Expert's Report

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- **Introduction and Scope of Assignment**

I have been asked by the Québec Government to provide my opinion on the nature and effect of American state constitutional provisions stating, in a number of different specific formulations, that the government of the states is based on the idea that "all power is inherent in the people." I understand that my opinion is being sought in connection with pending litigation before the Québec Superior Court concerning the enactment of the Québec National Assembly entitled, An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec state, Bill 99 (2000, chapter 46).

The following questions were submitted to me:

1) What is the meaning and scope attributed to principles proclaimed in State constitutions such as:

- we, the people of the State of California;
- the people of Massachusetts;
- all political power is inherent in the people (example: Maine);
- the people have the inalienable right to alter, reform or abolish their form of government (example: Maryland);

- amendments to the constitution must be ratified by a majority of the electors voting (example: Indiana);
- we, the people, reserve the right to control our destiny, to nurture the integrity of our people and culture (example: Hawaii);
- the people of this state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state (example: New Hampshire);

Are these principles compatible with federal constitutional law respecting the division of legislative powers and the rules governing constitutional amendments?

2) To your knowledge, are there other analogous principles of U.S. State constitutions or of the constitutions of United States territories that are similar to the principles proclaimed in sections 1 to 5 and 13 of "An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State"? If so, what would be the answers in this regard to the questions asked in the previous section?

- **Scope of Review**

I personally wrote this report and did the research upon which it is based. In preparing this report, I have reviewed and relied upon the information as described in Appendix I.

I hereby submit my opinion based on American state constitutional provisions, together with academic analysis and judicial interpretation of the provisions. I have not been asked to, nor do I, submit any opinion on questions of Canadian or Québec law.

- **Statement of independence and qualifications**

This report has been prepared independently and objectively; I have no stake, directly or indirectly, in the outcome of the proceedings.

I attach in Appendix II my *curriculum vitae*.

- **Summary of opinion**

My opinion in response to the questions submitted to me can be summarized as follows:

1. Virtually all of the American state constitutions contain one or more provisions expressing the sovereignty of the people of the state.

2. Although these provisions vary slightly in their wording, they all express the fundamental point that the people are the source of governmental power in the states.

3. Any expression of sovereignty, or popular authority, for American state governments must be understood within the context of American federalism where the Federal Constitution is the supreme law of the land and states are limited to operating within their competency in the federal system.

4. The popular sovereignty provisions in American state constitutions, thus understood, do not contravene the Federal Constitution in any way.

Meaning of popular sovereignty clauses

Virtually every constitution of an American state has one or more clauses on popular sovereignty. A good example of this kind of provision I will discuss is found in Art. 1 §1 of the Indiana Constitution, adopted in 1851:

> *We Declare*…that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the *people* have, at all times, an indefeasible right to alter and reform their government.

The Preamble of the Hawaii Constitution states: "we the people reserve the right to control our destiny…"

Article I, §1 of the Hawaii Constitution states:

> Section 1. All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.

I will describe these kinds of provisions as "popular sovereignty provisions." An authoritative commentator on the Indiana Constitution stated that "This initial segment of the constitution contains wording similar to parts of the Declaration of Independence. This section clearly outlines the basic, philosophical point that the people are…political sovereigns with the power to create government to achieve peace, safety, and well being." WILLIAM P. MCLAUCHLAN, THE INDIANA STATE CONSTITUTION: A REFERENCE GUIDE 33 (1996). McLauchlan concludes that this type of clause reflects the aim to "democratize many aspects of [state] government." *Id,* at 11.

In my book on the New Jersey Constitution I made the following observation about that constitution's popular sovereignty provision:

> Paragraph a, together with the preamble, restates the underlying source of authority for the adoption of, and changes in, state constitutions. It includes the Jeffersonian principle that each generation has the right to decide on its form of government by 'recurrence to fundamental principles.'

ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION 45 (2d Ed. 2012). The popular sovereignty provision in the Maine Constitution (Art. I §2) has been described as not only expressing the doctrine of popular sovereignty but also the "social compact" theory of

government. MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE 25 (1992).

Many of the American states actually have multiple provisions such as Indiana's, and Hawaii's. For example, Montana's state constitution, in Art. II §§1 and 2, reflects a similar philosophy but in two separate sections:

> 1. All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.
>
> 2. The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary.

The North Carolina Constitution also contains two different popular sovereignty provisions, Art. I, §2:

> Sovereignty of the people. All political power is vested in and derived from the people; all government of rights originates from the people, is founded upon their will only, and instituted solely for the good of the whole.

and §3:

> Internal government of the State. The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.

The state constitution of Virginia also contains several popular sovereignty provisions. In many ways, Art. I, §2, dating from 1776, is the paradigm for such provisions: "That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them." Dr. John Dinan, commenting on this section stated:

> This section has been unchanged since its adoption in the 1776 Constitution. Although the principle of popular sovereignty infuses the design of state governmental institutions, and in that sense has been quite influential, it has only occasionally had a direct influence on constitutional disputes and the resolution of particular cases.

JOHN DINAN, THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 39 (2006).

Thus, whether the American state constitutions contain one provision on popular sovereignty or several, it is clear that such provisions in American state constitutions have become standard. The provisions do, in fact, contain minor variations in language and emphasis but they all seem intended to express what an authoritative commentator on the clause in the Alabama Constitution (Art. I, §2) noted: "This section makes explicit the state's commitment to the principle of popular sovereignty." WILLIAM H. STEWART, THE ALABAMA STATE CONSTITUTION: A REFERENCE GUIDE 22 (1994). Dr. Christian Fritz concludes:

> A central teaching of American constitutionalism is that in America the people are the sovereign who rule through the means of written constitutions. This precept also is the foundation for American constitutional theory.

CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS, THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 290 (2008); James Henretta, *Foreword: Rethinking the*

American State Constitutional Tradition, 22 RUTGERS L.J. 819, 826 (1991) ("activist popular sovereignty").

Scope and limits of popular sovereignty clauses

All of these general points of view about the meaning, philosophy, and function of the popular sovereignty provisions in American state constitutions, however, must be analyzed within the legal and political understanding of state constitutions and the function of states within the American system of constitutional federalism.

American state constitutions are intrastate constitutions that must operate within a structure based on *imperium in imperio*. *See, e.g.*, FORREST MCDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO , 1776-1833 at 1 (2000). These state constitutions structure limited self-rule within a system of shared rule. DANIEL J. ELAZAR, EXPLORING FEDERALISM 4-5 (1987). The Supremacy Clause of the United States Constitution (Art. VI, cl. 2), provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the *Constitution* or laws of any State to the Contrary notwithstanding.

State constitutions are mechanisms or tools of "designing democracy" in federal countries like the United States, that utilize intrastate constitutions, but this design function is only for intrastate polities rather than for the national polity. *See generally* CASS SUNSTEIN,

DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2001). For an analysis of state constitutions as "political technology," *see* Donald S. Lutz, *The Purposes of American State Constitutions,* 12 PUBLIUS: THE JOURNAL OF FEDERALISM 27, 31 (1982).

American state constitutions, therefore, constitute component parts of the federal constitutional structure. The constitutions form interlocking, interdependent elements of each other. The American state constitutions, therefore, operate within the Federal Constitution. This is a fundamental element of American constitutional federalism. Some states also include provisions in their constitutions that make explicit the limitation of their popular sovereignty provisions to intrastate activities.

There has been no controversy or litigation concerning the constitutional validity of the state constitutional popular sovereignty provisions. The fundamental restriction of the operative effect of state constitutions to intrastate matters, including their popular sovereignty provisions, is clearly enforceable by the United States Supreme Court. It is in this way that the American states are confined to the "space" for intrastate constitution-making competency that they are allotted within the federal structure. Robert F. Williams and G. Alan Tarr, *Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder, and Cantons,* in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 1, 7 (G. ALAN TARR, ROBERT F. WILLIAMS, AND JOSEF MARKO, eds., 2004).

Examples of this mechanism by which "a federal system polices" the boundaries of intrastate "constitution-making space allotted to the component units" are common in the American system. For example, the United States Supreme Court declared a provision of the Colorado State Constitution, that purported to bar local or state legislation protecting gays and

lesbians from discrimination, unconstitutional as violating the 14th Amendment's Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620 (1996).

Further, it is not only when state constitutions come into conflict with the Federal *Constitution* that they are declared invalid. Under the Supremacy Clause, state constitutional provisions that conflict with federal *statutes* are also declared invalid. For example, California's state constitutional privacy provision could not be given force in a context covered in a contrary way by the federal labor laws. *Utility Workers of America v. Southern California Edison Co.*, 852 F. 2d 1083 (9 ph Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

There are many other examples of the firm American constitutional law principle that the range of operation of state constitutional provisions, must be restricted only to the range of authority or competency possessed by the American states.

Based on the clearly-recognized supremacy of the Federal Constitution, it is not surprising that there have been no cases, to my knowledge, challenging state constitutional popular sovereignty provisions as violating the Federal Constitution in any way, nor is there any academic opinion to that effect. These provisions are, in my opinion, fully compatible with the way in which the United States Constitution operates.

Legal effects of popular sovereignty clauses

State constitutional popular sovereignty provisions have both a symbolic and a practical, legal significance. It is just an intrastat*e* significance in the United States. Both the legal significance of, and the fundamental point about the inherent limitations of *state* popular sovereignty within the United States, have been recognized by state courts. For example, the

Alabama Supreme Court relied on its constitution's popular sovereignty provisions to conclude that it was "self-evident that with the ultimate sovereignty residing in the people, they can legally and lawfully remove any provision from the [state] Constitution which they previously put in or ratified...." But the Court was careful to note the limitations it had recognized in an earlier decision. It had described the subject matter of a state constitutional amendment as unlimited, "except that it must continue to be a 'republican form,' Article IV, section 4, Constitution of the United States... must not impair the obligations of contracts, nor otherwise violate Section 10, Article I, of the Constitution of the United States, nor violate the 14th amendment of the Constitution of the United States, nor any other provisions of it." *Opinion of the Justices*, 81 So. 2d 881, 883-884 (Ala. 1955).

In fact, as in Alabama, these provisions have figured in a variety of ways in actual litigation under the state constitutions. For example, the Maine provision was invoked in litigation challenging binding arbitration for public employees that reached the Supreme Judicial Court of Maine in 1983. *Cape Elizabeth School Board v. Cape Elizabeth Teachers Association*, 459 A. 2d 166, 171-172 (Maine 1983). The Court explained:

> The delegation doctrine derives from the contract theory of government, under which consent is the only legitimate basis for the exercise of the government's coercive power....according to that theory, discretionary power is, in effect, political power which must be limited to the politically responsible organs of government.

Id, (citing Art. I, §2 reflecting "the contract theory of government").

In the 1975 Arkansas decision *Pryor v. Lowe*, 523 S.W. 2d 199 (Ark. 1975) the legislature had purported to establish a *limited* constitutional convention without a popular vote accepting such limitations. The Arkansas Court, citing the popular sovereignty provision in the Arkansas Constitution, stated:

> Since the delegates to a constitutional convention are exercising that ... "power ... inherent in the people" ... then it logically follows that any limitation upon the exercise of the power by the General Assembly, without ratification by the electorate, is prohibited...

Id, at 202. *See Harvey v. Ridgeway*, 450 S.W. 2d 281, 288 (Ark. 1970) (state constitutional convention delegate is representative of the people); *Smith v. Cenarrusa*, 475 P. 2d 11, 17 (Idaho 1970); *Gatewood v. Matthews*, 403 S. W. 2d 716, 721 (Ky. 1966); *Staples v. Gilmer*, 33 S.E. 2d 49 (Va. 1945).

In a different context, the Iowa Supreme Court relied on the popular sovereignty provision to require write-in votes to be counted for candidates who were not on the ballot. *Barr v. Cardell*, 155 N.W. 312, 313-314 (Iowa 1915).

The Alaska Supreme Court, relying on its constitutional popular sovereignty provision (Art. 1, §2) invalidated misleading language on a ballot question on whether a constitutional convention should be called. *Boucher v. Bamhoff*, 495 P. 2d 77, 78 (Alas. 1972).

Even the fundamental tenet of judicial interpretation of American state constitutions, that provisions should be interpreted in accord with the intent of the electorate that ratified the provision at a referendum, Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions As Unique Legal Documents*, 28 OKLA. CITY U.L. REV. 189, 194-197 (2002) ("voice of the people") has been linked to the popular sovereignty provisions of state

constitutions. *See, e.g.* ANNE FEDER LEE, THE HAWAII STATE CONSTITUTION: A REFERENCE GUIDE 35 (1993) (citing *State v. Miyaski*, 614 P. 2d 915, 922 (1980)).

Conclusions

In all of these instances, as well as others not discussed here, the popular sovereignty clauses were relevant to the resolution of internal, state law issues. I do not necessarily assert the correctness of all of these decisions and scholarly points of view, but rather seek to demonstrate that the popular sovereignty clauses in American state constitutions can be effective beyond political rhetoric (and, even as political rhetoric, they are important), can be instrumental in state constitutional interpretation controversies, and can have actual legal effect. All of these functions and effects, however, are restricted to internal, state matters.

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