

J.H. Snider's Presentation at

“State Constitutions and Governance in the U.S.,”  
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### **How the Public Reasons about State Constitutional Convention Referendums**

#### **Background**

I'm going to start with some background about where I'm coming from on the issues we've been discussing. I am not a legal scholar. My PhD is in American Government, and I have spent much of my career in the think tank world, a netherworld halfway between academia and advocacy.

My specialty is the periodic state constitutional convention referendum. Fourteen U.S. states have it, excluding Utah. On average, at least one state has such a referendum every two years. Next year, three states have one: Alaska, Missouri, and New Hampshire. When each state has a con-con referendum on the ballot at its next election, I create a website providing basic statistics about that state's con-con history plus extensive links to published information on the referendum, including both pro and con information. No other source comes close to my thoroughness.

I became interested in this institution because I was interested in hard democratic reform problems and saw it as an institutional mechanism that could address such problems. By hard democratic problem, I mean one where the legislature has a direct and strong conflict of interest in proposing certain types of democratic reforms. The most publicized example of such a conflict is legislative redistricting. My favorite is legislative transparency. There are many others as well.

Eighteen states have the constitutional initiative, the other major constitutional mechanism for bypassing the legislature's gatekeeping power over constitutional reform. I believe the state con-con is a more democratic legislative bypass mechanism than the constitutional initiative. Jonathan Marshfield, one of the most eloquent scholars who make that argument, is at this conference. But the relative merits of different legislative bypass mechanisms, which should be an important issue for the democratic reform community, is not what I'm here to discuss.

#### **The Public's Con-con Knowledge**

The question I want to address is not how much the public knows about state constitutional conventions but how it reasons about voting to call one, given its information limitations.

One important limitation is how much it knows about state constitutions; for example, it's hard to have an informed debate about whether to call a con-con if the public doesn't know either that a state constitution exists or what's in it.

My comments here will take for granted that in most states the public knows very little about their state constitution and the comparative merits of their various constitutional amendment procedures. For this audience, I don't think that's a controversial assumption.

This means that the public engages in low information reasoning when it reasons about whether to vote for a periodic con-con referendum. With low information reasoning, the public relies on cues such as party labels and interest group endorsements to figure out how to vote. The idea is that the public doesn't carefully weigh all the merits of a decision before deciding how to vote; instead, it relies on others to do that analysis and then signal their results.

Most political decision making is based on low information reasoning. For example, most Americans are heavily dependent on political party cues to decide how to vote in candidate elections, especially for low salience elections. For referendums, interest group endorsements may be more important, but the basic reliance on cues is the same.

The key observation is that the cue system not only differs for con-con politics but differs in harmful ways.

### **Constituent Power Theory**

My argument is built upon a theory of constitutionalism. First, let me acknowledge that there isn't one theory of constitutionalism; there are dozens of them. For example, just going back to the founding era, there is Jeffersonian constitutionalism and Madisonian constitutionalism—each one contested even among its advocates.

I trust, however, that if I keep my definition of constitutionalism general enough, most scholars attending this conference will find it reasonable. For me, the core purpose of a constitution is to grant the constituent power, which is the constitution making power, control over the constituted powers, which are the core government entities. Phrased in more everyday terms: the constituent power in a democracy is the people, and the constituted powers the government, including the legislative, executive, and judicial branches.

A key implication of this theory of constitutionalism, which I'd label as a constituent power theory, is that we don't want the constituted powers controlling their own powers because, if they are rational power-seeking entities, they would have an inevitable conflict of interest in doing so. Thus, for example, it has become all but universal practice in the U.S. to require that all state constitutional changes be ratified by the people as opposed to, say, the legislature. By the end of the 18<sup>th</sup> Century, this type of rudimentary constitutional theory was widely accepted in the U.S.

Constituent power theory gets more controversial when we start specifying the required participation of the constituent power in the constitution-making process. I follow Colon-Rios in arguing that a true democratic constitutionalism requires that the constituent power must not only ratify proposed constitutional changes but have the option to bypass legislative control over the constitutional change agenda. The constitutional initiative is one such legislative bypass mechanism. Another, which I consider more deliberative and democratic, is the periodic con-con referendum. Also, and perhaps even more controversial, the legitimacy of a constitution depends not on how it was created but on the opportunities it provides for future constituent-based reform.

With that theoretical framework outlined, I now want to return to the cue system associated with con-con politics. What types of cues are provided by rational, self-interested constituted powers-- as well as the special interests that excel at influencing them--about a con-con process designed to bypass them?

Let's start with the two major political parties, which are both dominated by incumbent politicians who constitute the constituted powers. Constituent Power Theory implies that they are acting rationally when they oppose the con-con process.

Next, let's take the most powerful special interest groups. By definition, they excel at influencing the constituted powers, so they are also acting rationally when they oppose the con-con process.

Lastly, let's take the weaker interest groups who must join forces with—or at least not alienate—the most powerful political actors if they are to be effective pursuing their core interests. They won't engage in such mutual back scratching if it means sacrificing their core mission. But if it means tossing a bone to their needed coalition allies on a secondary issue, that's just smart politics.

So now we've got quite a mess in our political system's cue system. To educate the public, modern democracy depends on elite disagreement among the constituted powers. But when those elites have a shared interest adverse to the electorate, the information system based on competing elite cues breaks down.

Part of that breakdown is that the constituted powers and their allies will never publicly admit the role that power-seeking plays in their con-con opposition. Misleading reporting of motives is, of course, Politics 101. But whereas the press and academics routinely assume that the public-regarding reasons election-seeking politicians give for their actions are suspect and report accordingly, this is not the case with political actors expressing public-regarding reasons for their opposition to con-cons. Not guided by Constituent Power Theory, they gullibly report what they've been told, especially if those identified as con-con supporters don't clearly and effectively express such a theory to the press, which is rare.

In theory, we might expect some political entrepreneur to emerge who will overcome the collective action problems association with con-con advocacy. But barring some colossal constitutional crisis, that may be a prohibitively expensive task, especially when the constituted powers have designed the system to make it as expensive as possible and constitutional path dependency has had an opportunity to take firm root.

So, to conclude, on theoretical grounds we can expect a breakdown of the conventional con-con cue system for voters. Now let's look at some examples of the cue system in practice.

### **Campaign Finance**

Let's start with campaign finance. Reporters and the public are supposed to “follow the money” when analyzing a referendum on whether to call a state con-con. Following the money is supposed to allow voters to understand which interests will benefit from or be hurt by their vote.

New York State's 2017 con-con referendum may be an especially good case study because, unlike most states with the periodic con-con referendum, lots of money was reportedly spent on the con-con referendum. Indeed, the National Institute on Money in State Politics reported that, at 5.2 million dollars, it was the third most expensive referendum campaign that year across all fifty states. The final reported figure was 4.1 million dollars against and 1.1 million dollars for. But even if that number was an accurate description of resources spent for and against the referendum, which it isn't, it would be wildly misleading.

One reason is timing. Most yes campaign were reported early; that is, months before the election. In contrast, most no campaign expenditures were reported in the last few days or after the election was already over.

There is also the question of making apples to apples comparisons about what's included in the disclosures. Con-con opponents tend to want to minimize and hide their expenditures whereas supporters view high expenditures as giving them credibility when seeking free media.

Let's take expenditures on salary and communications. NYSUT, primarily representing teacher and healthcare workers, orchestrated the campaign against the referendum. Exempt expenditure disclosures included any campaign expenditures made within the organization, including a staff member paid to be an expert on New York's con-con history, polling by an in-house polling operation to test messaging and public opinion, and internal communications via both print and social media to millions of union members in New York State, many of which were shared with friends and relatives. Also exempt was the distribution of some 330,000 yard signs that seemed to pop up on every block in the state the last week before the referendum. Since they were distributed by in-house staff to union members, the distribution expenditures were exempt from public disclosure.

Contrast this with the two individuals who contributed the most money to the yes campaign. One was a lone wolf business entrepreneur seeking to legalize marijuana—thus creating a huge new market—and another a local talk show host championing dozens of hard-to-pass progressive policies, most having little to do with democratic reform. Their early in-kind contributions dwarfed those for NYSUT and included the time they devoted to the campaign and the multi-purpose offices they occupied while doing so. Never mind that reporting such in-kind expenditures are allowed but not mandated by law and that such expenditures are inherently subjective. For example, the office space was used for many things, not just advocating on behalf of the con-con referendum. And no independent authority audited how much each individual's time was worth and how much of it was actually devoted to the yes campaign. Moreover, no objective standard for doing such an audit, including valuing someone's unpaid time, even exists.

I cite New York not as an example of the worst but as a paragon of the best campaign finance disclosure. For the worst, I'd use Rhode Island, which treated violations of its campaign finance laws regarding expenditures on the con-con referendum like driving 60 mph on a highway with a 55 mph speed limit.

However, I should note that in most states campaign expenditures cannot even be used as a cue, no matter how bad a cue, because there are no or negligible reported expenditures.

## **Political Parties**

Next, let's look at political parties. From the period 2010 to 2020, I am not aware of a single political party that took an unambiguous position in favor of calling a state con-con, although it is generally true that incumbent politicians from a political party that doesn't control the legislature may be less hostile to calling one and may sometimes even support one.

## **Interest Groups**

Next, let's look at interest groups. From the period 2010 to 2020, I am not aware of a single major business or labor group that supported calling a con-con. During the late 19<sup>th</sup> and early 20<sup>th</sup> Century, when labor was relatively weak, that wasn't necessarily the case. No more: labor groups now fear con-cons as much or more than business interests. As for other influential interest groups—with the exception of some good government groups—I am not aware of a single one between 2010 and 2020 that made calling a con-con central to its mission, thus making such groups highly susceptible to logrolls with their longtime coalition allies who strongly opposed calling a con-con. In most cases, the logroll results in silence. But, especially when pressed by key allies, it may mean joining the formal coalition that opposes a con-con.

## **Press**

Next, let's look at the press. Most government reporters have a certain beat focused on official sources. As it turns out, those trusted sources tend to be constituted powers opposed to calling a con-con. Thus, when reporters use those sources to frame their stories, the result is often a wildly skewed framing highly opposed to calling a con-con. To be sure, reporters try to frame their stories by citing those both in favor and opposed to calling a con-con. But they use their trusted sources to identify who the opponents are, and those opponents tend to be some of the most unpopular individuals and causes in a particular state. In 2014 in liberal Rhode Island, for example, con-con opponents made the conservative and highly unpopular Grover Norquist, who, as best I can tell, merely popped into Rhode Island and made some incidental comments about the upcoming con-con referendum, one of the prime faces of the yes supporters. Another favored opponent—the subject of a massive direct mail campaign the weekend before the referendum—was right-to-life advocates, who were wildly unpopular in Rhode Island and had no organized yes campaign.

## **Proximate Causation**

Next, let's look at causal chains. When people think about the causes of some phenomenon, the first thing that typically comes to mind are the immediate rather than remote causes. Often, the deep causes for something may be very complex and difficult to discern. That is, the information cue is the proximate, not fundamental cause, of the problem. Members of the public are like fish swimming in water, where the water is the constitutional framework. They are oblivious to the causal influence of the water, which they take for granted.

This is a huge factor in how the public reasons about government problems and the need for constitutional change. The public consistently rates government institutions with disdain but votes as if government problems were a matter of personalities; that is, to keep the same

government framework but elect better individuals within that framework. That's also how the press tends to frame public policy problems. In the leadup to New York's 2017 con-con referendum, New York's governor set up the Moreland Commission to Investigate Public Corruption in response to avowed public concerns about state corruption. But such problems weren't conceptualized in constitutional terms and after it moved in a direction the governor didn't like, he disbanded the commission with negligible political costs to himself or impact on the public's likelihood to vote for a con-con.

### **Path Dependency**

Next, let's look at path dependency. The problem of path dependency has been mentioned in the constitutional veneration literature; namely, that the longer a constitution hasn't been changed the more it becomes venerated and thus harder to change. My observation is different. As decade after decade goes by without a con-con being called, any effort to call a con-con appears hopeless and thus not worth effort, thus becoming a self-fulfilling prophecy. For the masses trying to decide how to vote, all the above cues then become irrelevant, as the only cue that matters is that past electorates have decided that a con-con should not be called, so there is no reason to examine the merits of calling one anew. This reasoning was vividly illustrated in the leadup to Iowa's 2020 con-con referendum, where arguably the most common argument to dismiss calling another con-con was that past Iowa electorates, presumably after weighing the arguments, chose overwhelmingly not to do so. Thus, expending effort to reconsider the referendum would merely be a waste.

### **Education**

Next, let's consider education. Teaching students state history and state government has increasingly become a secondary priority for most educational institutions from kindergarten through college. Instead, it's the national government that gets virtually all the attention, including its only con-con in 1787. And unlike the national government, when state history and state government do come up, a state's con-con's history and process tends to be overlooked. In my State of Maryland, for example, K-12 students were never told about Maryland's five state con-cons. Maryland General Assembly members handed out brief pocket summaries of the Maryland constitution at civic events—summaries that included the legislature-initiated amendment system process but not a word about the State's periodic con-con referendum. And when the periodic referendum is on the ballot, school staff either ignore or disparage it. As far as I can tell, constituent power theory is completely excluded from the K12 curriculum, although a primitive version is at least implicit in the story of America's 1787 con-con.

The result is three types of information biases. First, that the con-con process must be unimportant or obsolete if elites ignore it. Second, that since America's 1787 con-con is the only con-con Americans know about, they will use it as a proxy for a state con-con. Third, that compared to legislature proposed constitutional change, a con-con is just more expensive and riskier. In short, many Americans have been taught that the con-con process is an archaic relic from 1787 that would be grossly wasteful and risky if repeated. Founding con-cons are

lawgiving miracles that are unlikely to be repeated, like after god gave Moses the ten commandments.

### **Status Quo Bias**

Next, consider status quo bias. In recent years, the type of cue that has gotten the most attention in explaining the public's resistance to constitutional change may be status quo bias. Clearly, when a change is highly risky and the public has little knowledge about the risks associated with a particular change, it has a rational incentive to favor the status quo. All that I want to add to this discussion is that con-con opponents are aware of this political logic, which helps explain their heavy investment in the Pandora's Box argument when arguing against a con-con. The Pandora's Box argument has often been based on highly misleading arguments, including the patently fraudulent implication that a con-con not merely proposes but approves constitutional changes.

### **Emotional Contagion**

The concept of emotional contagion can summarize much of the foregoing analysis. As with herd animals that respond to a sentinel's danger signal with emotional imitation, many of the cues outlined above are operationalized with a similar emotional imitation, which is often summarized in the literature as constitutional veneration. But I'd suggest the constitutional veneration framing often gives far too much intellectual credit to the venerators, especially when the supposed venerators aren't really the venerating type of people and their veneration is inconsistent with their other claimed values, like popular sovereignty. This helps explain why, after I've told some people, especially the most educated, politically attuned people, that I support the institution of the state constitutional convention, I am sometimes treated like some self-evident child pervert. That is, when I ask these otherwise highly articulate people to explain their strongly held position, they are often only willing to respond with contempt, not reasoned argument. And that response is independent of party affiliation.

### **Conclusion**

In conclusion, among political elites, we live in an era of widespread knee-jerk state anti-con-conism, which then trickles down to the masses. Fostering this knee-jerk reaction are the rational incentives of the constituted powers who oppose empowering the constituent powers but don't find it politically advantageous to say so explicitly. Like so many other cues about seemingly relatively minor matters, their views are often conveyed, including among the elites themselves, as emotional contagion, occasionally combined with some type of plausible, message-tested soundbite.

My purpose here has not been to evaluate the merits of calling a constitutional convention but to evaluate the biases of the information cues the public has available to reason about such a decision. I believe that those are very different types of questions, and that the first one tends to get far too much attention in both the academic literature and the press. That is, with this type of argument, the system of cues available to voters is the key decision-making factor, not the merits of the various arguments directly addressing the merits of calling a con-con.

My argument is that the public decides how to vote on a state con-con referendum not only in a very low information environment, but one with both highly unusual and skewed cues to cope with that deficiency. My conclusion is that our existing political information systems are very poorly designed to deal with this type of low information environment, which would require revamping our system of information cues for just this one type of referendum.

Given that constitutional legitimacy should depend on the existence of a politically viable legislative bypass mechanism that is deliberative and democratic, this failure of our constitutional reform information system should not be swept under the rug.

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