thought as early as the Revolution, it may be appropriate to view the restrictive traditional theory of legitimate constitutional change as a mere temporary aberration in an otherwise consistent pattern of adherence to the flexible tenets of popular sovereignty.

Popular sovereignty, the notion that all governments derive their just authority from the consent of the people, was the most fundamental right asserted by the American colonists at the time of the Revolution. The colonists insisted that government was created and controlled by a contract between the people and the state.²⁸ They expressed this principle in the Declaration of Independence:

[W]e hold these truths to be self-evident, that all men are created equal, that they are endowed with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to receive these rights, Governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. . . .

Many state constitutions contain a like assertion of popular sover-

²⁶ See, e. g., *Bradford v. Shine*, 13 Fla. 393 (1871). This and similar decisions will be discussed in Part II, *infra*.

²⁷ See, e.g., *HOAR*; *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1 (1912); *Gatewood v. Matthews*, 403 S.W.2d 716 (Ky. 1966).

²⁸ The origins and viability of the contract theory of government have been the subject of numerous essays and studies and this comment will not delve into that matter. See generally J. GOUGH, *THE SOCIAL CONTRACT* (2d ed. 1957). Suffice it to say that Hobbes, Locke, and Rousseau were each contract theorists, who assuming different conditions in the state of nature, developed different conceptions of the governmental contract. The contract theory adopted by the American colonists was modeled most closely after the thoughts of Locke, who viewed the state of nature as a condition of peace and mutual assistance. See J. LOCKE, *TWO TREATISES OF GOVERNMENT* (1690), especially book II, and J. LOCKE, *OF CIVIL GOVERNMENT* §§ 3, 91, 131. See generally A. GRIMES, *AMERICAN POLITICAL THOUGHT* (1960), chs. 1-5.

Constitutional Convention by Initiative

eignty.²⁰ Illustrative is the provision in the constitution of Washington:³⁰

All political power is inherent in the people, and governments derive their just power from the consent of the governed, and are established to protect and maintain individual rights.

According to this theory, the institution of government—constitution-making and revision—is an incident of popular sovereignty. As one observer put it: “The constitutional system . . . may be summed up in the formula: the sovereign people itself establishes its constitution.”³¹ A constitutional convention therefore would derive its authority to propose constitutional revision from the people themselves and not from any provision in the existing constitution.³²

It is at this point that the departure from the traditional legitimacy theory is most severe. While the traditional theory would require the existing constitution itself to make provision for a convention, it is the position of those subscribing to the popular sovereignty doctrine that there need be “no reservation in the organic law to preserve to the people their inherent power to change their government.”³³ The Honorable Reverdy Johnson, a United States Senator from Maryland, stated the doctrine thus:³⁴

No man denies that the American principle is well settled, that all governments originate with the people, and may by like authority be abolished

²⁰ Hoar cites those constitutions of the original thirteen states that included a declaration of popular sovereignty similar to the Declaration of Independence. HOAR at 13-14.

²⁹ WASH. CONST. art. 1, § 1. Similarly, MASS. CONST. Preamble and Declaration of Rights, art. vii reads:

The Body Politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each Citizen, and each Citizen with the whole people, that all shall be governed by certain Laws for the Common good

The people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.

³¹ C. BERGEAUD, *ETABLISSEMENT ET REVISION DES CONSTITUTIONS EN AMERIQUE ET EN EUROPE* 218 (1893). The text is an English translation by the author of this comment. The original French reads: “Le système constituant . . . se résume en cette formule: le peuple souverain établissant lui-même sa constitution.”

³² HOAR at 12-14, 52, 80.

³³ *Ellingham v. Dye*, 178 Ind. 336, 344, 99 N.E. 1, 4 (1912).

³⁴ Letter to William D. Bowie and others, dated October 7, 1864, published in the *New York Daily Tribune* of June 5, 1865, as quoted in *Board of Supervisors v. Attorney Gen.*, 246 Md. 417, 229 A.2d 388, 396-97 n.3 (1967). Jameson criticizes Johnson’s argument. JAMESON at 598-600.

or modified; and, that it is not within the power of the people, even for themselves, to surrender this right, much less to surrender it for those who are to succeed them. A provision, therefore, in the Constitution of any one of the United States, limiting the right of the people to abolish or modify it, would be simply void.

To properly appreciate this theory, that a constitutional convention derives its authority directly from the people and not from the existing constitution, it is necessary to distinguish between a convention's constitution-making power and a legislature's law-making authority. This distinction follows from the difference in nature between a constitution and a statute. A constitution, because of its basic nature, is established by authority delegated *directly* from the people. A statute, on the other hand, is "enacted by authority assigned under the constitution and only *indirectly* delegated by the people" according to the principles of representative democracy.³⁵ The courts in particular have consistently emphasized this distinction.³⁶

It is the constitutional convention that exercises constitution-making power and the legislature that exercises law-making authority; and, while the legislature's authority comes from the constitution, the con-

³⁵ ATT'Y GEN. BRIEF, *supra* note 10, at 11. The delegation of some legislative power to the legislature is a basic principle of representative government. Obviously, with a Washington electorate of approximately a million and a half voters it would be impossible for the people to govern themselves directly. Thus the legislature has been given the power to enact statutes. The legislature has also been empowered to propose a constitutional convention, but, this is not authority to adopt a constitution. That authority the people never surrender. Accordingly,

[i]t should be clearly understood that the . . . Constitution and any action on the part of the General Assembly which might be employed to facilitate the convening of . . . a convention in no way circumscribe or limit the authority of the convention. While . . . [the] provisions of the [c]onstitution and such legislative actions as are taken under them tend to give a semblance of legal continuity to . . . constitutional development, they are mere vehicles of convenience and in no sense affect the ultimate legality of the power of the people in convention assembled to change the fundamental law of the state.

R. UHL, R. STOUDEMIRE & G. SHERRILL, CONSTITUTIONAL CONVENTIONS 3 (1951).

³⁶ *E.g.*, *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1, 4 (1912):

A "Constitution" is legislation direct from the people acting in their sovereign capacity, while a "statute" is legislation from their representatives, subject to limitations prescribed by the superior authority.

And, *Board of Supervisors v. Attorney Gen.*, 246 Md. 417, 229 A.2d 388, 394 (1967): Essentially, a constitution is fundamental legislation directly by the people acting politically in their sovereign capacity, while a law is a rule of conduct prescribed by the legislative agents of the people under and subject to delegated limitations of the previously ordained superior legislation, the Constitution.

Constitutional Convention by Initiative

vention's power comes directly from the people who approve its call, elect its delegates, and ultimately pass on its product.³⁷ Because of this, Hoar could say of constitutional conventions: "[t]heir validity rests not upon constitutional provision nor upon legislative act, but upon the fundamental sovereignty of the people themselves."³⁸

Popular sovereignty theory was found to be so persuasive by one court that approval of a new constitution by the electorate was held sufficient to legitimize a constitution even though it had been drafted and proposed (to the electorate) in a manner totally inconsistent with that prescribed by the existing constitution. In 1871 a Pennsylvania constitutional convention was called in a way not provided for in the Pennsylvania constitution of 1838. The convention met in 1872, and in 1873 the voters approved, in an irregular election, the product of the irregularly convened convention. The Pennsylvania Supreme Court, though decrying the illegality of the procedure, concluded: "The change made by the people in their political institutions, by the adoption of the proposed Constitution . . . , forbids an inquiry into the merits of this case."³⁹ Even traditional legitimacy theorists, such as Jameson, had to concede that a popular election could validate an irregularly passed constitution since it was obvious that the popular will, once executed, could be reversed only with great difficulty.⁴⁰

Further, relying on the popular will to legitimize constitutional

³⁷ ATT'Y. GEN. BRIEF, *supra* note 10, at 11.

³⁸ HOAR at 52.

³⁹ Wood's Appeal, 75 Pa. 59, 68-9 (1874). Opponents of the irregular 1872 convention sought an injunction to prevent submission of the new constitution to the people. The lower court denied the injunction and before review could be obtained the election had occurred and the people had approved the new constitution.

While not invalidating the new constitution, the Pennsylvania Supreme Court in *Wells v. Bain*, 75 Pa. 39 (1874) and *Wood's Appeal*, strongly criticized the procedure.

⁴⁰ Jameson admitted:

A Constitution . . . originating in a convention justly stigmatized as illegitimate, may, notwithstanding its origin, become valid as a fundamental law. This may happen in two ways: namely, first, by its adoption by the electoral body, according to the forms of existing laws; or, secondly, by the mere acquiescence of the sovereign society The ratification . . . would be a direct exercise of sovereign power . . . which it would be folly to gainsay.

JAMESON at 112.

Concerning the Pennsylvania experience, Jameson had to conclude: "the Constitution framed by the Convention had been submitted to and adopted by the people . . . ; and thus, however irregular, or even revolutionary, its inception had been, it had become the fundamental law of the State, and the Supreme Court must accept it as such." *Id.* at 407.

change can be very advantageous. As one participant in reform suggested:⁴¹

If you make the constitution and laws at all times subject to the control of the people, through a prudent and cautious mode of exercising their power, expressly pointed out and regulated, you produce a trebly advantageous effect. First, you make the people contented in the consciousness of their power and authority. Second, you check the rash propensity to change, by the consciousness that one can make a change when one pleases, and hence there is no urgency for doing it precipitiously or inconsiderately. Third, you secure the people against the dangers of despotism, which always accompany the making of changes in an irregular and undefined manner.

Most important, a recognition of popular sovereignty facilitates peaceful constitutional change. The problem with oppressive legal restrictions on the popular will is that such restrictions often leave the electorate no recourse but revolution. As one authority observed: "Search all history and you will find that the prominent cause of violent revolution, both those which have, and those which have not, terminated in despotisms, has been the feeling of the people that they were burdened with shackles, . . . and they could obtain relief only by violent measures."⁴²

Finally, even mere attempts at revision by the populace may improve chances for legislative action. Consider a series of events that occurred in Maryland in 1837. There, supporters of reform of the Maryland constitution elected a constitutional convention without any authorization from the existing government. In fact, the existing government denounced the rump convention as revolutionary and threatened to prosecute its participants. No more action was necessary since the Maryland General Assembly rapidly incorporated the most important reforms in constitutional amendments.⁴³ Likewise, there can be little doubt that one reason the Washington Legislature seriously considered a "gateway amendment" during the 1969 session was the

⁴¹ Thomas Earle, delegate to the Pennsylvania Constitutional Convention of 1837-38 quoted in BORGEAUD, *supra* note 31 at 166-67. This is the author's translation of the original French text.

⁴² BORGEAUD, *supra* note 31 at 166-67. This is the author's translation of the original French text.

⁴³ JAMESON at 216; HOAR at 20; DODD at 61.

Constitutional Convention by Initiative

near success of the initiative movement of 1968. Threatened with a constitutional convention beyond their control, the Washington legislators, like their nineteenth century Maryland counterparts, sought constitutional reform drafted by the legislature.

In summary, during the latter part of the nineteenth century traditional legitimacy theory gained enough influence to convince some writers that constitutional conventions could be convened, if at all, only according to the procedure authorized by the existing constitution. This restrictive interpretation of legitimacy theory was eventually eroded by the tenets of popular sovereignty, the doctrine upon which the American states were founded after the Revolution. As will be demonstrated in the following Part, today, while the traditional notion of legitimacy has only a minimal following, the doctrine of popular sovereignty is being consistently relied upon to justify extraconstitutional changes in the structure of state government.

II. THE EFFECT OF PARTICULAR CONSTITUTIONAL PROVISIONS ON CHANGES BY OTHER LAWFUL MEANS

A. Methods for Determining the Will of the Electorate

Before studying in detail the scope of the popular initiative in Washington, a primary inquiry is whether particular provisions for revision in an existing constitution preclude, by their very existence, other reasonable means of achieving the same goal. At the outset it should be clear that, since constitutional reform must represent the authentic will of the people, there must be some method to determine the voters' position on the issue. The electorate must be polled as to their desires for or against convening a convention. Also, there must be some mechanism to provide for election of delegates and the submission of the proposed constitution to the electorate.

Traditionally, this function has been performed by state legislatures exercising ordinary legislative power to assist the calling of a constitutional convention.⁴⁴ Both Cooley and Jameson felt this to be the most desirable method since they saw the legislatures as "being closest to

⁴⁴Dodd at 48 *et seq.*

the people" and best adapted to "a wise balancing of expediencies."⁴⁵

Determining the will of the people on the question of a constitutional convention can be accomplished in other ways. Indeed, frequent experience with the reluctance of legislatures to even submit the question to the people led some states to adopt alternative mechanisms. Both the Pennsylvania constitution of 1776 and the Vermont constitution of 1777, for example, provided for Councils of Censors that might call conventions or submit the issue to the electorate. While Vermont experienced a measure of success with this institution, it was found by the Pennsylvanians that the Council could be just as obstructive as a legislature.⁴⁶

The most frequently used tool for circumventing legislatures has been the submission into constitutions of a requirement that the electorate be automatically consulted at specified, periodic elections as to their desire for a convention.⁴⁷ This method of providing for a convention when the people desire one is in accord with the principles of popular sovereignty and has the approval of many authorities. Hoar felt that:⁴⁸

[i]t is preferable that this machinery [for determining the will of the electorate] be provided in detail by the constitution, as the people will

⁴⁵ COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, *supra* note 18, at 56, 59-60; JAMESON at 109-12. The Pennsylvania Supreme Court has described this legislative function in the following terms: "When a law becomes the instrumental process of amendment, it is not because the legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an *authorized* consent of the whole people, the entire state, can be lawfully obtained in a state of peace." *Wells v. Bain*, 75 Pa. 39, 47 (1874).

⁴⁶ JAMESON at 212-14; HOAR at 51-2.

⁴⁷ DODD at 50 *et seq.* Dodd reports that:

The plan of fixing definite terms for the submission of this question has not gained in favor as against the arrangement for submission at the legislative discretion. . . .

The legislatures have ordinarily been found responsive to popular sentiment in this respect.

Id. at 51. *Contra: Id.* at 292.

⁴⁸ HOAR at 224. *See also* DODD at 56-57.

Commenting on a periodic submission device in the 1846 New York Constitution, another authority observed:

Not merely is the popular vote on the question of holding a convention to be taken at twenty-year intervals, but the last vestige of intervention by the legislature in the matter is swept finally away. In case the people vote in the affirmative, the constitution itself provides, minutely, for the apportionment, election, organization, and procedure of the convention. Thus there is now imbedded in the constitution of New York a complete system for total revision of the constitution of that state beyond the control of the legislature. The people initiate, the convention drafts, the people enact.

F. JUDSON, ESSENTIALS OF A WRITTEN CONSTITUTION 21 (1903).

Constitutional Convention by Initiative

not be subject to the whim of the legislature, but may have a convention whenever they desire to exercise their unquestionable right to have one.

Yet another mechanism for submitting the convention issue to the electorate is some form of popular initiative. This is the tool to which advocates of reform in Washington and Massachusetts have recently turned.⁴⁹ Although the popular initiative is a relatively new feature in state constitutions, a mechanism very much like the modern initiative was the convention-convening instrument in an early Georgia constitution. The Georgia constitution of 1777 provided that the legislature should call a convention upon petition of a majority of the counties of the state.⁵⁰ Though this mechanism was never employed to convene a convention, Dodd states that this provision was “the first instance in which the popular initiative was sought to be given for such a purpose.”⁵¹ Borgeaud, who liked the idea of automatic periodic submissions, favored, above all, the popular initiative approach, often citing the success of the Swiss experience with this method of convening constitutional conventions.⁵²

B. Can a Convention Be Called Only by the Legislature?

Of the many ways to ascertain the will of the people on the convention issue, the Washington constitution of 1889 specifies only the most common. Article XXIII provides:⁵³

Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote at the next general election, for or against a convention, and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session, provide by law for calling the same; and such convention shall consist of a number of members, not less than that of the most numerous branch of the legislature.

Jameson would describe this provision as “permissive”—the provision points out a method by which a convention may be called but does

⁴⁹ See notes 6 and 7 *supra* and accompanying text.

⁵⁰ GA. CONST. art. 63 (1777). DODD at 28, 42, 48.

⁵¹ DODD at 48.

⁵² BORGEAUD, *supra* note 31, at 220.

⁵³ WASH. CONST. art. XXIII, § 2.

not include a prohibition, or even an allusion, to other possible methods.⁵⁴ But, according to the traditional notion of legitimate constitutional change, there must be absolute adherence to the procedure which the Washington constitution prescribes for its own alteration. Whether traditional legitimacy theory would render article XXIII the exclusive means of constitutional revision in Washington is unknown. Since the Washington legislature has never proposed a convention and, since the initiative approach had not been considered until 1968, the Washington courts have not had an opportunity to decide the issue. Despite the absence of a decision directly in point, it would be helpful to study the little Washington law that might be applicable to the issue since a determination of the exclusiveness of article XXIII is a key to further analysis.

The decision of the Washington State Supreme Court in *State ex rel. O'Connell v. Meyers*⁵⁵ suggests that the court would not rely on traditional legitimacy theory to invalidate procedures for constitutional revision not mentioned in the constitution. This case arose when the legislature thoroughly revised, by amendment, a popular initiative measure redistricting the legislature.⁵⁶ Following the legislative action, the Attorney General sought a writ of mandamus to compel the Secretary of State to redistrict the state in accordance with the original provisions of the initiative.

The Attorney General contended that since article II, section 3 of the Washington state constitution detailed the manner and timing of legislative redistricting, the legislature could not adopt another procedure (*e.g.*, amendment of an initiative) to accomplish the same end.⁵⁷ The court refused to accept this argument that article II, sec-

⁵⁴ See JAMESON at note 25 *supra* and accompanying text.

⁵⁵ 51 Wn. 2d 454, 319 P.2d 828 (1957).

⁵⁶ The twenty-sixth amendment to the constitution permitted the legislature to amend popular initiative measures within two years of their passage so long as two-thirds of each house of the legislature concurred. For the text of Amendment 26, see WASH. CONST. art. II, § 41 quoted in note 8 *supra*.

In *O'Connell v. Meyers*, the legislative amendment was a complete substitution of the legislature's redistricting scheme for the scheme approved by the passage of the initiative. *O'Connell v. Meyers*, 51 Wn. 2d 454, 319 P.2d 828 (1957).

⁵⁷ *O'Connell v. Meyers*, 51 Wn. 2d 454, 319 P.2d 828 (1957). The Attorney General, in arguing the invalidity of the legislature's amendment of the redistricting initiative, pointed to article II, section 3 of the Washington constitution. WASH. CONST. art. II, § 3 specifies:

The legislature shall provide by law for an enumeration of the inhabitants of the

Constitutional Convention by Initiative

tion 3 was an exclusive means for redistricting. “[I]t is a familiar rule,” said the court, “that the state constitution is a limitation upon, rather than a grant of, legislative power; that the legislature may enact any law not expressly or inferentially prohibited by the constitution of the state. . . .”⁵⁸ The court concluded:⁵⁹

In the absence of specific words of limitation, an express enumeration of legislative powers does not exclude the exercise of others not named.

. . . .
It follows that, since Art. II, § 3, contains no negative words of limitation, the legislature is not precluded from redistricting as often as it determines necessary.

The language and approach of this opinion suggests that the Washington court would not find that inclusion of article XXIII, section 2 in the state constitution (providing for a legislative proposal of a convention) would preclude other methods of calling a constitutional convention. Though the reasoning of the *O’Connell v. Meyers* decision can only be relied upon analogously, it is significant to note that the decision deals with an infrequently exercised, *constitutionally prescribed* power. It could be argued that calling a constitutional convention is similar in these regards to reapportioning the state legislature. And, though the scope of the initiative will be discussed further in Part III of this comment, it is instructive to notice that *O’Connell v. Meyers* dealt with initiative exercise of a function for which the constitution specifically states: “The legislature shall provide by law. . . .” Since article II, section 3 did not preclude reapportionment by initiative, it may be that the Washington court would find that article XXIII, section 2 does not preclude calling a constitutional convention by initiative. To rule otherwise it appears that the court would have to ignore the provision in the constitution that reads:⁶⁰

All political power is inherent in the people, and governments derive their

state . . . every ten years . . . and at the first session after . . . each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and house of representatives according to the number of inhabitants.

⁵⁸ 51 Wn. 2d at 465, 319 P.2d at 832. *Burns v. Anderson*, 51 Wn. 2d 810, 322 P.2d 359 (1958) might be read to the contrary.

⁵⁹ 51 Wn. 2d at 465, 319 P.2d at 833.

⁶⁰ WASH. CONST. art. I, § 1.

just powers from the consent of the governed, and are established to protect and maintain individual rights.

Similar constitutional provisions have been cited by the Kentucky⁶¹ and Maryland⁶² courts in support of rulings that existing constitutional revision provisions do not preclude resort to alternative methods.

Additionally, the Washington Supreme Court has stated: "There is little logic in arguing that the makers of the constitution 'excluded' that which did not then exist to be excluded."⁶³ It would make no sense, then, to argue that the 1889 provision for legislative proposal of a convention excluded the calling of a convention by an initiative. The initiative provision was added twenty-three years after the 1889 constitution was adopted.

Yet the foregoing discussion is merely analogous reasoning from decisions not directly in point. The Washington law is unsettled on the exclusiveness of the constitutionally prescribed mode for calling a constitutional convention. It is necessary, therefore, to study the decisions of other courts.

C. *Expressio Unius Est Exclusio Alterius*

Some judges and commentators, relying on traditional legitimacy theory, have applied the entrenched legal maxim, *expressio unius est exclusio alterius*, to void constitutional change by any means other than that provided for in the existing constitution. The *expressio unius* maxim is a rule of construction providing that an explicit statement of one thing implies exclusion of those alternatives not mentioned.⁶⁴

The Supreme Court of Rhode Island relied on this maxim in 1883 to advise the state senate that the general assembly could not call a

⁶¹ Gatewood v. Matthews, 403 S.W.2d 716, 718 (Ky. 1966). See note 123 *infra* and accompanying text.

⁶² Board of Supervisors v. Attorney Gen., 246 Md. 417, 229 A.2d 388, 396-97 (1967). See note 129 *infra* and accompanying text.

⁶³ State *ex rel* Lemon v. Langlie, 45 Wn. 2d 82, 99, 273 P.2d 464, 474 (1954). See also Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1731 (1966).

⁶⁴ H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 219 (2d. ed. 1911).

Constitutional Convention by Initiative

constitutional convention.⁶⁵ Observing that the Rhode Island constitution authorized the general assembly to propose amendments, the court concluded:⁶⁶

[T]he mode provided in the Constitution for the amendment thereof is the only mode in which it can be constitutionally amended. The ordinary rule is that where power is given to do a thing in a particular way, there the affirmative words, marking out the particular way, prohibit all other ways by implication, so that the particular way is the only way in which the power can be legally executed.

The losing parties had relied on principles of popular sovereignty. They pointed to article I, section 1 of the Rhode Island constitution which provided: "The basis of our political systems is the right of the people to make and alter their constitutions of government; . . ." To this argument the court replied:⁶⁷

Finally, it has been contended that there is a great unwritten common law of the states, which existed before the Constitution, and which the Constitution was powerless to modify or abolish, under which the people have the right, whenever invited by the General Assembly, and as some maintain, without any invitation, to alter and amend their constitutions. If there be any such law, for there is no record of it, or of any legislation or custom in this State recognizing it, then it is, in our opinion, rather a law, if law it can be called, of revolutionary than of constitutional

⁶⁵ *In re* The Constitutional Convention, 14 R.I. 649 (1883) *overruled by In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433 (1935). Reaction to the 1883 Rhode Island opinion was varied though not as violent as in 1842. *See* note 16 *supra*. One of the several pamphleteers active after the decision wrote:

Alas what a pity our fathers didn't mention
That we boys, if very good, could hold a convention.
They never said we shouldn't but didn't say we might,
"Ergo," cry the sages, "you haven't got the right."
'Twas very bad, indeed, their permission to deny,
But infinitely worse at once to up and die;
For thus they turned the lock and flung away the key,
And Rhode Island's "in a box" for all eternitee.

Quoted in Z. CHAFEE, *THE CONSTITUTIONAL CONVENTION THAT NEVER MET* 5 (1938). More serious criticism of the 1883 Rhode Island opinion is found at notes 89-95 *infra* and accompanying text.

⁶⁶ *In re* The Constitutional Convention, 14 R.I. 649, 651 (1883) *overruled by In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433 (1935).

Jameson is quick to point out that this opinion was at most an *advisory* opinion "not properly [a] judicial decision, binding upon either the officers propounding the questions [to the court] which they purported to answer, or upon the judges themselves." JAMESON at 606. *See also* JAMESON, Appendix E, pp. 667-69.

⁶⁷ *In re* The Constitutional Convention, 14 R.I. at 654.

change. Our Constitution is, as already stated, by its own terms, "the supreme law of the State." We know of no law, except the Constitution and laws of the United States, which is paramount to it.

One backer of the Rhode Island court noted the dangers of applying popular sovereignty doctrine to constitutional change. Quoting from an 1883 Iowa decision, William Sheffield observed that popular desire for extraconstitutional change could be peacefully satisfied only when the people unanimously agreed on the change. If on the other hand, he continued, there are many who object to the change, there would be civil war.⁶⁸ He concluded: "It follows then after all, that the much boasted right [of popular sovereignty] . . . is simply the right to alter the government in the manner prescribed in the existing constitution or the right of revolution. . . ."⁶⁹

⁶⁸ W. SHEFFIELD, THE MODE OF ALTERING THE CONSTITUTION OF RHODE ISLAND 20-21 (1887) quoting from *Koehler v. Hill*, 60 Iowa 543, 14 N.W. 738 (1883).

⁶⁹ W. SHEFFIELD, THE MODE OF ALTERING THE CONSTITUTION OF RHODE ISLAND 21 (1887). Sheffield argued vehemently that the only manner in which a constitution could be revised was by that manner directed in the constitution. He drove home his argument with a quotation from *Koehler v. Hill*, 60 Iowa 543, 14 N.W. 738 (1883):

If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory, and if the legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the courts should enforce it, and it also seems to us that there are few evils which can be inflicted by a strict adherence to the law, so great as that which is done by the habitual disregard by any department of the government of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed We deem it sufficient to say that if there is any provision of the Constitution which ought to be regarded as mandatory, it is the provision for its own amendment
Id. at 23.

But Sheffield failed to distinguish the *Koehler* case from the Rhode Island matter. In *Koehler*, the Iowa Supreme Court struck down a liquor prohibition amendment to the Iowa constitution on the ground that the procedure used to enact the amendment had varied from the constitutionally prescribed mode. The Iowa constitution required that proposed constitutional amendments be transcribed on the journals of both houses of the general assembly. *Id.* at 738. Since there were discrepancies in the language of the amendment as it had been entered on the house and senate journals, the court held it void. Though *Koehler* is an extreme case, it is fairly consistent with a long line of authorities to the effect that if one is going to amend a constitution by the constitutionally prescribed mode then there must be exact adherence to that mode. See authorities collected in DODD at 216-17.

The Rhode Island case, however, involved a completely different question. There, the attempt to call a constitutional convention was not an act pursuant to the constitutionally prescribed method; rather, it was an act in derogation of the constitutionally prescribed mode. Since the Rhode Island constitution was silent on the matter of calling a convention there was no provision to which adherence was necessary.

It should also be noted that Sheffield's quotation was a mix of the court's language with a quotation by the court from T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, *supra* note 18.

Constitutional Convention by Initiative

Finally, the Rhode Island court rejected the contention that the *expressio unius* maxim should be applicable only in the interpretation of statutes and deeds and not applicable in the interpretation of constitutions. The court noted:⁷⁰

Those who assert this difference do not appear to have any reason to give for it but this, namely: that under stress of strong political excitement, the rule, if it exists, is pretty sure to be disregarded, as past experience proves, and therefore it is better to conclude that it does not exist.

Citing *Opinion of the Justices*,⁷¹ the court decided that the maxim was a guide to language and would be just as applicable to interpretation of constitutional language as to statute or will language.⁷²

The Rhode Island opinion seems to build a persuasive case for application of the *expressio unius* maxim in similar situations. Yet there is no record that the maxim has been employed since 1883 to block an extraconstitutional convention. This is not to say that the logic of the maxim has lost its appeal; occasionally, a jurist or commentator will argue for use of the maxim when proponents of reform seek to employ revision methods not expressly mentioned in the existing constitution.⁷³ The idea still has sufficient validity to have been included in a modern legal reference volume which states: "Any attempt to revise a constitution or adopt a new one in any manner other

⁷⁰ *In re* The Constitutional Convention, 14 R.I. at 652 (1883).

⁷¹ 60 Mass. (6 Cush.) 573 (1833). This Massachusetts decision was written in 1833. However, due to an oversight, it was not included in the reports until 1883.

⁷² The Rhode Island court concluded: "Men do not put away their spontaneous and habitual modes of expressing themselves merely because they are engaged in the unaccustomed work of framing or adopting a constitution." 14 R.I. at 652. W. SHEFFIELD *supra* note 68, agrees at 16-17.

Opinion of the Justices, 60 Mass. (6 Cush.) 573 (1833), and the Rhode Island court's reliance on this Massachusetts decision are discussed at notes 89-91 *infra* and accompanying text.

⁷³ See, e.g., *Gatewood v. Matthews*, 403 S.W.2d 716, 722-23 (Ky. 1966) (dissent):

The authors of our Constitution outlined in section 258 definite and specific steps for its revision. This is the one and only mode of revision contained therein. Had the authors intended any other mode of revision, they would have said so. Had they intended its revision in "any manner as they (the people) may deem proper," as is urged by appellees, section 258 would have been an indulgence in idle curiosity and speculation. I believe there is no reasonable-minded person in this Commonwealth who doubts that it was the intention of the authors of the Constitution to provide an exclusive plan for revision.

It appears to me that the only justification for the majority opinion is expediency

• • • •

than that provided in the existing instrument is almost invariably treated as extraconstitutional and revolutionary."⁷⁴

D. Rejection of Limitations on Popular Sovereignty

Historical precedent and sound reasoning have led to a rejection of the restrictive requirements of the traditional legitimacy theory and the *expressio unius maxim*.

1. Historical Rejection

Hoar, in assessing reform experiences up to 1917, concludes that the right of the people to call a constitutional convention cannot be restricted by explicit provisions in an existing constitution.⁷⁵ Hoar then details historical evidence in five states that confirms his observation.⁷⁶

In Delaware, for instance, the constitution of 1831 provided that a constitutional convention could be called only when the people voted on the third Tuesday of May in any year and only when the total of affirmative votes was a "majority of all the citizens of the state having a right to vote for representatives."⁷⁷ In 1851, the Delaware General Assembly decided to poll the electorate to determine the need for a constitutional convention. Of those voting on the convention question, a majority favored a convention, but the number was not sufficient to constitute a majority of all those electors who could vote for representatives. Despite this significant discrepancy,

⁷⁴ 16 AM. JUR. 2d *Constitutional Law* § 26 (1964). It should be noted that none of the cases cited there are exactly in point. Most of the cited cases, such as *Moore v. Brown*, 350 Mo. 256, 165 S.W.2d 657 (1942), are those in which the courts have struck down proposed amendments because their enactment procedures varied in some manner from the constitutional provisions relating to amendment. For example, in *Moore*, one of the reasons the Missouri Supreme Court voided the initiative measure proposing a constitutional amendment was that the initiative did not disclose some related constitutional provisions it would affect. This omission was held a violation of statutes passed by the legislature upon a constitutional mandate.

Thus, the cases cited by the editors are not cases like *In re The Constitutional Convention*, 14 R.I. 649, 651 (1883), where the *expressio unius maxim* was used to prohibit an extraconstitutional convention. There is a very important distinction between cases like *Moore, supra*, and *Koehler*, 60 Iowa 543, 14 N.W. 738 (1883), where revision was attempted in a manner prescribed by the constitution, and cases like *In re The Constitutional Convention, supra*, and the present Washington situation, where revision is attempted in a manner which the constitution does not mention at all.

⁷⁵ HOAR at 50.

⁷⁶ *Id.* at 51-52.

⁷⁷ *Id.* at 51.

Constitutional Convention by Initiative

the General Assembly certified that the people had called a convention and enacted another law actually convening the convention. Hoar noted:⁷⁸

If the constitution of Delaware could effectively limit the right of the people to call a convention, then this convention was illegal and void. If, on the other hand, the people can lawfully disregard the constitution even in cases where the constitution provides for a convention, then this convention was valid. The question arose in the convention itself, and the majority opinion of the delegates was that the clause of the constitution was merely recommendatory, not peremptory.

Other examples prove the same point. The Indiana constitution of 1816 provided for the convening of a convention every twelfth year. Yet the Indiana Constitutional Convention of 1850 was held within one of the twelve-year periods and its legitimacy was never doubted.⁷⁹ Of this convention, Hoar wrote: "It would seem . . . that it is even a stronger disregard of the constitution to hold a convention whenever you please, under a constitution which says you may hold it in 1828, 1840, or 1852, than to hold a convention whenever you please, under a constitution which makes no mention of conventions . . ."⁸⁰

The Pennsylvania constitution of 1776 contained a provision prescribing the only method of amendment allowed. Under the early Pennsylvania scheme a Council of Censors had the authority to convene a constitutional convention when they felt the need was evident. Twice proponents of reform attempted to persuade a majority of the Censors to call a convention. Neither attempt was successful. Just before the Council was to meet again, the Pennsylvania General Assembly acted unilaterally. It instructed its members to return to their districts and test the mood of the people. The members of the assembly found that the electorate favored a convention, returned to the capitol, and enacted a law convening a convention. The convention of 1789 wrote and established the Pennsylvania constitution of 1790.⁸¹

In Georgia, the constitution of 1777 authorized a convention upon petition of a majority of the electorate. The state legislature ignored

⁷⁸ *Id.*, citing JAMESON at 209, n.1.

⁷⁹ *Id.*, citing JAMESON at 210, n.1. See also *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1, 9-10 (1912).

⁸⁰ HOAR at 41-42.

⁸¹ *Id.* at 51-52, citing JAMESON at 213-214.

this explicit provision and appointed a convention in 1788. This convention drafted a new constitution which was modified by a second convention the delegates to which were elected by the people in the 1788 general election. The modified constitution was submitted to yet a third convention comprised of delegates popularly elected in 1789.⁸²

The 1838 constitution of Florida expressly provided that "no convention of the people shall be called, unless by the concurrence of two-thirds of each House of the General Assembly." Disregarding this instruction, the governor called a convention by himself. The convention drafted the Florida constitution of 1865 and the action was upheld by the Florida Supreme Court.⁸³

It can be observed that the language of the Florida constitution is similar to that of the present Washington constitution—the legislature is to call the convention. The Florida language, phrased in the negative, is even stronger than the Washington language yet that provision did not preclude other reasonable means of calling a convention.

Hoar concludes:⁸⁴

These five examples would seem to establish the principle that conventions, even when expressly authorized by the constitution, are nevertheless popular in their nature, and have pretty much the same standing as though the constitution had been silent on the subject. In other words, constitutional provisions permitting the holding of conventions are, like legislative acts on the subject, merely recommendatory to the people.

Thus we come back to the fact that all conventions are valid if called by the people speaking through the electorate at a regular election. This is true, regardless of whether the constitution attempts to prohibit or to authorize them, or is merely silent on the subject. Their validity rests

⁸² JAMESON at 135-36; DODD at 42.

⁸³ HOAR at 52; *Bradford v. Shine*, 13 Fla. 393 (1871).

⁸⁴ HOAR at 52. Another example of disregard for the *expressio unius maxim* is found in the history of constitutional revision in North Dakota. The North Dakota constitution stipulated that the legislature could present the convention issue to the electorate after passing a law and sending it to the governor for his approval or veto. Since the legislature proposed to call an election on this issue by a concurrent resolution that did not require the governor's signature, the secretary of state refused to certify the issue for the November, 1896 election. Supporters of the convention sought and obtained a writ of mandamus to compel submission. The North Dakota Supreme Court concluded:

The decided weight of authority and the more numerous precedents are arrayed on the side of the doctrine which supports the existence of this inherent legislative power to call a constitutional convention, notwithstanding the fact that the instrument itself points out how it may be amended.

State ex rel. Wineman v. Dahl, 6 N.D. 81, 68 N.W. 418, 420 (1896).

Constitutional Convention by Initiative

not upon constitutional provision nor upon legislative act, but upon the fundamental sovereignty of the people themselves.

2. *Sound Reasoning Has Rejected Application of the Expressio Unius Maxim to Restrict Constitutional Change*

(a) *Reversal of opinion by the Rhode Island Supreme Court.* A convenient starting point for an analysis of the rejection of the *expressio unius* maxim is to study the reversal of opinion by the Rhode Island Supreme Court—the one court that in 1883 had directly applied the maxim to prohibit an extraconstitutional convention. In 1935 the Rhode Island court observed that their previous decision, *In re The Constitutional Convention*,⁸⁵ had been subject to vigorous attack from the day it was rendered and, further, it had never been relied upon by any other court which had considered the issue involved.⁸⁶ Nothing that the prior opinion had been based solely on the *expressio unius* maxim, the justices decided: “[W]e are convinced that the judges [in the 1883 opinion] misunderstood the maxim and its proper application.”⁸⁷ They concluded:⁸⁸

⁸⁵ *In re The Constitutional Convention*, 14 R.I. 649 (1883).

⁸⁶ *In re Opinion to the Governor*, 55 R.I. 56, 178 A. 433, 436 (1935) *overruling In re The Constitutional Convention*, 14 R.I. 649 (1883).

One of the Rhode Island constitutional scholars that wrote critically of the 1883 decision was Judge Charles Smith Bradley, a Chief Justice of the Rhode Island Supreme Court. In his book, *THE METHODS OF CHANGING THE CONSTITUTIONS OF THE STATES, ESPECIALLY THAT OF RHODE ISLAND* (1885), he observed that the Rhode Island Court first spelled out the constitutional provision for amendment and then

the inference is drawn that “it is inconceivable to us that they would have elaborated so guarded a mode of amendment, unless they had intended to have it exclusive and controlling.” This inference is met by the historic fact that such provisions have not been so considered in about fifty State constitutions, which contain the same provision for amendment, and also provisions for a convention. The opinion and the pamphlet [Bradley was writing in reply to *SOME THOUGHTS ON THE CONSTITUTION OF RHODE ISLAND* (1884), by Chief Justice Thomas Durfee of the 1883 Rhode Island Supreme Court] rest only upon an inference set up against the usage of the country as to the meaning and effect of these provisions.

Id. at 56-57. Other authorities criticizing *In re The Constitutional Convention*, *supra*, are JAMESON at 605; DODD at 45; and HOAR at 45-48.

⁸⁷ *In re Opinion to the Governor*, 55 R.I. 56, 178 A. 433, 440 (1935). The manner in which the judges of the 1883 court misunderstood the *expressio unius* maxim will be discussed at notes 106-108 *infra* and accompanying text.

⁸⁸ *In re Opinion to the Governor*, 55 R.I. 56, 178 A. 433, 437-438 (1935). CHAFFEE, *supra* note 65 at 7, explained the political circumstances under which the 1935 opinion was written.

Therefore, when the *coup d'état* of January 1, 1935, placed all three branches of the government in Democratic hands, [previously the Democratic Party had been hampered by a malapportioned legislature which diluted the influence of their stronghold in Providence and by the lack of a veto for the usually Democratic

[I]t 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.

One of the major reasons for over-ruling the 1883 Rhode Island decision was the discovery that the Massachusetts decision, *Opinion of the Justices*,⁸⁹ upon which the opinion had relied, did not stand for the proposition for which it had been cited. The Massachusetts decision did not say, as the 1883 Rhode Island court assumed, that a convention was illegal because the constitution provided for amendments. Rather, the Massachusetts Supreme Judicial Council said that the amendment method prescribed by the Massachusetts constitution was the only method for revision "under and pursuant to the existing Constitution." In its decision, which was in answer to a legislative request for a decision on the legality of a proposed convention, the Massachusetts court *expressly reserved* the question of whether the people could legally call a convention in a manner other than that prescribed by the constitution. The justices observed that this reserved matter⁹⁰

would involve the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded, rather than any question upon the nature, construction, or operation of the existing constitution of the commonwealth, and the laws made under it. We pre-

governor] plans were disclosed at once for . . . a convention. The first step was to get rid of the advisory opinion of 1883. This is commonly supposed to be one reason why the five Republican judges of the Supreme Court were immediately ousted, and a new court with a Democratic majority put in their place. Three weeks later, Governor Green asked the new judges to give him a fresh advisory opinion on the validity of a constitutional convention. In view of the numerous conventions in other states with no express provisions in their constitutions, the favorable opinion that was eventually given could reasonably be anticipated from the start.

⁸⁹ 60 Mass. (6 Cush.) 573 (1833). See note 71 *supra* and accompanying text.

⁹⁰ Opinion of the Justices, 60 Mass. (6 Cush.) 573, 574 (1833).

Constitutional Convention by Initiative

sume, therefore, that the opinion requested applies to the existing constitution

While the court did say that a convention could not be called pursuant to the existing constitution, they concluded that the people probably did have the inherent power to call a convention.⁹¹

(b) *The legislative authority has inherent power to propose constitutional revision.* The basis for the over-ruling of *In re The Constitutional Convention* was the recognition that the legislative power to propose a convention is an inherent power that cannot be restricted by *affirmative* constitutional provisions.⁹² It should be understood that legislatures have predominantly inherent powers—authority the legislatures possess without any grant from the state constitutions. These powers are unlimited except where restrictions are specifically imposed by the federal or state constitutions.⁹³ Restrictions on legislative powers must be clear;⁹⁴ thus, an enumeration of certain legislative powers does not operate to restrict exercise of other powers not mentioned.⁹⁵ Notwithstanding the fact that a legislature may enact all reasonable laws not prohibited, constitutions often specifically “grant” legislative powers to the legislature. For instance,

⁹¹ *Id.* at 574-75. The relationship between Opinion of the Justices and *In re The Constitutional Convention* is discussed in JAMESON at 605; DODD at 45; HOAR at 45-47; and in Lord, *The Massachusetts Constitution and the Constitutional Conventions*, 2 MASS. L.Q. 1, 23-25 (1916).

⁹² *In re Opinion to the Governor*, 55 R.I. 56, 178 A. 433, 438-39 (1935).

⁹³ As the Washington Supreme Court has stated:

We are mindful of the fundamental principle that the state constitution is not a grant, but a restriction on the law-making power. The power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state or federal constitutions.

Pacific Am. Realty Trust v. Lonctot, 62 Wn. 2d 91, 95, 381 P.2d 123, 126 (1963). *Accord*, *State ex rel. O'Connell v. Myers*, 51 Wn. 2d 454, 465, 319 P.2d 828, 832 (1957); *Miller v. Clarke*, 47 R.I. 13, 129 A. 606, 608 (1925).

⁹⁴ See, e.g., WASH. CONST. art. II, §§ 24-29 which provide in part:

§ 24: The legislature shall never authorize any lottery or grant any divorce.

§ 25: The legislature shall never grant any extra compensation to any public officer

§ 28: The legislature is prohibited from enacting any private or special laws in the following cases:—

1. For changing the names of persons, or constituting one person the heir at law of another.

2.

It is important to note that there is *no* provision in the Washington constitution that reads to the effect: “The initiative power shall not include the power to summon a constitutional convention.”

⁹⁵ *State ex rel. O'Connell v. Meyers*, 51 Wn. 2d 454, 465, 319 P.2d 828, 832 (1957).

the Washington constitution provides that the legislature may initiate the call for a constitutional convention.⁹⁶

There is an important and practical significance to this classification of legislative powers as either inherent or granted. As to inherent powers, the courts employ a liberal construction and resolve questions of power to pass a particular law in favor of the legislature.⁹⁷ But, as to granted powers, the courts require that every substantial requirement of the grant be strictly observed and followed.⁹⁸

Most legislatures have both inherent and granted powers to initiate constitutional revision. In addition to receiving express grants of authority to draft constitutional amendments for submission to the electorate, legislatures frequently have been given the power to submit the convention call issue to the people.⁹⁹ And, in some cases, the people have expressly reserved to themselves the legislative power to initiate constitutional amendments.¹⁰⁰ In all these cases, when the

⁹⁶ WASH. CONST. art. XXIII, § 2. While the legislature's authority to initiate a convention is not dependent on this specific grant of legislative power (*see* note 102 *infra* and accompanying text), the legislature's authority to exercise nonlegislative power is dependent on specific constitutional grants. An example of granting the legislature a non-legislative power is the provision in the Washington constitution giving the senate the power to consent to or reject certain appointments of the governor. WASH. CONST. art. XIII, § 1. *See also* ATT'Y GEN. DRAFT, *supra* note 10, at O'Connell, *Use of the Initiative to Call a Constitutional Convention*, 6-7.

⁹⁷ ATT'Y GEN. DRAFT, *supra* note 10, at O'Connell, *Use of the Initiative to Call a Constitutional Convention*, 7.

⁹⁸ *See, e.g.*, *Koehler v. Hill*, 60 Iowa 543, 14 N.W. 738 (1883) and authorities collected in *Dodd* at 216-17.

An example of the narrow interpretations cast on granted powers is found in *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (1948), *cert. denied*, 336 U.S. 918 (1949). In *McFadden*, the California Supreme Court held that authority under the California constitution to propose constitutional amendments by initiative did not include the power to propose general constitutional revision.

⁹⁹ *See* note 44 *supra* and accompanying text. *See also* *Dodd* at 129-136; *Hoar* at 83-85. As described earlier, this is the method of revision provided for in the Washington State constitution at article XXIII § 1 (note 53 *supra* and accompanying text).

¹⁰⁰ *Dodd* at 127-28, 136. Though the Washington constitution has no provision for proposing amendments by popular initiative, the Attorney General has held that the constitution can be amended in this manner. 1939-40 WASH. OP. ATT'Y. GEN. 238-41. In view of this opinion it is possible that the people can use a two-step procedure for calling a constitutional convention. First, by initiative, they could *amend* article II, section 1 to allow calling a constitutional convention by initiative. Second, exercising this newly granted power, they could initiate a convention. The two-step procedure is supported by the argument that the people should be able to decide whether the electorate as well as the legislature hold the right to initiate a convention. Those in favor of the people's right would vote in favor of the first initiative—this is what occurred in Massachusetts in November, 1968. However, some of those who favor the people's right to call a convention might feel that there is no need for a convention at this time and would then vote against the second initiative.

Constitutional Convention by Initiative

legislatures or the people exercise their granted powers, they must exercise them in strict conformity with the grant.

As to inherent powers, the law is quite clear that the legislatures *do not* have the inherent power to make or remake a constitution directly or even indirectly by submitting a legislative draft of a new constitution to the electorate.¹⁰¹ But the law is equally well settled that the legislatures *do* have the inherent power to provide by law for the convening of a constitutional convention.¹⁰² As Daniel Webster once explained:¹⁰³

Another American principle growing out of this, and just as important and well settled as is the truth that the people are the source of power, is that, when in the course of events it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things or of opinion, the legislative power provides for that ascertainment by an ordinary act of legislation.

. . .

We see . . . from the commencement of the government under which we live . . . one uniform current of law, of precedent, and of practice, all going to establish the point that changes in government are to be brought about by the will of the people, assembled under such legislative provisions as may be necessary to ascertain that will, truly and authentically.

(c) *Affirmative provisions for constitutional reform cannot limit inherent power to propose a convention.* Can a constitution's affirmative provisions for constitutional revision limit the legislature's inherent power to call a convention? Since inherent powers to call a convention are broadly construed,¹⁰⁴ this is unlikely. Further, inherent

It is entirely conceivable that this whole approach is only an academic consideration. The Washington Supreme Court has not spoken even on the narrow issue of whether the people can amend the constitution by initiative and the Attorney General's Opinion, referred to above, is suspect since it did not distinguish between granted and inherent powers.

¹⁰¹ JAMESON at 422-23; HOAR at 79 ff. *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1 (1912): The Indiana General Assembly, at its regular biennial session held in 1911, drafted a proposed new constitution. Following the governor's approval, the new constitution was to be submitted to the people. Before the election could be held the Board of Elections was enjoined from submitting the constitution issue. The Supreme Court affirmed.

¹⁰² COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, *supra* note 18, at 56; JAMESON at 210-12; DODD at 44; and HOAR at 24-25, 40.

¹⁰³ VI D. WEBSTER, WORKS OF DANIEL WEBSTER 227-29 (5th ed. 1853).

¹⁰⁴ See note 97 *supra* and accompanying text.

legislative authority is restricted by "limitations," not by affirmative provisions. As the Washington court stated: "In the absence of specific words of limitation, an express enumeration of legislative powers does not exclude the exercise of others not named."¹⁰⁵ The legislature already has the inherent power to call a convention and provisions in an existing constitution on the same subject do not restrict that inherent power.

Application of the *expressio unius* maxim so that affirmative provisions limit inherent legislative power stems from a misunderstanding of the maxim.¹⁰⁶ The maxim does not mean that where two powers are consistent, the granting or affirmative provision for one power is a prohibition of the exercise of the other.¹⁰⁷ The proper basis of the rule is that affirmative words may be construed as operating negatively also (to exclude similar unexpressed powers), *if* such a construction is necessary to give the affirmative words meaning.¹⁰⁸ If the method specified in the express provision could never be used because of the exercise of another, unexpressed method, there would be justification for application of the maxim to exclude the latter. Following this reasoning, use of an initiative petition to call a constitutional convention should not be prohibited by express constitutional provision for a legislative convocation of a convention. The express provisions would continue to have great meaning—as when the initiative proponents fail to secure the requisite number of valid signatures to place the issue on the ballot.

Finally, a good argument can be made that the *expressio unius* maxim should not be used under any circumstances to interpret constitutional language.¹⁰⁹ Some authorities feel that the maxim is logically unsound.¹¹⁰ Others argue that this mechanistic rule of construction might be applied to interpret statute or deed language

¹⁰⁵ State *ex rel.* O'Connell v. Meyers, 51 Wn. 2d 454, 465, 319 P.2d 828, 832 (1957).

¹⁰⁶ See generally, H. BLACK, HANDBOOK ON THE CONSTITUTION AND INTERPRETATION OF THE LAWS 219-23 (2d ed. 1911).

¹⁰⁷ *In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433, 441 (1935).

¹⁰⁸ *Id.* See also JAMESON at 606-08 and COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, *supra* note 18, at 105.

¹⁰⁹ *In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433, 440 (1935). See also Eastern Archipelago Co. v. Queen, 2 Ellis and Blackburn R. 856, 879, 118 Eng. Rep. 988, 996 (Q.B. 1853); Barto v. Himrod, 8 N.Y. 483, 493, 59 Am. Dec. 506, 511; and Williams v. Mayor of Detroit, 2 Mich. 560, 564 (1853) (Cited in JAMESON at 608-609).

¹¹⁰ Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873-74 (1930).

Constitutional Convention by Initiative

but that such a risk should not be taken with fundamental, constitutional language.¹¹¹ A maxim of construction may provide a “short-cut” to the solution of an interpretation problem but “short-cuts” should not be sought when constitutional language is involved.

(d) *Expressio unius should not be applied to restrict popular sovereignty.* Thus far many arguments have been advanced for rejecting the use of the *expressio unius* maxim to restrict the convening of a constitutional convention. The basic assumption of each argument is that this maxim of construction—*expressio unius*—must not be used to limit popular sovereignty. Accordingly, one court has stated that specific provisions for revision should not be viewed as “exclusive” since “the recognized rule is that if two constructions of a constitutional provision are reasonably possible, one 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.”¹¹²

Such a liberal construction of revision provisions is essential since, as Hoar observed,¹¹³

The people have the right to change their form of government at will, using whatever method suits them.

This is a fundamental right, which constitutions are powerless to deny, restrict, or limit as to method.

3. *The Proper View of Express Constitutional Provisions for Revision*

If expression of one method of revision cannot limit inherent legislative power to call a convention in another manner, and if it cannot prohibit the electorate from convening a convention in any authentic way, then for what purpose is the expression in the constitution in the first place? According to the authorities, the proper view of expressed constitutional revision provisions is that, at most, they only provide

¹¹¹ See note 109 *supra*.

¹¹² *In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433, 441-42 (1935).

¹¹³ HOAR at 221. Language in a recent Kentucky opinion is explicit:

The right of each generation to choose for itself is inalienable Being thus inalienable, that right cannot be cut down or subjected to conditions any more than it could be completely denied by one generation to another. So long as the people have due and proper notice and opportunity to acquaint themselves with any revision, and make their choice directly by a free and popular election, their will is supreme, and it is to be done.

Gateway v. Matthews, 403 S.W.2d 716, 721 (Ky. 1966).

a means for the expression of an inherent popular right.¹¹⁴ Of these provisions, Hoar stated: "That the constitution is merely helping out a superior right, rather than granting a privilege to the people, is shown by the fact that the people may accept so much of the constitutional assistance as they wish, and may disregard the constitutional limitations."¹¹⁵ Under the express constitutional provisions, the government's ordinary legislative power is merely used to assist or facilitate the exercise of the people's right to convene a convention.

Where ordinary legislative power is used to assist the electorate in calling a constitutional convention, provisions in the existing constitution are never deemed exclusive.¹¹⁶ As the Rhode Island justices stated in *In re Opinion to the Governor*, the specific power "granted" to the General Assembly in article 13 of the Rhode Island constitution (the power to propose amendments for popular ratification) should "naturally and reasonably be viewed as an *additional* rather than an exclusive power . . ."¹¹⁷ Actions by the existing government which assist the people to convene a convention are not limited by express constitutional provisions since they are actions in exercise of the people's reserved powers of sovereignty.¹¹⁸ The assistance the government provides, *e.g.*, supplying the machinery to establish the convention, is not action in exercise of powers delegated by the constitution. As the Maryland Supreme Court put it recently:¹¹⁹

To use the Legislature, a body created by the constitution, to provide the mechanics and sinews for changing that constitution by ascertaining the will of the people, for the election of delegates and the submission of their work to the people and at the same time to class their legislative actions as not encompassed by the provisions of the constitution as to laws may at first thought seem so illogical as to be unsound. Yet it has been accepted generally as sound and proper. . . . This technique is but part of the exercise of the fundamental right of the people to change

¹¹⁴ Bradley *supra* note 86, at 92. See also UHL, STOUDEMIRE & SHERRILL, *supra* note 35 at 3.

¹¹⁵ HOAR at 50-51.

¹¹⁶ ATT'Y. GEN. BRIEF, *supra* note 10, at 13 (with cases cited).

¹¹⁷ *In re Opinion to the Governor*, 55 R.I. 56, 178 A. 433, 441-42 (1935).

¹¹⁸ ATT'Y. GEN. BRIEF, *supra* note 10 at 13:

The principle of non-limitation operates in these circumstances because, by assisting the people in the exercise of their rights, legislation "borrows" authority from the inherent, retained rights of the people which are above and beyond the existing constitution.

¹¹⁹ Board of Supervisors v. Attorney Gen., 246 Md. 417, 229 A.2d 388, 396-97 (1967).

Constitutional Convention by Initiative

their constitution whenever and however they deem fit; this right derives not from constitutions, but is a retained inherent right above and beyond the constitution, and therefore actions of the Legislature making available and supporting the exercise of that right . . . are actions in exercise of the people's reserved powers of sovereignty and not actions in exercise of powers delegated by the Constitution.

4. Recent Decisions Approving Extraconstitutional Conventions

Three recent decisions approving extraconstitutional conventions indicate a reliance on the tenets of popular sovereignty and a continued rejection of the traditional notion of legitimacy and the *expressio unius* doctrine.¹²⁰ The first decision was in Kentucky in 1966 where the court upheld the validity of a new constitution submitted to the voters in a manner different from the procedure which was provided by the existing constitution. The stage was set by the 1964 Kentucky General Assembly which enacted legislation establishing the Constitutional Revision Assembly. The Revision Assembly drafted a revised constitution and submitted the document to the General Assembly. The 1966 General Assembly passed a law submitting the revised constitution to the voters. The draft was to be adopted or rejected by the voters at the November 8, 1966, general election but the revision issue was immediately brought before a Kentucky Circuit Court.

Plaintiff, a taxpayer, sought declaratory relief and an injunction prohibiting the state officers from placing the question of adoption of the new constitution on the ballot. Plaintiff alleged that the actions of the 1964 and 1966 General Assemblies proposing a new constitution were invalid since they failed to conform with section 258 of the Kentucky constitution which provides that a constitutional convention can be proposed for a vote of the electorate after two-thirds of both houses of the legislature, for two consecutive sessions, agree that such a convention is necessary.¹²¹ The circuit court refused to issue an

¹²⁰ *Gatewood v. Matthews*, 403 S.W.2d 716 (Ky. 1966); *Board of Supervisors v. Attorney Gen.*, 246 Md. 417, 229 A.2d 388 (1967); *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 (1969).

¹²¹ Ky. CONST. § 258 reads in part:

[W]hen a majority of all the members elected to each House of the General Assembly shall concur . . . in enacting a law to take the sense of the people of the State as to the necessity and expediency of calling a Convention for the purpose of revising or amending this Constitution, and such amendments as may have been made to the

injunction. In affirming the decision, the Kentucky Court of Appeals isolated as the primary question: "whether by the terms of Sections 256 [providing for legislative initiation of constitutional amendments] and 258 of the Constitution the people have imposed upon themselves exclusive modes of amending or of revising their Constitution."¹²² Observing that the actions of the General Assembly had not followed the dictates of section 258 of the 1891 constitution, the court declared that the authority for the legislative action¹²³

must be derived from the sovereign power of the people as delineated in section 4 of the [Kentucky] Bill of Rights [which reads:] All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper.

The court found it "inconceivable" that provisions of the 1891 constitution might divest the people of their inherent power to reform the constitution. "The power of the people to change the constitution" said the court, "is plenary, and the existence of one mode for exercising that power does not preclude all others."¹²⁴ Emphasizing the right of each generation to choose for itself, the court concluded that no constitution can declare an exclusive mode of revision.¹²⁵

One year after the Kentucky decision, the Maryland Court of Appeals confronted the same issue when the Maryland General Assembly called a constitutional convention in a manner different from that

same, such law shall be spread upon their respective journals. If the next General Assembly shall, in like manner, concur in such law, it shall provide for . . . holding general elections at the next ensuing regular election to be held for State officers or members of the House of Representatives, which does not occur within ninety days from the final passage of such law, at which time and places the votes of the qualified voters shall be taken for and against calling the Convention, in the same manner provided by law for taking votes in other State elections If it shall appear that a majority voting on the proposition was for calling a Convention, and if the total number of votes cast for the calling of the Convention is equal to one-fourth of the number of qualified voters who voted at the last preceding general election in this State, the Secretary of State shall certify the same to the General Assembly at its next regular session, at which session a law shall be enacted calling a Convention to readopt, revise or amend this Constitution, and such amendments as may have been made thereto.

¹²² *Gatewood v. Matthews*, 403 S.W.2d 716, 718 (Ky. 1966).

¹²³ *Id.* at 718.

¹²⁴ *Id.* at 719.

¹²⁵ *Id.*

Constitutional Convention by Initiative

provided in the constitution of 1867.¹²⁶ The Maryland constitution provided that the General Assembly should take “the sense of the People” at specified intervals to determine the need to convene a convention. The General Assembly was to enact legislation convening a convention if a majority of those voting at the election favored it.¹²⁷

Though the next specified date of consulting the electorate on the need for a convention was the 1970 general election, the 1966 Maryland General Assembly passed a law to poll the voters on this issue at a special election to be held in conjunction with the 1966 primary election. The law also provided that if a majority of those voting at the special election voted for a convention, it should assemble on September 12, 1967. At the September 13, 1966, special election, the majority of those voting on the convention issue voted to call a convention (the margin was almost five to one), but the number of votes cast in the special election (both for and against the constitution) was not a majority of the total votes cast in the primary election held the same day.

Because of the constitutional question raised by these discrepancies, the 1967 General Assembly authorized the Attorney General to seek declaratory relief. Among the nine questions directed to the circuit court was question (h): “In light of the fact that those voting ‘for’ the calling of a convention did not constitute a majority of those voting in the [primary] election, is the calling of a convention at this time mandatory?”¹²⁸ The circuit court held that the deviations from the constitutional provision did not invalidate the election. The Maryland Court of Appeals affirmed, citing the constitution: “That all Government of right originates from the People, is founded in com-

¹²⁶ Board of Supervisors v. Attorney Gen., 246 Md. 417, 229 A.2d 388 (1967).

¹²⁷ Md. CONST. art. XIV, § 2 (amended 1956) reads in part:

It shall be the duty of the General Assembly to provide by Law for taking, at the general election to be held in the year nineteen hundred and seventy, and every twenty years thereafter, the sense of the People in regard to calling a Convention for altering this Constitution; and if a majority of voters at such election or elections shall vote for a Convention, the General Assembly, at its next session, shall provide by Law for the assembling of such convention, and for the election of Delegates thereto. . . . But any Constitution, or change, or amendment of the existing Constitution, which may be adopted by such Convention, shall be submitted to the voters of this State, and shall have no effect unless the same shall have been adopted by a majority of the voters voting thereon. (The 1956 amendment, *inter alia*, advanced the next specified interval from 1887 to 1970.)

¹²⁸ Board of Supervisors v. Attorney Gen., 246 Md. 417, 229 A.2d 388, 391 (1967).

pact only, and instituted solely for the good of the whole; and they have at all times, the inalienable right to alter, reform or abolish their form of Government in such manner as they may deem expedient."¹²⁹ The court recited previous instances of deviation from constitutional provisions allegedly controlling constitutional revision and concluded that express revision provisions were more often ignored than followed.¹³⁰

Specifically, the court held that the special election was not held pursuant to the existing constitution and that, as a consequence, the provisions of the constitution requiring a majority vote of all those in the election did not apply to invalidate the special election. Thus, the high court determined that the 1967 Constitutional Convention was legally constituted; the express provisions of the Maryland constitution had not precluded resort to other, more expedient, approaches to reform.

In February, 1969, the Pennsylvania Supreme Court held that the people of that state could amend their existing constitution by convention despite the absence of any provision for a convention in their constitution. Further, the court held that procedures that led to the enactment of the amendments by the electorate did not violate the amendatory provisions of the existing constitution because the amendments were not initiated pursuant to those provisions but were instead initiated in another lawful manner—by convention.¹³¹

In March, 1967, the Pennsylvania General Assembly had authorized a limited constitutional convention to propose amendments to the constitution of 1874. This proposal to call a convention was approved by the electors in May, 1967. The convention met and proposed several amendments for submission to the electorate. Because the method in which the amendments were proposed varied in substantial fashion from the method provided in the existing constitution, the plaintiffs sought to enjoin the Secretary of the Commonwealth from submitting the proposals to the voters. The relief sought was denied in the lower court, and in April, 1968, the eligible voters of the state adopted several of the proposed constitutional amendments.

¹²⁹ MD. CONST., Declaration of Rights, art. 1 as quoted in *Board of Supervisors v. Attorney Gen.*, 246 Md. 417, 229 A.2d 388, 400 (1967).

¹³⁰ *Id.*, 229 A.2d at 397-400.

¹³¹ *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 (1969).

Constitutional Convention by Initiative

On appeal (after the election), the Pennsylvania Supreme Court heard the following facts and arguments. Article XI of the Pennsylvania constitution specified that amendments to the constitution could be proposed to the electorate following a majority approval of the amendments by both houses of two successive General Assemblies.¹³² Three months had to intervene between the time the second Assembly proposed the amendments and the election at which they would be voted upon.¹³³ There was no provision for a constitutional convention.

Plaintiffs contended that the convention method of proposing the 1968 amendments was unconstitutional since article XI was silent as to that method. Further, plaintiffs contended that the 1968 procedure violated article XI since only eighteen days intervened between the time the convention proposed the amendments and the time the election on those amendments was held. The Supreme Court rejected both contentions¹³⁴ observing first that the Pennsylvania constitution of 1874 had been proposed by a convention when the existing constitution at that time specified another method of revision, and second, that the adoption of the United States Constitution directly contravened article XIII of the Articles of Confederation. The court concluded as to this latter issue: "We reaffirm our prior decisions which have consistently held that so long as a Constitutional Convention is not expressly prohibited by the then existing Constitution, it represents a proper manner and method in which the citizens of Pennsylvania *may initiate* an amendment of their Constitution."¹³⁵

¹³² Article XI was formerly Article XVIII. The renumbering was accomplished by a Governor's proclamation. *Id.*, 250 A.2d at 478 n.6.

¹³³ PA. CONST. art. XI, § 1 reads in part:

Amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by a majority of the members elected to each House, . . . the Secretary of the Commonwealth shall cause the same to be published three months before the next general election, in at least two newspapers in every county . . . ; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each House, the Secretary of the Commonwealth shall cause the same again to be published . . . ; and such proposed amendment or amendments shall be submitted to the qualified electors of the State . . . at least three months after being so agreed to by the two Houses, as the General Assembly shall prescribe; and, if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution; but no amendment or amendments shall be submitted oftener than once in five years. . . .

¹³⁴ The Supreme Court decision in this case came after the new amendments had been approved by the electorate. *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 (1969).

¹³⁵ *Id.*, 250 A.2d at 479.

Rejecting the notice contention, the court said:¹⁸⁶

It is undoubtedly true that in matters relating to the alteration or amendment or change or abolition of the Constitution . . . all the clear and mandated provisions of the Constitution must be strictly followed and obeyed However, the appellants misconstrue what has taken place here. These new amendments to or revision of the Constitution were not adopted pursuant to the provisions of Article XI of the Constitution of 1874, but were adopted pursuant to and through a different manner of amendment—the Constitutional Convention. As we said earlier, this Court has declared that the convention method of amending the Constitution is lawful.

The Pennsylvania decision is a persuasive addition to the near-unanimous body of opinion rejecting the proposition that express constitutional provisions for particular methods of revision exclude other methods not mentioned. Scholarly judicial reasoning has made it clear that the legal maxim *expressio unius est exclusio alterius* cannot be relied upon to prohibit or limit the inherent right of the legislature to propose or the people to call conventions to revise their state constitutions. Under current analysis, the popular sovereignty doctrine legitimizes constitutional conventions convened by any authentic act of the electorate. Thus, the authorities suggest that article XXIII, section 2 of the Washington constitution [providing that the legislature shall call a convention] does not preclude calling a convention by initiative.

III. USE OF THE WASHINGTON POPULAR INITIATIVE TO CONVENE A CONSTITUTIONAL CONVENTION

Having established that any authentic expression of popular sovereignty may provide the vehicle for convening a constitutional convention, the next question to be asked is: Does the popular initiative approach qualify as an authentic expression? Analysis leads to the conclusion that the initiative mechanism may be used to call a constitutional convention.

Use of an initiative to put the convention issue on the ballot may be either the exercise of a granted legislative power or the exercise of an

¹⁸⁶ *Id.*

Constitutional Convention by Initiative

inherent legislative power. As Hoar wrote: "If the [convention enabling] act originates by an initiative petition, it is clear that the people pass the act, although there may be some dispute as to whether they proceed under the authority of the constitution, or under a supra-constitutional authority, with the mere assistance of the constitution."¹³⁷

A. Use of the Initiative as a Granted Legislative Power

Use of an initiative to place the convention issue before the electorate may be the exercise of a granted legislative power. Article XXIII, section 2 of the Washington State constitution provides that the legislature shall submit to the voters the question of convening a constitutional convention. Analysis of Washington cases indicates that the people, through the popular initiative, may exercise all granted legislative powers.¹³⁸ Presumably this would include the exercise of the article XXIII power to place the convention issue before the voters.

In *State ex rel. Mullen v. Howell*¹³⁹ there was a dispute over whether a joint resolution of the legislature was subject to referendum. In January, 1919, the Washington Legislature ratified, by joint resolution, the prohibition amendment to the federal constitution. The following March, Mullen tendered a referendum petition to the respondent Secretary of State seeking to have the action of the Legislature reversed. The Secretary of State refused to file or number the petition on the grounds that the amendment had been ratified by a joint resolution—not by an act, bill, or law—and was not within the terms of the seventh amendment which reads:¹⁴⁰

The legislative authority of the State of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, *but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also*

¹³⁷ HOAR at 77.

¹³⁸ *State ex rel. Mullen v. Howell*, 107 Wash. 167, 181 P. 920 (1919); *State ex rel. Miller v. Hinkle*, 156 Wash. 289, 286 P. 839 (1930); *State ex rel. O'Connell v. Kramer*, 73 Wn. 2d 85, 436 P.2d 786 (1968).

¹³⁹ 107 Wash. 167, 181 P. 920 (1919).

¹⁴⁰ WASH. CONST. art. II, § 1.

reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature (emphasis added).

Mullen sought a writ of mandamus to compel the Secretary of State to receive the petition. The Supreme Court ordered the writ to issue.¹⁴¹

At issue was the scope of the initiative and referendum power. The determination of whether a "joint resolution" was a "bill, act or law" turned on the question of "whether the people intended an act, bill, or law to be statutes enacted by the legislature, or whether they meant action by the *Legislature which affected them as law?*"¹⁴² (Emphasis added). The court chose the second—and broader—alternative, concluding that the terms of the seventh amendment "imply in the strongest possible way that the intention of the people was to reserve a right to review every act of the legislature which might affect the people in their civil rights or limit or extend their political liberties"¹⁴³

In *State ex rel. Miller v. Hinkle*¹⁴⁴ the Washington court considered the scope of the initiative power. At issue was whether the seventh amendment initiative provision could be utilized to reapportion the legislature. The court stated that "the matter of apportioning the state for legislative membership is a matter of law, requiring legislative acts."¹⁴⁵ The court reasoned that the constitution itself required this interpretation since two sections of article II (containing the reapportionment section) began with the phrase "until otherwise provided by law." Citing *Mullen v. Howell*, the court declared that the seventh amendment had revested the legislative power in the people and held that the initiative could be the *legislative act* necessary to redistrict the legislature.

Finally, the *Miller* court stated that the initiative was as broad as

¹⁴¹ *State ex rel. Mullen v. Howell*, 107 Wash. 167, 181 P. 920 (1919). Note that in this case the court dealt with the merits while in *State ex rel. O'Connell v. Kramer*, 73 Wn. 2d 85, 436 P.2d 786 (1968), a case involving use of an initiative to convene a constitutional convention, the court refused to discuss the merits. The latter case is still useful since the court stated (in dictum) that an initiative petition proposing a convention was like any other legislative act. 73 Wn. 2d at 85, 436 P.2d at 787.

¹⁴² *State ex rel. Mullen v. Howell*, 107 Wash. 167, 170, 181 P. 920, 922 (1919).

¹⁴³ *Id.* at 168, 181 P. at 921.

¹⁴⁴ *State ex rel. Miller v. Hinkle*, 156 Wash. 289, 286 P. 839 (1930).

¹⁴⁵ *Id.* at 292, 286 P. at 840.

Constitutional Convention by Initiative

the referendum.¹⁴⁶ Since, after *Miller*, the initiative and referendum powers are equal in scope, the statements in *Mullen* speaking to the referendum may also be applied to the initiative.

A combined analysis of the *Mullen* and *Miller* cases leads one to the conclusion that *legislative acts which affect the people in their civil rights or limit or extend their political liberties* are subject to the initiative power. Convening a constitutional convention meets both criteria. First, article XXIII, section 2 of the state constitution states that the legislature shall "recommend" to the voters that they vote for or against a convention, and, if the voters approve the convention call, then the legislature shall "provide by law" for the convocation.¹⁴⁷ Clearly, legislative acts are required to convene a convention. Second, it is obvious that convening a constitutional convention may affect the people in their civil rights, or may limit or extend their political liberties. An argument that article XXIII is not within the scope of the initiative because the legislature only "recommends" a convention (without passing a bill, act or law) would fall before the reasoning of the *Mullen* court.¹⁴⁸

Following the reasoning of the two previous cases, it appears that the people, through the initiative, may exercise the article XXIII power to convene a constitutional convention. This conclusion raises another question: Would the people's exercise of the granted legislative power be subject to the limitations included in the grant? The framers of the constitution, who expressly authorized the legislature to convene a constitutional convention, imposed two restrictions on the exercise of that power. First, two-thirds of the members of each house of the legislature had to agree that a convention was necessary; and

¹⁴⁶ *Miller*, *supra* note 144, cites *State ex rel. Howell v. Superior Court*, 97 Wash. 569, 166 P. 1126 (1917) for the proposition that the initiative is as broad as the referendum. There is no explicit statement to that effect in *Howell*. Rather, the case speaks of the initiative and referendum interchangeably.

¹⁴⁷ WASH. CONST. art. XXIII, § 2 is set out in note 3 *supra* and in the text accompanying note 53 *supra*.

¹⁴⁸ There does not seem to be a requirement that the legislative act affect the people *immediately*. In *Mullen*, *supra* note 142, the approval of the prohibition amendment (to the federal constitution) by the Washington Legislature did not have the effect of immediately closing the saloons. Rather, additional, and independent, ratifications were necessary. Likewise, there is no certainty that the legislative act "recommending" a convention will have an immediate affect. Indeed, if the electorate does not approve the convention or later rejects a convention product, then the legislative act will have had no effect on the people's civil rights or political liberties.

second, for the convention call to be approved by the electorate there had to be a favorable majority of all those voting in the general election at which the convention vote was scheduled.¹⁴⁹ It is difficult to envision how the first restriction could be applied to an exercise of the initiative power. An initiative petition must contain valid signatures equal to eight percent of the number of voters voting in the preceding gubernatorial election.¹⁵⁰ Conceivably, the two-thirds requirement of article XXIII, section 2 might require a great number of initiative petition signatures, but who would set the increased number and what would the higher figure be?

The second restriction could be applied to the initiative with less difficulty. Approval of an initiative requires only a majority of the votes cast upon the issue (rather than a majority of all votes cast in the election) provided that the total votes cast on the initiative issue equals one-third of the total votes cast in the election.¹⁵¹ If the people, through the initiative, exercise the article XXIII granted power, it may be that the terms of article XXIII would require approval of the convention call by a majority of the voters in the election. It is not clear whether or not such a requirement would contravene the one-man, one-vote dictate of the federal Constitution.¹⁵² It can be said, however, that the general rule is as follows: limitations on the process of constitutional amendment by the legislature will not be applied to the process of amendment by initiative.¹⁵³ Whether this general rule

¹⁴⁹ WASH. CONST. art. XXIII, § 2 is set out in note 3 *supra* and in the text accompanying note 53 *supra*.

¹⁵⁰ WASH. CONST. art. II, § 1(A) is set out near the end of note 8 *supra*.

¹⁵¹ WASH. CONST. art. II, § 1(d) is also set out in note 8 *supra*.

¹⁵² If the opponents of a convention merely refrained from voting on the convention issue when the *majority of those voting in the election* rule is in effect, they could effectively dilute the importance of votes favorable to the convention. This could constitute a violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. *Cf. Gray v. Sanders*, 372 U.S. 368 (1963); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964); *Lance v. Roane City Bd. of Educ.*, — W. Va. —, 170 S.E.2d 783 (1969).

¹⁵³ *Grant v. Hardage*, 106 Ark. 506, 153 S.W. 826 (1913). In this case there was a conflict between the procedure for constitutional amendments submitted by the legislature and the procedure prescribed for constitutional amendments proposed by initiative. Amendments proposed by the legislature had to be published six months before the next general election while initiative measures had to be filed four months before the election at which they were to be voted upon. *Id.* The court held that the original constitutional requirements for legislative amendments had to yield to the new requirements for initiative amendments. The decision was based on the fact that the initiative requirements had been added to the constitution subsequent to the legislative amendment requirements. *Id.* at 827.

Reasoning by analogy, it might be argued that the validation terms of the Washington

Constitutional Convention by Initiative

will extend to calling a *convention* by initiative is unknown.¹⁵⁴

B. Use of the Initiative as an Inherent Legislative Power

The potential problems that could arise if article XXIII *granted* legislative power is exercised by initiative would not arise if the people, through an initiative, assert their popular sovereignty and exercise their *inherent* legislative power to call a convention. As noted above, convening a constitutional convention is an inherent power of the legislative authority¹⁵⁵ and the possessors of that inherent power may exercise it notwithstanding existing constitutional provisions for revision. In acting independently of the existing convention proposal provisions, those who exercise inherent powers also act independently of the restrictions there expressly imposed.¹⁵⁶ If the people convene a convention by initiative, the only applicable restrictions would be those included in the initiative provision.

Basic to this analysis is the assumption that the voters, through the initiative, may exercise *all* inherent legislative power. The Washington state constitution supports this assumption. The seventh amendment reads, in part: “[T]he people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature. . . .” This reserved power is so complete and absolute that the governor’s normal legislative veto does not apply to it.¹⁵⁷

The assumption that the people may exercise all inherent legislative power is also supported by the court’s construction of the seventh amendment. In *State v. Paul*,¹⁵⁸ the Washington Supreme Court emphasized the broad scope of the initiative power in these words:¹⁵⁹

Now the passage of an initiative measure as a law, by the people, is not the exercise of the power of any different sovereignty than is the passage

initiative provision would control over the conflicting terms of the original constitutional provision providing for a legislative call of a convention. Thus, validation of an initiative convention call would require only a majority of the votes cast on that issue instead of a majority of all the votes cast in the election. Such a result is indicated since the Washington initiative clause was added at a date subsequent to passage of the original constitution. *Cf. Brickhouse v. Hill*, 167 Ark. 513, 268 S.W. 865 (1925).

¹⁵⁴ These issues have never been broached by any court. *See note 7 supra*.

¹⁵⁵ *See notes 102 & 103 supra* and accompanying text.

¹⁵⁶ *See, e.g., Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474, 479 (1969).

¹⁵⁷ WASH. CONST. art. II, § 1(d), note 8 *supra*.

¹⁵⁸ *State v. Paul*, 87 Wash. 83, 151 P. 114 (1915).

¹⁵⁹ *Id.* at 90, 151 P. at 116.

of a law by the legislature. Each is simply the exercise of the legislative power of the state. Nor is the power superior in one as compared with the other, with the exception that there are certain restrictions against repeal by the legislature of an act passed by the people, within a limited time.

Similarly, courts in other states have said that the legislature, and the people exercising the initiative power, are coordinate legislative bodies.¹⁶⁰ The Washington court has said more than merely that the initiative power is unlimited. In *Love v. King County*, the court ruled explicitly that the people may exercise inherent legislative powers by initiative.¹⁶¹ *Love* was an action by a taxpayer seeking to enjoin a county from issuing general negotiable bonds. The petitioners alleged that the issuance of the bonds violated a recently enacted initiative measure limiting the rate of taxation.¹⁶² The county argued that the initiative measure limiting the rate was unconstitutional and had no effect since the power of taxation was an inherent legislative power that could not be limited or restricted by the people. The court disagreed. Emphasizing that the power to tax is an inherent legislative function, the court stated that an initiative "is as much a legislative act as" is a statute.¹⁶³ Pointing to article I, section 1 of the constitution,¹⁶⁴ the court reasoned:¹⁶⁵

Under our form of government, ultimate sovereignty, so far as the state is concerned, rests in its people, and so long as the government established by them exists, that sovereignty remains with them, except so far as they have expressly surrendered it to a higher authority.

¹⁶⁰ See, e.g., *State ex rel. Public Serv. Comm'n. v. Brannon*, 86 Mont. 200, 283 P. 202, 208 (1929), where the court stated: "A law may be enacted by the people exercising the initiative or by the people acting through the Legislature. In either case the power to enact a law is illimitable, except as restrained by the Constitution." *Accord*, *Luker v. Curtis*, 64 Idaho 703, 136 P.2d 978, 979 (1943); *State ex rel. Richards v. Whisman*, 36 S.D. 260, 154 N.W. 707, 709-10, *error dismissed* 241 U.S. 643 (1915).

¹⁶¹ *Love v. King County*, 181 Wash. 462, 44 P.2d 175 (1935).

¹⁶² The county resolution authorizing the issuance of the bonds also provided that "for the punctual payment of the bonds, principal and interest, there should be levied . . . a direct tax *without restriction or limitation as to the rate or amount thereof*." *Id.* at 464-65, 44 P.2d at 176.

¹⁶³ *Id.* at 469, 44 P.2d at 178.

¹⁶⁴ WASH. CONST. art. I, § 1 reads:

All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and the established to protect and maintain individual rights.

¹⁶⁵ *Love v. King County*, 181 Wash. 462, 467, 44 P.2d 175, 177 (1935).

Constitutional Convention by Initiative

The court concluded that the people, through the initiative, could exercise the inherent power to limit the amount or rate of taxation just as they had reserved the power to levy taxes in the first place.¹⁶⁶ Since another inherent legislative power is the authority to call a constitutional convention,¹⁶⁷ it seems logical that the people may exercise that power as well through the initiative mechanism.

C. Construction of Provisions for Initiatives

Since the Washington court in *Paul, Mullen, and Love*, along with other courts,¹⁶⁸ has interpreted the people's reserved legislative power in the broadest possible terms, it is not surprising that the courts have required a liberal construction of the initiative provisions. For the same reason, the courts have held that the initiative power will not be restricted by implied limitations and must be harmonized, when possible, with existing constitutional provisions. Both of these positions are incumbent upon the courts since the exercise of the initiative power is the exercise of popular sovereignty.

In requiring a liberal construction, the Washington State Supreme Court in *State ex rel. Case v. Superior Court*¹⁶⁹ cited the initiative provisions of the Washington constitution which conclude: "This section is self-executing, but legislation may be enacted especially to facilitate its operation."¹⁷⁰ The court then observed:¹⁷¹

Thus there is strongly suggested, in the language of the constitution and this law, a required liberal construction, to the end that this constitutional right of the people may be *facilitated*, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.

This language has been repeated by the Washington court¹⁷² and paraphrased by the courts of other jurisdictions,¹⁷³ and would seem to

¹⁶⁶ *Id.* at 467-69, 44 P.2d at 177.

¹⁶⁷ See notes 102 & 103 *supra* and accompanying text.

¹⁶⁸ See note 160 *supra*.

¹⁶⁹ *State ex rel. Case v. Superior Court*, 81 Wash. 623, 143 P. 461 (1914).

¹⁷⁰ WASH. CONST. art. II, § 1(d).

¹⁷¹ *State ex rel. Case v. Superior Court*, 81 Wash. 623, 632, 143 Pac. 461, 464 (1914).

¹⁷² *Rouso v. Meyers*, 64 Wn. 2d 53, 60, 390 P.2d 557, 561 (1964).

¹⁷³ See, e.g., *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (1948), *cert. denied*, 336 U.S. 918 (1949).

offer persuasive argument against an application of the *expressio unius* maxim to limit the people's initiative power.

When prohibitions on implied limitations and requirements for harmonious construction of the initiative power are added to the requirement of a liberal construction, the barrier to application of the *expressio unius* maxim appears impenetrable. In addition, these rules would seem to mitigate against application of granted power restrictions to the initiative power. As to implied limitations, it has been held that, while powers subject to the initiative may be limited, such a limitation will not be implied unless the language of the provision establishing the power clearly states that the power cannot be exercised by initiative.¹⁷⁴ It can be recalled that article XXIII (providing for legislative initiation of constitutional revision) is cast in "permissive" terms.¹⁷⁵ There is no language that compels an interpretation that other methods are prohibited. Finally, the courts, in construing an initiative or referendum amendment, have applied the following rule of construction: "[T]he amendment and the previous provisions of the [c]onstitution are to be harmonized, when not necessarily inconsistent and repugnant."¹⁷⁶ As discussed above,¹⁷⁷ the legislature's article XXIII authority to convene a convention can be easily harmonized with the people's right to call a convention by initiative. The initiative method does not eliminate, or even complicate, exercise of the article XXIII authority. Rather, use of an initiative to call a convention will only be necessary when the legislature refuses to exercise its inherent or granted power.

To this point we have seen that the people's reserved legislative authority is equal to that possessed by the legislature, that the convening of a constitutional convention is an inherent legislative function, and that either the legislature, or the people through the initiative, may exercise inherent legislative power. It is thus logical to

¹⁷⁴ *Glass v. Smith*, 150 Tex. 632, 244 S.W.2d 645 (1951) involving a municipal initiative.

¹⁷⁵ See note 3 *supra*.

¹⁷⁶ *State ex rel. City of Little Rock v. Donaghey*, 106 Ark. 56, 152 S.W. 746, 748 (1912). See also *Brickhouse v. Hill*, 167 Ark. 513, 268 S.W. 865, 874 (1925) (concurring opinion) and *Galvin v. Board of Supervisors of Contra Costa Cty.*, 195 Cal. 686, 235 P. 450, 452 (1925).

¹⁷⁷ See note 108 *supra* and accompanying text.

Constitutional Convention by Initiative

conclude that the people can call a constitutional convention through use of the popular initiative. The authorities agree. Dodd wrote:¹⁷⁸

The introduction of the initiative and referendum in South Dakota, Oregon, Montana, Oklahoma, Missouri, and Maine makes it possible for the people of these states to initiate and adopt a measure providing that a convention be held, and thus removes this question to a large extent from legislative control.

Dodd approved of the initiative method of convening a convention and suggested that the technique be extended to additional jurisdictions.¹⁷⁹ Hoar, writing in 1917, observed:¹⁸⁰

Since the introduction of the initiative and referendum in the West and Middle West, not only may constitutional amendments be made in twelve States by an initiative petition without the interposition of either the legislature or a convention; but also in six additional States, the people can initiate and adopt a measure providing for the holding of a convention; and may, by referendum, veto any statutes by which the legislature attempts to interfere with a convention. In all these States . . . the constitutions provide that legislative acts for calling of a convention must be referred to the people . . . Thus, in these States the convention is entirely, absolutely, and unquestionably within the control of the people, and hence owes nothing of its authority to the legislature.

A more recent student of constitutional reform, Albert Sturm, has also concluded that the initiative is available to call a convention. Sturm suggests that "the initiative may . . . be used to advantage in overcoming legislative recalcitrance."¹⁸¹

¹⁷⁸ DODD at 54. Washington was not included on Dodd's list since at the time he was writing (1910) Washington had not yet adopted the initiative.

¹⁷⁹ *Id.* at 292:

Popular control over the proposal of amendments should be extended. Legislatures are not always responsive to the desires of the people in this respect, and it should be possible to initiate proposed amendments by popular petition. The popular initiative has already been introduced in several states, and its extension with respect to constitutional questions is desirable. The popular initiative is open to many objections, both theoretical and practical, but the people should have power independently of the legislature, to force changes in their constitutions when such changes are desired.

¹⁸⁰ HOAR at 58. In a footnote Hoar included Washington as one of the states in which the initiative could be used to convene a convention. *Id.* at 58 n.2. Cf. Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 995, 1002, 1006 (1968).

¹⁸¹ A. STURM, *METHODS OF STATE CONSTITUTIONAL REFORM* 84 n.2, 120 (1954).

CONCLUSION

Despite the encouraging opinions of the few scholars who have considered the question, the initiative has never been used as a vehicle for convening a state constitutional convention. This is not to say that the idea of using an initiative for this purpose has not been considered. As will be recalled,¹⁸² the Georgia constitution of 1777 provided for a convention convening device which looked very much like a modern initiative provision. Article 63 of the 1777 Georgia constitution provided for a constitutional convention to be called by the legislature "upon the petition of a majority of the voters of a majority of the counties."¹⁸³ This tool was never used and, as Dodd suggests, the method was "extremely cumbersome, and would probably have proven unworkable had it been tried."¹⁸⁴ The greatest difficulty no doubt was that the signature requirement was practically unattainable.

In another instance, supporters of reform in Massachusetts unsuccessfully attempted to convene a constitutional convention by initiative in 1923. However, the issue never reached a court since the backers of the initiative failed to secure sufficient valid signatures to place the initiative on the ballot.¹⁸⁵ It seems certain, though, that the issue will be decided by the Massachusetts Supreme Judicial Council in mid-1970.¹⁸⁶

As the need for modernization of state government becomes more acute there are likely to be more attempts to employ the initiative to call constitutional conventions. Thus, courts will have to rule on the

¹⁸² See notes 50 & 51 *supra* and accompanying text.

¹⁸³ DODD at 42.

¹⁸⁴ *Id.*

¹⁸⁵ The 1923 Massachusetts convention initiative was criticized in Grinnell, *Does the I. and R. Amendment Authorize An "Initiative" Petition for Another Constitutional Convention?*, 9 MASS. L.Q. 34 (1924), reprinted 45 MASS. L.Q. 10 (1960). Grinnell argued that the Massachusetts initiative power was not available for such a use since the constitution provided that the initiative power could not be exercised in certain areas. Since a convention would discuss all matters including those specifically excluded from the scope of the Massachusetts initiative, Grinnell concluded that a petition to call a convention would violate the express terms of the initiative power and would be unconstitutional. Grinnell's argument was refuted in Goulding, *The Use of the Popular Initiative Petition for a Constitutional Convention Act*, 47 MASS. L.Q. 367 (1962). Goulding concluded that the initiative could be used to call a convention. The issues raised by the Grinnell article as well as the basic issues discussed in this comment are now before the Supreme Judicial Council of Massachusetts. This litigation arose following the successful 1968 initiative campaign proposing to submit the convention call issue to the voters in 1970. See note 7 *supra*.

¹⁸⁶ See notes 7 & 185 *supra*. For a discussion of the Massachusetts decision see Editor's Note on page 591.

Constitutional Convention by Initiative

questions of (1) whether revision provisions in an existing constitution preclude the use of other revision techniques, and (2) whether a particular initiative provision is broad enough to encompass convening a convention. If the Washington court is faced with these issues, its own precedents¹⁸⁷ would most likely lead it to conclude that the scope of the seventh amendment of the Washington constitution would include the authority for an initiative call of a constitutional convention. Apparently, the initiative power is unlimited and may be employed to exercise both granted¹⁸⁸ and inherent legislative power.¹⁸⁹ Convening a convention probably falls into both of these categories.¹⁹⁰

The Washington court has little precedent to rely upon in deciding the question whether the provision for legislative initiation of a convention found in article XXIII of the Washington constitution precludes use of the initiative alternative. However, what the court has said is instructive:¹⁹¹

[I]t is a familiar rule that the state constitution is a limitation upon, rather than a grant of, legislative power; that the legislature may enact any law not expressly or inferentially prohibited by the constitution of the state. . . . In the absence of specific words of limitation, an express enumeration of legislative powers does not exclude the exercise of others not named.

Equally important is a long line of consistent decisions which have held that express provisions for constitutional revision are no barrier to other unexpressed methods for achieving the same goal.¹⁹² Most recently, popular sovereignty theory was emphasized by the Kentucky Court of Appeals in 1966,¹⁹³ by the Maryland Court of Appeals in 1967,¹⁹⁴ and by the Pennsylvania Supreme Court in 1969¹⁹⁵ as these

¹⁸⁷ See, e.g., *Love v. King County*, 181 Wash. 462, 44 P.2d 175 (1935); *State ex rel. Miller v. Hinkle*, 156 Wash. 289, 286 P. 839 (1930); *State ex rel. Mullen v. Howell*, 107 Wash. 167, 181 P. 920 (1919); *Case v. Superior Court*, 81 Wash. 623, 143 P. 461 (1914); and *State v. Paul*, 87 Wash. 83, 151 P. 114 (1915).

¹⁸⁸ *State ex rel. Mullen v. Howell*, 107 Wash. 167, 181 P. 920 (1919); and *State ex rel. Miller v. Hinkle*, 156 Wash. 289, 286 P. 839 (1930).

¹⁸⁹ *Love v. King County*, 181 Wash. 462, 44 P.2d 175 (1935).

¹⁹⁰ See notes 44, 102 & 103 *supra* and accompanying text.

¹⁹¹ *State ex rel. O'Connell v. Meyers*, 51 Wn. 2d 454, 465, 319 P.2d 828, 832 (1957).

¹⁹² E.g., *Bradford v. Shine*, 13 Fla. 393 (1871); *Woods Appeal*, 75 Pa. 59 (1874); *Wine-man v. Dahl*, 6 N.D. 81, 68 N.W. 418 (1896); *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1 (1912); *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 (1969).

¹⁹³ *Gatewood v. Matthews*, 403 S.W.2d 716 (Ky. 1966).

¹⁹⁴ *Board of Supervisors v. Attorney Gen.*, 246 Md. 417, 229 A.2d 388 (1967).

¹⁹⁵ *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 (1969).

courts approved extraconstitutional conventions. Only one court has ever blocked extraconstitutional reform and that court later reversed itself.¹⁹⁶

*John W. Hempelmann**

APPENDIX

INITIATIVE MEASURE 241**

CALLING 1970 STATE CONSTITUTIONAL CONVENTION

BE IT ENACTED BY THE PEOPLE OF THE
STATE OF WASHINGTON:

SECTION 1. PREAMBLE. The present constitution of the state of Washington was adopted in 1889. Since that time it has been amended on a piecemeal basis a total of forty-eight times. It has never been comprehensively revised. In its present form the constitution is archaic, making it difficult for local and state governments to respond to the problems of modern society. Although a number of other states have recently acted to rewrite their constitutions, the Washington state legislature has not exercised its authority to initiate a call for a constitutional convention to prepare a draft of a modern state constitution for submission to the voters. Therefore, the people of the state of Washington, in exercise of their reserved law-making and political powers, do hereby call for a state constitutional convention to be held in the manner hereinafter set forth.

SEC. 2. CALL FOR CONVENTION. There shall be a state constitutional convention, hereinafter referred to as the 1970 State Constitutional Convention, which will convene in December, 1969, and hold general sessions in 1970, for the purpose of preparing a revised state constitution for approval or rejection by the people at the November 3, 1970, general election.

SEC. 3. ELECTION OF DELEGATES. A state general election shall be held on Tuesday, November 4, 1969, for the purpose of electing delegates to

¹⁹⁶ *In re* The Constitutional Convention, 14 R.I. 649 (1883) *overruled In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433 (1935).

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This paper is based upon a similar paper submitted by the author to Georgetown University in partial fulfillment of the requirements for a Master of Arts degree in Political Science.

** Not submitted to the people, due to the inability of the sponsors to obtain sufficient signatures. See note 6 *supra*.

Constitutional Convention by Initiative

the 1970 State Constitutional Convention. At this election there shall be elected ninety-nine delegates to the convention on the basis of two delegates from each of the senatorial districts established by chapter 6, Laws of 1965, together with a third delegate from the forty-second senatorial district as thereby established. The election of delegates shall be by position within the respective senatorial districts, there being two positions, designated "A" and "B" within each senatorial district and a third, designated "C," within the forty-second senatorial district. Any registered voter of the state of Washington and of the particular district shall be eligible for election as a delegate.

SEC. 4. DECLARATIONS OF CANDIDACY. All candidates for election to the office of delegate to the 1970 State Constitutional Convention herein provided for shall file their declarations of candidacy by not earlier than Monday, July 28, 1969, nor later than Friday, August 1, 1969, using the form prescribed by RCW 29.18.030. Declarations of candidacy shall be filed with the secretary of state in the case of candidates from districts comprising more than one county, and with the county auditor of the particular county in cases of candidates from districts wholly contained in a single county. A filing fee of twenty-five dollars (\$25.00) shall be paid by each candidate at the time of filing his declaration of candidacy.

SEC. 5. NONPARTISAN PRIMARY AND GENERAL ELECTION. The election of delegates to the 1970 State Constitutional Convention shall be on a nonpartisan basis. Upon filing his declaration of candidacy, each candidate shall indicate the alphabetically designated position within his district to which he seeks election. Candidates shall be nominated at a primary election in accordance with RCW 29.13.070, and the names of the person who receives the greatest number of votes and of the person who receives the next greatest number of votes for each position at the primary shall appear on the general election ballot under the designation therefor. The candidate for each position receiving the greatest number of votes at the general election shall be deemed elected, and shall be a delegate to the 1970 State Constitutional Convention.

SEC. 6. CONVENTION POWERS AND APPROPRIATION. It shall be the duty of the 1970 State Constitutional Convention to prepare a revised constitution of the state of Washington for submission to the people as hereinafter provided at the general election of November 3, 1970. In performance of this duty the convention shall have power to purchase necessary supplies and materials, to employ such legal, technical and clerical employees as it deems necessary, and to fix the compensation of such employees, all within the limits of an appropriation of \$975,000 from the state general fund which is hereby made for the purpose of funding all authorized costs and expenses of the convention during the 1969-71 biennium. In addition, the convention shall have plenary power to do all things necessary to accomplish its purpose

as herein set forth and shall be entitled to call upon and receive without charge the professional or other services of any state officer and employee. The convention may make such use of the chambers and offices of the House of Representatives as it deems necessary, unless the convention sessions are in conflict with a special legislative session, in which case the legislature shall make provision for other suitable facilities for use of the State Constitutional Convention. Any vacancies occurring in the membership of the convention shall be filled by designation of a replacement having the same qualifications as the vacating member, in such manner as the convention by rule shall provide.

SEC. 7. CONVENTION TIMETABLE. The constitutional convention of delegates elected in accordance with Sec. 5 hereof shall convene in the state capitol on Friday, December 19, 1969, for purposes of organization, planning, employment of staff and assignment of such research or other projects as it deems appropriate to have accomplished prior to undertaking the formal work of the convention. At this organizational session the lieutenant governor shall serve as temporary chairman until a permanent chairman is selected by the convention, and Robert's Rules of Order (latest published edition) shall be in effect until the convention adopts its own rules. The convention shall then adjourn and reconvene on Monday, February 16, 1970, and shall remain in session for such period as is necessary to complete the work assigned by Sec. 6 hereof: PROVIDED, That the convention shall file a complete copy of its proposed revised constitution with the secretary of state not later than June 19, 1970, and shall then adjourn.

SEC. 8. COMPENSATION AND EXPENSES OF DELEGATES. Delegates to the 1970 State Constitutional Convention shall receive compensation at the rate of twenty-five dollars per day for each day they are in attendance at the State Constitutional Convention and, in addition, they shall receive per diem, in lieu of actual expenses for subsistence and lodging, at the rate of twenty-five dollars per day for each such day, and reimbursement for travel expenses at the rate of ten cents per mile for travel in going to and coming from the convention sessions or for travel on other convention business authorized pursuant to rules adopted by the convention.

SEC. 9. PUBLICATION AND NOTICE REQUIREMENTS. The 1970 State Constitutional Convention shall file a complete copy of the revised constitution with the secretary of state by not later than June 19, 1970, as hereinbefore provided. Thereupon, the secretary of state shall publicize the revised constitution in the manner specified by the convention; in the absence of such direction, the secretary of state shall cause the full text of the revised constitution to be published once during the month of September, 1970, in at least one daily legal newspaper in each county of the state: PROVIDED, That in counties wherein no daily newspaper is published, publication as herein provided shall be made in at least one weekly legal newspaper pub-

Constitutional Convention by Initiative

lished therein. In addition, the secretary of state shall cause the complete text of the proposed reviewed constitution to be set forth in the official voters' pamphlet to be issued in 1970, pursuant to chapter 29.81 RCW. All costs of publication herein provided for shall constitute allowable charges against the appropriation made by Sec. 6 of this act.

SEC. 10. SUBMISSION TO PEOPLE. The revised constitution which is prepared by the 1970 State Constitutional Convention shall be submitted to the people at the general election of November 3, 1970. The convention shall be responsible for the preparation of ballot propositions which will enable the people to vote on the question of whether the revised state constitution shall be adopted in whole or in part. The secretary of state shall cause such propositions to be placed on the November 3, 1970, general election ballot throughout the state, and is hereby authorized and directed to do all things necessary to cause this to be done. An affirmative vote by a majority of the voters voting on any proposition shall constitute adoption of the proposition.

ERROR'S NOTE: The pending Massachusetts cases mentioned in Footnotes 7, 185 and 186 were decided on June 5, 1970, shortly before the printing of this volume. In *Cohen v. Att'y Gen.* and *Cohen v. Sec. of the Commonwealth* Nos. 14,403 and 14,404, (Mass., June 5, 1970) the Supreme Judicial Council, the highest court of Massachusetts, ruled that the Massachusetts *legislative* initiative could not be used to exercise the legislative prerogative to place the issue of a constitutional convention before the electorate. [See Footnote 7, *supra* for a description of how the issue arose.]

Article 48 of the Amendments to the Massachusetts Constitution of 1780 provides, in part: "[T]he popular initiative . . . is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection." MASS. CONST. amends., art. 48. The Supreme Judicial Council felt that the basic and determinative issue of the two cases was "whether the proposed measure [the initiative to place the convention call issue before the electorate] falls within the meaning of the words 'law' or 'laws' as they are used in the initiative provisions of art. 48."

In answering the question in the negative the Council relied almost exclusively on the legislative history preceding adoption of the constitutional amendment providing for the initiative. The Council reviewed the background and proceedings of the Massachusetts Constitutional Convention of 1917-1918 and concluded "to the delegates to that convention the use of the initiative petition as a device to call a constitutional convention was unthinkable." The Council felt that because delegates to the 1917-18 Convention approved of the initiative proposal of *constitutional amendments* such initiative amendments were the only manner in which the initiative power could affect the constitution. Accordingly, initiatives proposing *laws* could not involve constitutional revision even though one might term the means through which the legislature normally places the convention call issue before the people, a "law."

Convention proceedings cited in *Cohen v. Att'y Gen.* do not support the Council's broad statement that use of the legislative initiative to convene a convention was "unthinkable" to the delegates. It is clear that the delegates had not considered this possibility *at all* and therefore it would have been impossible that this use of the legislative initiative could have been excluded.

The Washington legislative initiative would not lend itself to the same sort of analysis the Massachusetts court applied to the Massachusetts initiative. The Washington initiative does not specifically provide for amendments to the constitution by initiative. Further, the Washington Supreme Court has made clear that the initiative power of the people should not be hampered by technical construction. See Comment, Part III beginning at page 576 *supra*.

It should also be noted that three of the seven justices participating in *Cohen v. Att'y Gen.* felt that but for the 1918 debates the language of the Massachusetts initiative was broad enough to permit initiative adoption of a "law" authorizing a vote on the convention call question. See *Cohen v. Att'y Gen.*, No. 14,403 (Mass., June 5, 1970) (Cutter, concurring).