THE STATE CONSTITUTIONAL CONVENTION CLEARINGHOUSE

DEMOCRACY FOR THE 21ST CENTURY

WORKING PAPER

The State Con-Con Papers

J.H. Snider's compiled op-eds on the history, democratic function, and politics of the periodic state constitutional convention referendum

by

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ABSTRACT

The State Con-Con Papers includes a collection of J.H. Snider's 54 state-specific brief essays ("op-eds") on the history, democratic function, and politics of the periodic state constitutional convention referendum, which is mandated by 14 U.S. state constitutions. The op-eds, organized chronologically, cover five of the most recent referendums: Iowa (2020), Hawaii (2018), New York (2017), Rhode Island (2014), and Maryland (2010). In each of these five states, the convention referendum is the only constitutional mechanism that allows the people—the constituent power—to bypass the state legislature's gatekeeping power over constitutional amendment; that is, the constitutional initiative is not an option. The next three periodic constitutional convention referendums are in Alaska (2022), Missouri (2022), and New Hampshire (2022). Of these three, only Missouri has the constitutional initiative. *The State Con-Con Papers* concludes with several essays that provide an overview of con-con politics.

ABOUT THE AUTHOR

J.H. Snider is the editor of The State Constitutional Convention Clearinghouse and state-specific clearinghouses. The state-specific clearinghouses are for upcoming periodic state constitutional convention referendums. Primary effort goes into maintaining the state-specific websites, not the national website that has been only haphazardly maintained.

For Snider, the constitutional convention is America's most advanced method of what some comparative constitutional scholars call participatory constitution making and others call implementing the constituent power. America doesn't have to look to Chile, South Africa, or other countries for examples of such constitution making. We have a long tradition—more than 200 constitutional conventions at the state level—that we can be proud of. What makes them participatory as well as a remarkably democratic implementation of constituent power, is that they include three votes by the sovereign people—a vote whether to call a convention, a vote to elect delegates to a convention to propose amendments, and a vote whether to approve each of the convention's proposals.

Snider has been especially concerned with the decline of the state constitutional convention as a democratic reform mechanism. For example, see Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776–2015, *Journal of American Political Thought* 6, no. 2 (Spring 2017). In each state where there is an upcoming referendum, Snider tries to foster a more educated debate about the democratic function of the constitutional convention; hence, the 54 op-eds directed to a non-scholarly audience contained in *The State Con-Con Paper*s.

Snider has been a fellow at Harvard University's Edmond J. Safra Center for Ethics, the Harvard Kennedy School of Government's Shorenstein Center on Media, Politics and Public Policy, the New America Foundation, the American Political Science Association, and Northwestern University. He holds a Ph.D. in American Government from Northwestern University, an MBA from the Harvard Business School, and an AB from Harvard College.

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> "It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."
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> *--Publius, Federalist Papers #1*

Fourteen U.S. states have a state constitutional provision mandating a periodic state constitutional convention referendum. In most states, the period is once every twenty years.

The State Con-Con Papers includes J.H. Snider's collection of 54 brief essays ("op-eds") on the history, democratic function, and politics of this constitutional provision. They cover state constitutional convention referendums during the past decade (2010-2020) in five states: Iowa (2020), Hawaii (2018), New York (2017), Rhode Island (2014), and Maryland (2010). It concludes with several short essays, "How the Public Reasons about State Constitutional Convention Referendums" (2021) and "Why the Need for 'A Political Primer on the Periodic State Constitutional Convention Referendum'" (2016), that provide an overview of con-con politics. Both academic articles and blog posts are excluded from this compilation.

The State Con-Con Papers vs. The Federalist Papers

The title of this collection of essays is a play on *The Federalist Papers*, which was a collection of 85 newspaper op-eds written by Alexander Hamilton, James Madison, and John Jay that served to defend the work of America's 1787 national constitutional convention.

Obviously, *The Federalist Papers* have great historical and legal significance, whereas these essays do not. The purpose of *The Federalist Papers* was also different: to advocate for an already written constitution proposed by a national constitutional convention rather than to advocate for the constitutional convention as a type of state level democratic reform mechanism.

However, the format (a newspaper commentary), audience (a popular one), and subject (advocacy on behalf of the work of a constitutional convention, albeit one not yet

convened), are arguably the same. Hence, the indirect allusion to *The Federalist Papers* in the title.

Academic standards have changed since the late 18th Century. Writing op-eds is no longer an acceptable way to make lasting scientific and philosophical claims. Accordingly, political scientists and democratic theorists rarely cite such works. An exception is made for *The Federalist Papers*, which have long been viewed among scholars as a noteworthy contribution, if only because of their enduring influence, to both theory and science. It is also a vital legal document, as legal scholars and judges rely on it to determine the original intent of the national constitution's framers. Nevertheless, the op-ed format may occasionally retain some enduring value, and it is with that in mind that Snider has compiled this set of op-eds. Hundreds more from other writers are on Snider's state-specific websites.

Oscar Handlin compiled and then published popular advocacy that resulted in the Massachusetts' 1780 Constitution. That advocacy included many arguments concerning the need to call a state constitutional convention and then later to influence it. That collection is singularly important for its description of how advocates forced the emergence of the world's first modern style constitutional convention, which bypassed the legislature in proposing constitutional reform.[1]

Snider's collections of published popular advocacy for states in the second decade of the 21st Century is different in that they are a catalog of failed democratic reform attempts and pervasive public hostility to an institution once thought to be the sine qua non of legitimacy for constitutional reform. Nevertheless, because Snider believes the health of this institution is vital for the health of state and local democracy in America, he believes documentation concerning its ill health should be of general interest to those interested in the possibilities for democratic reform and thus democratic legitimacy more generally.

Snider's immediate intended audience is not academics but local opinion leaders, including journalists, advocates, and local experts, in states with an upcoming periodic state constitutional convention referendum.

Those interested in an accessible conference on con-con politics, including a half dozen experts with different perspectives, may consult Snider's American Political Science Association "short course," A Political Primer on the Periodic State Constitutional Convention Referendum, presented at the 2016 Annual Meeting of the American Political Science Association, Philadelphia, PA, August 31, 2016. Other presenters at that conference, in order of presentation, were Sanford Levinson (University of Texas, Austin), John Dinan (Wake Forest University), William Blake (University of Maryland, Baltimore), David Farrell (University College Dublin), Carol Weissert (Florida State University), Craig Holman (Public Citizen), and Richard Briffault (Columbia Law School and Citizens Union). Four presentations, including Snider's, are summarized in The

[1] Handlin, Oscar, and Mary Flug Handlin, eds. The popular sources of political authority: documents on the Massachusetts constitution of 1780. Vol. 14. Belknap Press, 1966.

Politics of State Constitutional Reform, American Political Science Association Law & Courts Section, Fall 2016. Snider's overview, "Why the Need for 'A Political Primer on the Periodic State Constitutional Convention Referendum'," is included here.

The Periodic State Con-Con Referendum's Democratic Function

The democratic function of the periodic state constitutional convention referendum is not fixed for all time; it depends on the other constitutional amendment options available in a given state. In all five of the states covered here, the periodic state constitutional convention referendum is the only constitutionally specified mechanism that allows the people—the sovereign—to bypass the state legislature's gatekeeping power over state constitutional amendment; that is, none has the constitutional initiative. A major theme of these essays is that because of constitutional democracy's need for a legislative bypass mechanism, legislature-initiated and referendum-initiated constitutional amendment mechanisms are complements rather than substitutes.

In states that have both the periodic state constitutional convention referendum and the constitutional initiative, the democratic function of the periodic state constitutional convention referendum is both different and narrower in scope. Six of the 14 states have some form of both mechanisms.[2] But note that the statutory and constitutional initiative are different. Alaska, for example, has the statutory but not constitutional initiative, whereas Missouri has both.

With its three popular votes to pass constitutional reform, the periodic constitutional convention referendum is a model of participatory constitution making; that is, a democratic implementation of constituent power. The popular votes are 1) a vote whether to call a convention, 2) a vote to elect delegates to a called convention, and 3) a vote whether to approve each of the convention's proposals. Chile in 2021 was the most recent country to copy this type of participatory constitution making.

In recognition of its comparative excellence in constitution making, all new U.S. states since the beginning of the 19th Century have called a constitutional convention to propose their initial state constitution. Most states since then have also called conventions that proposed either general revisions or, increasingly, a collection of discrete amendments.

National Democratic Reform Organizations

As national democratic reform organizations came to view Congress as dysfunctional and thus unlikely to pursue meaningful democratic reform, many shifted their focus to state and local government, especially states and localities with the citizens' initiative.[3] The

[2] The comparative merits of these two mechanisms is beyond the scope of this paper. For a brief discussion, see Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776–2015, *Journal of American Political Thought* 6, no. 2 (Spring 2017): 273-274.

[3] E.g., see Carney, Eliza Newton, Democracy is on the Ballot, *The American Prospect*, October 18, 2018; Williams, Timothy, First Came a Flood of Ballot Measures From Voters. Then Politicians Pushed Back.,

oft-stated hope is that these sub-national governments will provide models of reform for other governments, perhaps even the federal government.

In recent years, many of the wins these organizations have touted to the press and others have come via either the statutory or constitutional initiative (the "citizens' initiative"). Represent.us, for example, has touted citizens' initiatives in more than a dozen states.[4] Yet the same democratic reform organizations have avoided states with the periodic state constitutional convention referendum—even when this referendum is the exclusive legislative bypass mechanism available to the people.

Snider hopes these organizations will take another look at the periodic state constitutional convention referendum as an essential legislative bypass mechanism, especially in states where it is the only available legislative bypass mechanism for constitutional reform.

Organization of this Paper

The op-eds in this paper are organized by state (in descending chronology) and within state by op-ed date (in ascending chronology, just like *The Federalist Papers*). The reason for ascending chronology by op-ed date is to better indicate how issues evolve during a periodic state constitutional convention referendum election cycle.

The op-eds span a decade (2010-2020), during which time some of Snider's thinking evolved. There is some boilerplate repetition of text and ideas. For example, openings tend to remind voters of the upcoming referendum, and there are also many reminders of the process and democratic function of the periodic state constitutional convention referendum. Nevertheless, the issues addressed or context in which they are addressed tend to differ substantially.

Different newspaper editors have different styles regarding capitalization, abbreviations, subtitles, and other matters. The styles as originally published were kept except for the abbreviations for constitutional convention, which have been standardized to con-con as opposed to concon. Newspaper editors have occasionally published an essay under a different title than it was submitted. Except for one essay, "Hawaiians' most precious political right? Not what you think," I have kept the title as published rather than submitted.

Several of the essays published in Maryland (2010) and Rhode Island (2014) were co-authored. Each co-author's affiliation is noted only at their first citation.

Many of the original links to the essays have been broken due to changes in a publisher's website.

New York Times, October 15, 2018; and Woellert, Lorraine, Badass Grannies, activists push to clean up government, *Politico*, October 14, 2018.

[4] See https://represent.us/map. Accessed August 10, 2018.

Most of the original op-eds had headers including photos. These photos are not included here. But where the op-eds included figures, they have mostly been retained.

Readers interested in a comprehensive list of commentary, news articles, and other media on upcoming state constitutional convention referendums, should consult Snider's state constitutional convention clearinghouse websites, not the national summary website.

IOWA:
NOVEMBER 3, 2020

Regular Iowans can change things by voting for a constitutional convention on Nov. 3

Conventions are a check on legislatures, so legislatures have always opposed them. But with the growth of career-oriented as opposed to citizen legislators, incumbent opposition has intensified.

by J.H. Snider | August 16, 2020| Des Moines Register

J.H. Snider, Iowa View contributor

Iowa's Constitution mandates a decennial statewide referendum granting the people the right to call a state constitutional convention. The next such referendum is on Nov. 3. Efforts should begin now to ensure Iowans make an informed decision.

Iowa's Bill of Rights states the people have the inherent right to amend their constitution. To implement that right, Iowa's Constitution provides two mechanisms: one allows the Legislature to propose amendments; the other, the decennial referendum, allows the people to bypass the Legislature's gatekeeping power over constitutional amendment. As Delegate James Traer explained at Iowa's 1857 constitutional convention: "The people should have the right of amending or altering the constitution, and as there may be a case in which they cannot obtain the desired legislative enactments, … there should be left in the constitution a provision giving them that right."

Iowa's 1857 Constitution implemented that right by granting the people three votes: 1) to call a convention, 2) to elect delegates to the convention, and 3) to vote on convention proposed amendments.

Nineteen states allow the people to bypass a legislature's gatekeeping power over constitutional amendment via the popular constitutional initiative. Fourteen states, like Iowa, allow them to do so via the periodic constitutional convention referendum.

American states have convened 236 state constitutional conventions since 1776, including three in Iowa. The state convention is an American invention and widely considered one of America's greatest contributions to the development of democracy worldwide.

But conventions have fallen on hard times, increasingly viewed as a "Pandora's Box" by both incumbent legislators and powerful special interest groups.

Conventions function as a check on legislatures, so legislatures have always tended to oppose them. But with the growth of career-oriented as opposed to citizen legislators, incumbent-legislator opposition has intensified.

Meanwhile, as government has grown and spawned powerful interest groups cozy with legislators, including big business and big labor, special interest group opposition has also increased.

To these forces has been added the pathologies of coalition politics. To be effective politically, one needs powerful allies like incumbent legislators, big business, and big labor. If calling a convention isn't your top priority — and it never is — smart politics dictates engaging in mutual backscratching to win support for that priority.

As Iowa political scientist John Schmidhauser explained in his study of 1960 Iowa convention politics, the municipalities failed to support a convention they wanted because they were "dependent on the good wishes and cooperation of the state legislatures for their survival."

Nowadays, the resources held in reserve to oppose a convention are so overwhelming that convention proponents proposing popular reforms the Legislature won't pass rarely even bother to make their case. Why pick a fight one cannot win?

Nevertheless, polls indicate dissatisfaction with state government. The trick among convention opponents has been to argue that a convention would make the problem worse, not better; that the golden age of state constitutional conventions has ended. Iowa needs to have a thoughtful debate on whether that's the case or merely a self-serving argument.

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J.H. Snider, a former fellow at Harvard University's Edmond J. Safra Center for Ethics, is the editor of The Iowa State Constitutional Convention Clearinghouse and author of Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776–2015.

Source: Snider, J.H., Regular Iowans can change things by voting for a constitutional convention on Nov. 3, *Des Moines Register*, August 16, 2020.

Three things Iowans should consider about constitutional convention referendum

by J.H. Snider | September 21, 2020 | Iowa City Press-Citizen

Do Iowans support calling a state constitutional convention on Nov. 3? Since 1900, Iowa's political insiders have argued that Iowans have known better than to call a convention on that decennial referendum question. But that 120-year history is more ambiguous than its use by opponents suggests.

Days after Iowans apparently approved the 1900 referendum, the Dubuque Times presciently predicted "the Legislature would find a way to avoid holding it." From Election Eve, Nov. 6, to Nov. 27, the official county tally showed the referendum passing. Meanwhile, convention opponents, led by political insiders, spun the line that the majority vote (177,337 yes to 176,889 no) didn't reflect Iowans' true intentions because Iowans had mistakenly voted for the convention thinking it was a different, more popular referendum on the ballot. On Nov. 28, Iowa's canvassing board suddenly announced the previous results incorrect because Tama County incorrectly tallied a thousand no-ballots.

The historical record provides no evidence that Tama's revised count was incorrect. But it also provides no evidence that the canvassing board looked with similar diligence for other counting errors that might have favored the yes vote. Today, we have lots of experience with such close elections and know how prone they are to recounting abuses.

In retrospect, the insiders' rationale for disparaging the voters in 1900 doesn't explain why the average convention yes-vote on the three convention referendums between 1900 and 1920 averaged 50.18%. A better explanation is that Progressive Era advocates for good government, women's suffrage, prohibition and labor rights tended to support convention calls not only in Iowa but elsewhere.

In 1920, the referendum passed by too large a margin for convention opponents to close the gap via found votes. Instead, the Legislature failed to pass the constitutionally required legislation to enable the convention, with the House and Senate each passing different enabling acts and then blaming the other for not negotiating a compromise. Legislators also claimed that calling a convention wasn't necessary because they passed legislation satisfying the wants of one convention proponent. A more accurate if incomplete explanation for their behavior is that rural legislators feared a convention might reapportion legislative seats to give urban areas their fair share.

In 1960 and 1970, the convention calls came within a whisker of passing. In 1970, the call was even thought to have passed on Election Eve — a reprise of 1900 but without the same apparent shenanigans.

Today, political insiders are engaging in the same type of straw man argument when they argue that there are no specific popular issues Iowans want a constitutional convention to address. These insiders have never accepted the legitimacy of such issues because they

are fundamentally opposed to the institution of a constitutional convention, which was designed by Iowa's framers as a way to bypass the Legislature's gatekeeping power over constitutional amendment. The framers' concern was that the Legislature — and, by extension, the special interest groups that excel at influencing the Legislature — would fail to propose democracy enhancing amendments that might weaken their own power.

Such amendments fall into three broad categories:

1. Legislative elections (e.g. redistricting, ballot initiative, campaign financing, ranked-choice voting, ethics, and term limits).
2. The power of government branches that compete with the legislature (e.g., judiciary, executive, and constitutional convention).
3. The rights the Legislature cannot take away from the people (e.g., speech, religion, assembly, right-to-know and privacy).

Despite the appeal of such specific questions, Iowans should ask themselves three general questions when they consider whether to support calling a constitutional convention:

1. How efficiently and democratically does state government currently work?
2. Is it dysfunctional partly because incumbent legislators of both parties won't propose popular democratic reforms that would reduce their own power?
3. Ware Iowa's constitutional framers right that a convention can better propose reforms than the Legislature to address such dysfunction?

Let's poll Iowans who understand the convention process to learn their answers to these questions.

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J.H. Snider, a former fellow at Harvard University's Edmond J. Safra Center for Ethics, is the editor of The Iowa State Constitutional Convention Clearinghouse, including Iowa Con Con 101, and author of Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776–2015.

Source: Snider, J.H., 3 things Iowans should consider about constitutional convention referendum, *Iowa City Press-Citizen,* September 21, 2020.

Iowa's constitutional convention process, a triumph of democracy, could be improved

Education, communication and political science have greatly improved since 1857

by J.H. Snider | October 10 | The Gazette

Iowa's Nov. 3 ballot includes a statewide referendum asking Iowans if they want to call a state constitutional convention. If Iowans vote yes, Iowa's Constitution grants them two more votes: to elect delegates to a convention and then to vote up or down any amendments the convention proposes. Iowans have called three conventions, the last one in 1920. Iowans called a fourth in 1933, but that was a state convention to amend the U.S. Constitution, not Iowa's Constitution.

Until 1857, the only way to amend Iowa's Constitution was via constitutional convention. At Iowa's 1857 constitutional convention, Iowa's framers granted the Legislature the power to propose amendments directly without first calling a convention. But they didn't want to give the Legislature a monopoly over the proposing of amendments, as incumbent legislators could use that power to veto proposed amendments that might reduce their own power while improving Iowa's democracy. So the framers created a second amendment process, the decennial constitutional convention referendum, which would allow the people to propose amendments without the Legislature's approval.

Ever since, the Legislature and the special interests that wield disproportionate power over it have hated this legislative bypass process. Without explicitly rebutting, let alone acknowledging, the framers' arguments for including a legislative bypass process in Iowa's Constitution, they have acted as if it were self-evident that any amendment process outside their control would harm rather than help democracy in Iowa.

I agree with Iowa's framers that the convention process is necessary to address the types of issues where incumbent legislators and their allies have a blatant conflict of interest with their constituents, including election processes (e.g., legislative redistricting, term limits, and campaign finance), the relative powers of competing branches of government (e.g., executive and judicial), and rights the people reserve to themselves (e.g., speech and privacy). But I also believe that convention opponents have a point when they assert that Iowa's current convention process isn't perfect.

Most of the states that adopted the periodic constitutional convention referendum did so after Iowa, and some made improvements to the process. Most notable are procedures, like New York adopted in 1894, to reduce a legislature's control of the enabling act. But those enhancements are inadequate to bring legislative bypass mechanisms into the modern age. Here I will propose just one reform to improve the process, which because it would make the process more democratic and effective, the Legislature would never propose on its own, thus also demonstrating the framers' wisdom in creating a legislative bypass process.

In the current process, after a convention proposes constitutional amendments, the voters must ratify them before they become law. I recommend inserting between those two stages of the process an additional stage for popular participation and deliberation. I call the proposed new stage a "post-convention jury."

The jury would consist of hundreds of Iowans randomly selected and stratified by at least gender and geography; for example, the jury could consist of a randomly selected male and female from each of Iowa's 100 General Assembly districts. The jury would be selected and moderated by a three-member panel of judges appointed by Iowa's Supreme Court. Representatives of the delegates who voted pro and con on each proposed amendment would present the pro and con debate before.

To avoid onerous travel, the jurors would convene remotely via the various local courthouses spanning Iowa. Over a period of at least one hour per proposed amendment, the jury would listen to the pro and con sides debate and then vote each amendment up or down. The resulting tally, with an accompanying link to a video recording of the actual debate, would be printed on each ballot and serve an analogous information function to the political party labels on the ballot next to the names of candidates. Currently, there is no such information cue to help voters decide when they vote on referendums. The next convention could implement key elements of such an educational institution even if it wasn't part of the Legislature's enabling act.

Regardless of political party affiliation, Americans in recent decades have become increasingly mistrustful of their fellow citizens' capacity for democracy, including their capacity to play their designated roles in state constitutional democracy. This mistrust is a tragedy, as trust in the democratic reform process is essential to maintaining the long-term health of a democracy. It is also ironic, given the great improvement since 1857 in Iowans' level of education, means of communication, and access to state-of-the-art political science. Instead of allowing the political establishment to exploit Iowans' mistrust of each other to preserve the status quo, we should seek to fix our democratic processes with the same can-do attitude that Iowa's framers had.

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Source: Snider, J.H., Iowa's constitutional convention process, a triumph of democracy, could be improved, The Gazette, October 10, 2020.

It's time to talk about a constitutional convention

by J.H. Snider | November 1, 2020 | The Globe Gazette

Have Iowans liked state constitutional conventions? Opponents of the Nov. 3 referendum would like you to think conventions are as obsolete and unpopular as the flintlock blunderbuss.

But Iowans have arguably called six state constitutional conventions: three unambiguously in 1844, 1856, and 1920; and three ambiguously in 1846, 1900 and 1933 — depending on how terms such as "Iowans," "legitimate recount," and "state constitutional convention" are defined. But convention opponents and press accounts routinely present facts suggesting that conventions were only popular in Iowa's primordial past.

The unstated implication of these historical "facts" is that we needn't bother having a contemporary discussion about the merits of calling a state constitutional convention because past generations of Iowans have already had that discussion and decided against one. This has become a dog whistle — echoed in the press — to the uninformed.

Consider Iowans' six convention calls since 1844:

In 1844, 1856, and 1920, Iowans called state constitutional conventions by an unambiguous majority vote.

In 1846, the Legislature, claiming to represent "Iowans," called what would become the statehood convention — but without bothering to first ask Iowans if they wanted to call one.

In 1900, Iowa's counties certified an election win for the convention referendum, but Iowa's state canvassing board, dominated by convention opponents, conducted a recount and, weeks later, suddenly announced they had found a thousand more no votes, which allowed them to defeat the proposition. The canvassing board made no serious attempt to find more yes votes.

In 1920, Iowans unambiguously approved a convention call, but the Legislature, disproportionally controlled by rural interests and worried that a convention might reapportion the Legislature based on the one-person, one-vote principle, was adamantly opposed. The House and Senate blamed each other for not fulfilling their constitutional duty to pass a mutually satisfactory enabling act to convene the called convention.

In 1933, Congress was worried that if it let the Iowa Legislature vote on the 21st Amendment to repeal prohibition the amendment might fail because Iowa's Legislature was controlled by rural interests who tended to favor prohibition. Thus, they bypassed Iowa's Legislature by calling an Iowa state constitutional convention, elected based on one-person, one-vote, to ratify the 21st Amendment, which Iowans did.

Today, Iowan advocates for state constitutional conventions are so discouraged they don't even try. It's like potential advocates for democracy in Russia, Turkey, and Venezuela, who are constantly reminded by those in power that any effort at meaningful democratic reform is doomed to failure, so don't even try. Locally, IowaConCon2020, an abortive effort to use the convention process to create an initiative process in Iowa like 26 other states already have, illustrated this defeatist mindset this election cycle.

Iowa's Framers gave the people the decennial state constitutional convention referendum to serve as a legislative bypass mechanism. Ever since, incumbent legislators and the special interests who excel at influencing them have opposed the convention process. It's time for Iowa's press to discuss the comparative merits of a convention and shut out the dog whistling.

Today, mistrust of government has reached similar heights to that during the Progressive Era a century ago. Today, like then, most Iowans believe their government desperately needs a constitutional tune-up. So today's apparent indifference to having a thoughtful discussion about what such a tune-up might mean is remarkable. Is change needed at a constitutional level? If so, should Iowa's Legislature be entrusted to propose the needed amendments on its own? Or, as Iowa's Framers argued, might a constitutional convention be necessary to bypass the Legislature? Instead of discussing the popularity of recent convention referendums, this is the conversation Iowa needs to have.

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Source: Snider, J.H., It's time to talk about a constitutional convention, The Globe Gazette, November 1, 2020.

HAWAII:
NOVEMBER 6, 2018

Preparing For Hawaii's Next Constitutional Convention Vote

A referendum is set for Nov. 6, 2018, but now is the time to begin the discussion. The author has created a website for that purpose.

by J.H. Snider | December 7, 2017 | Civil Beat

Hawaii's Constitution mandates a statewide referendum every 10 years on whether to call a state constitutional convention. The next referendum is Nov. 6, 2018. Efforts should begin now to ensure that Hawaii voters make an informed decision.

The most fundamental of all democratic rights is a people's right to amend their constitution. Hawaii's Constitution provides two mechanisms to do so: Legislature-initiated and convention-initiated. The unique democratic function of the convention mechanism is that it allows the people to bypass the Legislature's gatekeeping power over constitutional amendments.

The convention mechanism is a vital democratic safeguard because of the Legislature's institutional conflict of interest in proposing amendments that would limit its own power. This legislative conflict includes the relative power of incumbents vs. challengers (e.g., via term limits, redistricting, ethics, transparency, campaign finance and ballot access) and of competing branches of government (e.g., the executive, judicial and local branches).

American states have convened 236 state constitutional conventions since 1776, including three in Hawaii since 1950 (Hawaii's last two were in 1968 and 1978). The convention is an American invention and widely considered to be one of America's greatest contributions to the development of democracy worldwide.

However, as I explain in a recent journal article, the state constitutional convention has run into hard times and is now amid its longest drought in America's 240-year history.

Since a constitutional convention is designed to be a check on legislatures, legislatures have always opposed conventions. But with the 20th century's growth of career-oriented as opposed to citizen-legislators, incumbent-legislator opposition has greatly intensified.

The Growing Opposition

Special interest group opposition has also greatly increased. Successful special interest groups, especially unpopular ones in heavily regulated industries, including Big Labor

and Big Business, prefer to exercise their influence through a legislature, such as the Hawaiian Legislature, where they have an outstanding track record of success. As government has grown, so has the power of these groups, which now view a convention as a Pandora's Box.

Adding to this toxic mix is the logic of coalition politics. To be effective politically, one needs allies, and the most useful allies are incumbent legislators and the powerful special interest groups that form the cornerstone of the Republican and Democratic parties. Unless one's core mission is good government reform, which is rare among interest groups, the political cost of alienating one's allies by supporting a convention is usually too high. And even good government groups whose core mission isn't constitutional reform may fear alienating needed allies.

The convention is an American invention and widely considered to be one of America's greatest contributions to democracy.

As for members of the public, it cannot reasonably be expected that they will, starting from essentially zero knowledge, become experts on the history and democratic function of the state constitutional convention. Instead, they will rely on the political party and interest group cues that they also rely on in making down-ballot candidate choices. In this case, those cues will overwhelmingly signal that they should vote against a convention.

Even minority political parties, which often supported conventions in the past, now tend to be dominated by career-oriented legislators who fear losing their incumbent protections. Add to this mix conservatives who instinctively fear change and the poorly informed voter's propensity to vote no on or leave blank propositions that appear controversial, and the death knell of the state constitutional convention appears to have been rung.

A Sign Of Democratic Dysfunction

To me, there is no greater sign of democratic dysfunction in America than the decline of the state constitutional convention in states such as Hawaii where the periodic convention call is the only mechanism available to bypass a legislature's veto power over needed democratic reforms. The cause of fixing this dysfunction may be quixotic, but there is no worthier fight.

In the coming months, Hawaii voters will be told that their state constitution, which most have never read and may not even know exists, is a sacred document akin to the Bible and thus not worth the risk of changing. If it is indeed such a sacred document, I propose taking it as seriously as such a document deserves. That includes reading it and its history (including the role of conventions in inserting those sacred provisions), then asking why the framers of Hawaii's Constitution included a periodic convention call.

At the Hawaii State Constitutional Convention Clearinghouse, I have compiled material to help launch such a discussion. That includes links to any published material I can find both for and against calling a convention.

My purpose in creating the clearinghouse was to check some of the misinformation, especially the widespread convention badmouthing, that has characterized convention debates in recent decades. The odds of having a well-informed debate are slim, but I believe the attempt worth the effort.

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Source: Snider, J.H., Preparing For Hawaii's Next Constitutional Convention Vote, *Civil Beat*, December 7, 2017.

Hawaii's biased constitutional convention ballot question

by J.H. Snider | March 22, 2018 | Honolulu Star-Advertiser

On Nov. 6, 2018, Hawaii residents will vote on whether to call a state constitutional convention. The question they will see on the ballot is: "Shall there be a convention to propose a revision of or amendments to the Constitution?" This ballot text is the only form of conventionrelated media that every voter will see immediately before voting — when many voters are most impressionable.

Unfortunately, this seemingly innocuous question is highly biased because it doesn't specify whether it refers to the federal or Hawaii Constitution. Close to 100 percent of Americans know they have a national constitution, but less than half know they have a state Constitution. Thus, many Hawaii voters could go to the polls presuming that what is being referred to is the United States Constitution. And since Americans are taught to revere their federal constitution like the Bible, the question could just as well have been worded: "Shall the Bible, written by god, be rewritten?"

In short, the ballot language is strongly biased against a "yes" vote.

The language is derived from New York's 1846 Constitution. At that time, the language wasn't biased because prior to the Civil War voters considered state government, including state constitutions, more important than the federal government. State constitutional conventions were also frequent and relatively familiar occurrences, which undermined the notion that they should be treated as sacred convenings by godlike wise men. New York, for example, held state constitutional conventions in 1777, 1788, 1801, 1821, and 1846. Hawaii has held conventions in 1950, 1968, and 1978.

In 2008, the last time this question was on the ballot, Hawaii's Office of Elections provided voter information guides that included information on the upcoming convention referendum but failed to clarify that the question concerned a state rather than federal convention.

It also failed to explain in a timely and clear way three other attributes:

- The objective of Hawaii's framers in including this mandatory periodic provision in Hawaii's Constitution (to provide a mechanism to bypass the Legislature's veto power over constitutional amendment);
- The unsettled constitutionality and unfamiliar nature of the majority the Legislature had claimed it requires to pass (which counts voters' non-votes as no votes);
- That the referendum, if approved, would be only the first of three public votes (with the second to elect convention delegates and third to vote up or down any amendments the convention might propose).

All this is essential information if voters are to understand what they are voting on. Alas, offices of election controlled by state legislatures have a poor track record of providing such information. In

New York, a former counsel for the governor sued the Board of Elections for the obscure place on the ballot it placed the convention question. In Rhode Island, a former state Supreme Court justice wrote to the Board of Elections that the information it provided to voters was an "attempt to put a negative thumb on the voters' scale" and was "unauthorized and illegal."

We should not depend on Hawaii's Legislature-appointed Elections Commission for unbiased information concerning the upcoming referendum. Instead, we must rely on the press.

As usual, the press should provide pro and con information concerning a referendum. But it should also highlight how this referendum systematically differs from other ballot questions in both democratic function and process.

Doing so would help protect the people's most fundamental political right: their right to reform their constitution, which encompasses their right to reforms, such as legislative term limits, that the public overwhelmingly supports but the Legislature opposes and will never place on the ballot.

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Source: Snider, J.H., Hawaii's biased constitutional convention ballot question, *Honolulu Star-Advertiser*, March 22, 2018.

State Constitutional Convention Was Hijacked In '96 — It May Happen Again

More people voted "yes" than "no," but the Hawaii Supreme Court ruled that ballots left blank on the question were additional "no" votes.

by J.H. Snider | April 30, 2018 | Civil Beat

Hawaii's Constitution mandates that once a decade, next on Nov. 6, the people of Hawaii be granted the right to call a state constitutional convention to propose democratic reforms for popular ratification.

Hawaii's framers included this decennial mandate to secure the people's most fundamental political right: to reform their government — even in the face of the Legislature's opposition.

But what type of majority should be used to determine whether the people have called a convention? In 1996, a majority of those voting on the referendum, an "ordinary" majority, approved calling a convention. Hawaii's Office of Elections affirmed that the referendum was approved based on an opinion issued by Hawaii's attorney general, Hawaii statute, past practice, and the Office of Elections' own ballot guidance prior to the 1996 election.

But state legislative leaders and unions, which had opposed calling a convention, disagreed. The AFL-CIO sued, arguing that non-votes on the question among those who cast ballots should be counted as "no" votes — an "extraordinary" majority.

The case went to Hawaii's Supreme Court, which ruled in favor of the AFL-CIO. A federal court subsequently overturned part of the Hawaii court's opinion, ruling that the election should be redone. But a federal appeals court overruled the lower federal court's ruling.

Hawaii's Legislature then passed a bill to redo the election, thus eliminating the risk that the U.S. Supreme Court would rule on appeal that the convention referendum had passed. At the subsequent election, with the opposition vastly outspending supporters, the referendum was unambiguously defeated.

The Law

What is the law? Both the plaintiffs and defendants argued that the text of Hawaii's Constitution unambiguously favored their own interpretation. But the defendants sought to prove too much: they only needed to prove the language's ambiguity.

As it turns out, ambiguously phrased majority denominator referendum requirements, like Hawaii's, have been common in American constitutional, statutory and regulatory legal history. Indeed, prior to the Civil War, they were the norm. Even today, they are widespread in state constitutions and ubiquitous in popular and political speech.

Fueling this propensity for ambiguity is not only garden-variety intellectual sloppiness, but political self-interest. Politicians seek to portray themselves publicly as representing a majority of the people and thus above politics, but winning requires focusing on a small majority denominator (a "majority of the people voting"). Vague majority statements finesse this PR dilemma.

Barring compelling evidence to the contrary, legislatures and courts have traditionally interpreted such ambiguity as unambiguously referring to an ordinary majority.

The Politics

Bolstering this interpretative tendency has been the Legislature's self-interest: Legislators want their own proposals to pass.

Even in the relatively rare cases when majority language opposing a legislature's self-interest has been unambiguous, courts have generally acceded to the legislature's gimmicks to make an extraordinary majority function as an ordinary one. These gimmicks include making a referendum a special election, placing it on a separate ballot, and making the default ballot choice for a non-vote be a "yes" vote.

The specific language used in Hawaii's Constitution is: "majority of the ballots cast upon such question." Hawaii's Supreme Court argued that the plain meaning of this text was "clear and unambiguous." But its convoluted reasoning to arrive at this conclusion in the face of competing authorities and Hawaii precedent demonstrated its claim's tenuousness. As a Hawaii State Bar Association newsletter would later argue, the Supreme Court's opinion "was both logically flawed and intellectually disingenuous."

The First Amendment Issue

From a First Amendment perspective, the greatest outrage of the Hawaii Supreme Court's decision — as statutorily implemented in 2000 by the Legislature — is its implicit claim that the framers and ratifiers of Hawaii's 1959 statehood Constitution intended a larger majority to call a constitutional convention than to ratify a convention's proposals. As Russell Suzuki, Hawaii's current attorney general and then deputy attorney general, wrote to the Office of Elections: "the calculation of a majority for the convening of a constitutional convention was intended by our framers to be different from and less stringent than the calculation of a majority for the ratification of amendments proposed by a convention."

This type of relationship between an agenda-setting and lawmaking majority was in keeping with traditional American democratic norms. For example, authoritative manuals of democratic procedure, such as Robert's Rules of Order, never endorse the type of inverse relationship endorsed by Hawaii's Supreme Court. None of America's 236 state constitutional conventions since 1776 explicitly endorsed such a relationship. America's federal Constitution amendment process lacks such a relationship. And in the 19 U.S. states with the popular constitutional initiative — the primary alternative legislative

bypass mechanism in America — none require more than a 15 percent majority to place a constitutional amendment on the ballot.

Conclusion

In its shoddy legal reasoning driven by political considerations, the Hawaii Supreme Court's constitutional convention decision was analogous to the U.S. Supreme Court's infamous Bush v. Gore decision that settled the 2000 U.S. presidential election. In this case, the court's unacknowledged bias wasn't partisan; it was careerist, as the judges had an acute conflict of interest because they are reappointed by a judicial nominating commission that is controlled by state legislative leaders who have been as viscerally opposed to calling state constitutional conventions as to passing state legislative term limits. To paraphrase Upton Sinclair, "It is difficult to get a judge to understand something, when his salary depends on his not understanding it."

Given the Hawaii Supreme Court's conflict of interest, a legal remedy will most likely have to come from a federal court. I suggest focusing on the First Amendment abomination of making the majority required to call a convention larger than the original majority required to ratify its proposals.

Legal scholars and political scientists have often observed that constitutions are mere parchment barriers unless the people are able and willing to fight for their rights. These rights include the people's right to reform their government in the face of a legislature's opposition.

Hawaiians were unjustly deprived of a constitutional convention they fairly voted for in 1996. We must never allow this gross injustice to happen again.

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Source: Snider, J.H., State Constitutional Convention Was Hijacked In '96 — It May Happen Again, *Honolulu Civil Beat*, April 30, 2018.

[**Note:** This is a longer version of the previous article.]

Con-Con: The People v. Hawaii Supreme Court

The Court's 1997 ruling on the majority required to call a state constitutional convention was a travesty of justice that should be overturned before the Nov. 6, 2018 election.

by J.H. Snider | April 30, 2018 | Hawai'i Free Press

Hawaii's Constitution mandates that once a decade–next on Nov. 6–the People of Hawaii be granted the right to call a state constitutional convention to propose democratic reforms for popular ratification.

Hawaii's Framers included this decennial mandate to secure the People's most fundamental and precious political right: their right to reform their government —even in the face of the Legislature's opposition.

The 1996 Vote

But what type of majority should be used to determine whether The People have called a convention? In 1996, a majority of those voting on the referendum, an "ordinary" majority, approved calling a convention. Hawaii's Office of Elections affirmed that the referendum was approved based on an opinion issued by Hawaii's Attorney General, Hawaii statute, past practice since statehood, and the Hawaii Office of Elections' own ballot guidance prior to the 1996 election.

But state legislative leaders and unions, which had strongly opposed calling a convention, disagreed. Acting on their behalf, the AFL-CIO sued, arguing that non-votes should be counted as no votes–an "extraordinary" majority—so the referendum would be defeated.

The case was sent directly to Hawaii's Supreme Court, which ruled in favor of the AFL-CIO. The Court didn't dispute that its interpretation was being applied both retroactively and contrary to the public's understanding of how ballots would be counted. Instead, it argued that other considerations were paramount, notably the plain meaning of the constitutional language.

A federal court subsequently overturned part of the Hawaii court's opinion, ruling that the election would have to be redone. But a federal appeals court overruled the lower federal court's ruling, thus allowing the Hawaii court's ruling to hold.

The Hawaii Legislature then passed a bill to redo the election, thus heading off the risk that the U.S. Supreme Court would rule on appeal that the constitutional convention referendum had passed. At the subsequent election, with the opposition vastly outspending supporters, the referendum was unambiguously defeated.

The Law

What is the law? Both the plaintiffs and defendants argued that the text of Hawaii's Constitution unambiguously favored their own interpretation. But the defendants sought to prove too much. All they needed to prove is that the language is ambiguous.

As it turns out, ambiguously phrased majority denominator referendum requirements, like Hawaii's, have been a dime a dozen in American constitutional, statutory, and regulatory legal history. Indeed, prior to the Civil War, they were the norm rather than the exception. Even today, they continue to be widespread, including in state constitutions. In popular and political speech, they remain as ubiquitous today as in the 18th and 19th centuries.

Fueling this propensity for ambiguity is not only garden-variety intellectual sloppiness about government processes, but political self-interest. On the one hand, candidates and issue advocates seek to portray themselves publicly as representing all the people (e.g., a "majority of the people") and thus above dirty politics. On the other hand, winning requires focusing on a small majority denominator (e.g., a "majority of the people voting"). Vague majority statements finesse this PR dilemma.

Legislatures and courts haven't generally had any qualms about interpreting such ambiguity as unambiguously referring to an ordinary majority. That is, barring compelling evidence to the contrary, the legal tradition has been to interpret ambiguously worded majority denominators as ordinary majorities.

The Politics

Bolstering this interpretative tendency has been legislature self-interest: legislatures want their own proposals to pass. State courts, in turn, have generally been deferential to a legislature's self-interested interpretations.

Even in the relatively rare cases when the majority language opposing a legislature's self-interest has been unambiguous, courts have generally acceded to the legislature's gimmicks to make an extraordinary majority function as an ordinary majority. These gimmicks include making a referendum a special election, placing it on a separate, high-profile ballot at a general election, and making the default ballot choice for a non-vote equivalent to a yes rather than no vote.

From this perspective, what is most noteworthy about Hawaii's majority to call a constitutional convention is not its ambiguity but the Legislature's willingness to place its fingers on the electoral scale, even if only seemingly by omission, born out of its strong dislike for calling a convention.

The specific language used in Hawaii's Constitution is: "majority of the ballots cast upon such question." Hawaii's Supreme Court argued that the plain meaning of this text was "clear and unambiguous." But its convoluted reasoning to arrive at this conclusion in the face of competing authorities and Hawaii precedent demonstrated the tenuousness of its

claim. As an essay published by Elijah Yip in a Hawaii State Bar Association newsletter would later argue, the Supreme Court's opinion "was both logically flawed and intellectually disingenuous." Constitutional scholars living contemporaneously with the passage of this language had also interpreted it as an ordinary majority.

The Word "Ballot"

A central point of contention was the word "ballot." When ballot is used as a synonym for the word "vote," as defined by Merriam-Webster's Thesaurus, ballot can only refer to an ordinary majority in the disputed sentence. In this use, the word ballot is to vote like crown is to monarch: a concrete manifestation—a metonym—for a more abstract entity.

Historically, the word ballot is derived from ball, as in placing a ball in a basket to vote for or against a proposition. When 90% or more of the populace was illiterate, printed ballots weren't an option. As late as the early 20thCentury, most Americans voted with pre-filled ballots, called party tickets, which required minimal voter literacy and didn't include blank votes. Not until the advent of the government ballot, which required voters to fill blank ballots, does the Hawaii Supreme Court's presumption of a ballot consisting of non-votes make sense.

Even after the widespread adoption of the government ballot in the first half of the 20th Century, voters were often asked to fill out two or more ballots at the same election. This included different ballots for local, state, and national elections, which could dramatically simplify the printing, distribution, and counting of ballots. It also included separate ballots for partisan and non-partisan propositions. In Hawaii, as in other states, the constitutional convention question was placed on a separate, non-partisan ballot. For example, see Missouri, the last state before Hawaii to include a periodic state constitutional convention referendum in its constitution.

Even in the current era of the government ballot, 99% of "ballots" used by state and local legislatures, town meetings, and civic association, still include only one question, with the words ballots and votes being used interchangeably.

The Critical First Amendment Issue

From a free speech or U.S. First Amendment perspective, the greatest outrage of the Hawaii Supreme Court's decision—as statutorily implemented in 2000 by the State Legislature—is its implicit claim that both the Framers and Ratifiers of Hawaii's 1959 statehood Constitution intended a larger majority to call a constitutional convention than to ratify a convention's proposals. (This relationship has been obfuscated by a subsequent increase in the quorum required to pass constitutional amendments.)

As Russell Suziki, Hawaii's current Attorney General and then Deputy Attorney General, wrote to the Office of Elections: "the calculation of a majority for the convening of a constitutional convention was intended by our framers to be different from and less stringent than the calculation of a majority for the ratification of amendments proposed by a convention."

This type of relationship between an agenda-setting and lawmaking majority was in keeping with traditional American democratic norms. For example, read any authoritative manual of democratic procedure, such as *Robert's Rules of Order*, and you will never see the type of inverse relationship endorsed by Hawaii's Supreme Court. None of America's 236 state constitutional conventions since 1776 explicitly endorsed such a relationship. America's Federal Constitution amendment process lacks such a relationship. And in the 19 U.S. states with the popular constitutional initiative, which is the primary alternative legislative bypass mechanism in America, none require more than a 15% majority (e.g., 15% of those who voted at the last election) to place a constitutional amendment on the ballot.

Conclusion

In its shoddy legal reasoning driven by political considerations, the Hawaii Supreme Court's constitutional convention decision was analogous to the U.S. Supreme Court's infamous *Bush v. Gore* decision that settled the 2000 U.S. presidential election. In this case, however, the Court's unacknowledged bias wasn't partisan. It was careerist, as the judges had an acute conflict of interest because they are reappointed by a judicial nominating commission that is controlled by state legislative leaders who have been as viscerally opposed to calling state constitutional conventions as to passing state legislative term limits. To paraphrase Upton Sinclair, "It is difficult to get a judge to understand something, when his salary depends on his not understanding it."

Given the Hawaii Supreme Court's conflict of interest, a legal remedy will most likely have to come from a federal court. One federal court strategy would be to focus on the First Amendment abomination of making the majority required to call a convention larger than the original majority required to ratify its proposals. Ideally, declaratory relief should be sought on this question prior to the election so that ballot non-votes on one-size-fits-all-ballots won't be counted as no votes. But this is only one of a series of legal issues ultimately raised by the Hawaii Legislature's implacable opposition to calling a state constitutional convention.

One reason for seeking legal relief before rather than after the referendum is that the Hawaii Supreme Court's ruling unfairly discourages convention advocates, thoughtful press coverage, and public deliberation more broadly. After all, why invest resources in an activity when the result appears hopeless or predetermined? As Sun Tzu, the great military strategist, observed: "The supreme art of war is to subdue the enemy without fighting"–what we would today call "deterrence." An analogy would be autocratic countries with elections ("pseudo democracies") that adopt policies to discourage potential competitors and thus make the resulting elections irrelevant. But here the "autocrat" has been the Legislature acting below the public radar by discreetly laundering its influence via Hawaii's Supreme Court, Office of Elections, and Legislative Reference Bureau.

Legal scholars and political scientists have often observed that constitutions are mere parchment barriers unless the people are able and willing to fight for their rights. These rights include the people's right to reform their government in the face of a legislature's opposition.

Hawaiians were unjustly deprived of a constitutional convention they fairly voted for in 1996. Daunting as the task may be, we must never allow this gross injustice to happen again.

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Source: Snider, J.H., Con-Con: The People v. Hawaii Supreme Court, *Hawai'i Free Press*, April 30, 2018. Note: this is a longer version of the April 30, 2018 op-ed above.

Hawaiians' most precious political right? Not what you think

by J.H. Snider | June 14, 2018 | Honolulu Star-Advertiser

We are routinely taught to defend our fundamental political rights, such as various free speech and voting rights. To be sure, defending these rights is vital. But we are not taught to defend the one right that undergirds them all and is thus the most fundamental and precious — our right to meaningfully reform our constitution.

This right of reform, aka our "unalienable" right to alter our form of government, is featured in the U.S. Declaration of Independence and in the bill of rights of 37 American states. But it is ignored in popular discourse, especially the deeper question of what role the sovereign ("the people") should play in constitutional reform if our form of government is to survive and thrive.

Fortunately, the Framers of Hawaii's Constitution recognized the importance of a meaningful right of reform, which must include a mechanism to bypass the state Legislature's gatekeeping power over constitutional reform. The specific bypass mechanism they bequeathed to us was the periodic (once-a-decade) referendum to call a Constitutional Convention.

On Nov. 6, this constitutionally mandated question is next on the ballot. Hawaii has convened state constitutional conventions in 1950, 1968 and 1978.

Since America's founding in 1776, the basic idea behind the state Constitutional Convention — of which America has had 236 — is that the Legislature shouldn't have exclusive power over constitutional amendment because it would have an institutional conflict of interest in exercising such power: specifically, in proposing reforms related to legislators' incumbency advantages, the power of competing government branches, and the rights retained by the people. The convention was viewed, in short, as an essential feature of America's checks and balances system of government.

Some scholars have even described America's invention of the state Constitutional Convention — which was part and parcel of its invention of the modern written Constitution — as its greatest contribution to the development of democracy.

Unfortunately, however, the average citizen no longer understands the Constitutional Convention's essential role in our system of government. This misunderstanding can partly be attributed to recent Hawaii convention referenda. In the weeks leading up to them, convention opponents have spent millions of dollars asserting that Legislature-initiated constitutional reform is not only a perfect substitute for calling a convention but one that is less costly and risky. In short, rather than presenting the constitutional convention as a vehicle to preserve and enhance Hawaiian democracy, it has been demonized as its greatest threat.

How the Legislature and the various groups that thrive influencing it have been successful in demonizing the Framers' vision for constitutional reform is a remarkable

story. On the one hand, we live at a time of exceptionally low trust in Hawaii's Legislature, including the Legislature's willingness to democratically reform itself.

On the other hand, convention opponents — when behind in the polls — have spent bottomless sums attacking the institution the Framers gave the people to address such problems. One result: Convention proponents now believe their cause is hopeless, so don't even try.

The strategy of attacking the Framers' vision has worked partly because Hawaii voters have become so cynical of current politics that they don't believe the democratic process can be improved. Such defeatism is dangerous because it is self-fulfilling. To counter it, we must be reminded of our most fundamental and precious of all political rights as a sovereign people: our right to meaningfully reform our government.

What urgently requires attention (e.g., current candidate elections and minor referenda) is rarely fundamental. But what is fundamental (e.g., fixing our broken government) is rarely urgent. Thoughtful debate on the Nov. 6 referendum should begin now; waiting until the fall is too late.

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Source: Snider, J.H., Take the time now to understand the 'Con Con' question, *Honolulu Star-Advertiser*, June 14, 2018. This is the title as published, not submitted.

* This is the title as submitted, not published. The title published is noted in the paragraph above.

Analysis of Candidate Position Statements on the Nov. 6 Con-Con Referendum

by J.H. Snider | August 3, 2018 | Hawai'i Free Press

For Hawaii's August 11, 2018 primary election, *Civil Beat* collected position statements from candidates on a variety of issues, including Hawaii's Nov. 6, 2018 state constitutional convention referendum. In this article, I analyze the candidates' constitutional convention position statements based on the Civil Beat data compiled as of August 2.

In its thoroughness, Civil Beat's collection of candidate written positions on an upcoming state constitutional convention referendum is unprecedented. When I met with Civil Beat's editorial board in early May and encouraged Civil Beat to report on candidates' positions on the upcoming convention referendum, I did not even dream that it would be so ambitious in collecting such information, so it's a wonderful surprise. Alas, whereas most candidates for governor and lieutenant governor answered Civil Beat's survey, most candidates for the State Legislature, especially incumbents, did not.

Yes And No Positions

Of the 67 candidates taking a position on the issue, 55% favored calling a convention. Fifteen (18%) cleverly answered a question that wasn't asked or otherwise took a neutral stand. Candidates for governor and lieutenant governor expressed slightly less support (50%) than candidates for the Legislature (56%).

Given the outcomes of the last few convention referendums in Hawaii, the majority support for calling a convention is surprising. But it should not be taken too seriously. When a constitutional convention referendum is ahead in the polls, as it is in Hawaii (in May, 73% of those expressing an opinion for or against were for), candidates' public positions tend to be skewed favorably. Civil Beat's strong endorsement of a convention, presumably read by Civil Beat's readers, may also have skewed the results favorably. Politicians, after all, tend to adopt positions in accord with the audience they are addressing.

As an analogy, consider the politics of legislative transparency. When campaigning, an overwhelming majority of candidates for the State Legislature favor legislative transparency. But bills implementing legislative transparency rarely get a legislative floor vote, let alone passed, because legislators don't want to have to vote publicly against a popular reform they oppose. Similarly, voiced support for a convention is probably greater than actual support.

Constitutional convention politics, however, has a very different rhythm and playbook than legislative transparency. Whereas there is virtually no organized public opposition to legislative transparency, there will be substantial public opposition to any convention referendum that is ahead in the polls.* But the opposition is waiting until after

Hawaii's August 11 primary election before launching its campaign. In 2008, the last time the convention referendum was on the ballot, the opposition–a who-is-who of powerful Hawaii interest groups and their coalition allies–didn't launch until September. After the opposition's launch, candidate positions will shift toward opposition.

As a rule, when candidates say they are neutral on a convention referendum—e.g., they'll support whatever voters decide—one can be confident that the candidate's actual position is to oppose a convention. This is especially true when the candidate is an incumbent legislator and knows enough to feel embarrassed opposing a constitutional provision designed by Hawaii's Framers to function as a check on the Legislature. In short, taking a neutral position is politically like recusing oneself from a vote on an issue on which one has a well-known conflict of interest.

I have divided my findings into four categories depending on type of office: 1) Governor, 2) Lieutenant Governor, 3) State Senate, and 4) State House.

1. **Governor:** Six candidates answered the question, with 3 expressing support, 2 opposition, and 1 punting on the question. The two leading Democratic candidates, Incumbent Governor David Ige and Congress woman Colleen Hanabusa, were split, with Hanabusa voicing clear opposition and Ige tentative support. Unlike incumbent legislators, it's common for incumbent governors to voice tentative support for calling a convention because a convention is designed as a check on the legislature, not the governor. The expected Republican winner, Rep. Tupola, didn't answer any of the survey questions.

2. **Lieutenant Governor:** Nine candidates answered the question, with 3 expressing support, 4 opposition, and 2 punting on the question. The expected Democratic winner, Sen. Green, punted on the issue. The expected Republican winner, Marissa Kerns, voiced strident opposition.

3. **State Senate:** Fourteen candidates answered the question, with 6 expressing support, 7 opposition, and 1 punting on the question. Among incumbent senators, three voiced opposition and one support. Of the 11 Democrats who expressed a position on the issues, 5 expressed support and 6 opposition. The lone Republican who expressed a position voiced opposition; and the lone Libertarian who expressed a position voiced support. Sixteen candidates didn't answer any of the survey questions.

4. **State House:** Forty-nine candidates answered the question, with 24 expressing support, 15 opposition, and 10 punting. Among incumbent legislators, 5 expressed support, 2 opposition, and 4 punted–but note that this is a small fraction of the incumbents on the ballot. Sixteen Democrats expressed support and 15 opposition. All 5 Republicans who answered the question expressed support, as did the 2 Green Party candidates and lone Libertarian Party candidate who answered the question.

There was no clear partisan pattern of support or opposition. This is surprising given that Republican leaders, led by the incumbent Republican lieutenant governor, supported a convention during the last convention referendum in 2008.

Yes And No Arguments

Some arguments against a convention appeared logically contradictory. For example, consider two strong opponents for calling a convention. Republican Lieutenant Governor candidate Marissa Kerns argued that a convention would follow the wishes of the liberal majority in Hawaii and thus be bad for Republicans: "I oppose con con. No way! We do not trust the Hawaii Democrat supermajority-controlled Legislature." In contrast, Democratic State House candidate Dylan Armstrong argued the opposite: "If we have a state constitutional convention now, the grassroots will have to massively coordinate and organize to prevent major loses to special interests — think the Koch brothers and A.L.E.C." The Koch brothers and A.L.E.C. are shorthand for conservative Republicans.

Some interpreted similar data in opposite terms, with one side taking a glass half-full and the other a glass half-empty perspective. For example, some were worried that a convention could take away environmental rights won at Hawaii's last constitutional convention in 1978, whereas other thought a convention could enhance those rights just as they have done in the past. For example, Democratic State House candidate Koohan Paik-Mander argued: "The last constitutional convention took place in 1978. It was not perfect, but from an environmental perspective, it did implement fundamentally important legislation — Article XI, or, the 'Public Trust Doctrine'… If we were to lose it in the course of holding a state constitutional convention, it would hail a profound tragedy for protection of Hawaii's precious natural resources." In contrast, Green Party State House candidate Nick Nikhilananda argued: "The last convention incorporated some significant environmental, cultural and indigenous legislation and requirements. These need to be strengthened…."

Some paradoxically attacked the state constitutional convention process when that process won the rights the arguer was seeking to protect. For example, incumbent State House legislator Chris Dodd argued: "I oppose holding a state constitutional convention because the risks outweigh potential rewards. We currently have very strong labor and environmental protections in our state, and a con con puts that at risk." Not mentioned is that those labor and environmental protections were primarily won at previous Hawaii state constitutional conventions.

Some candidates clearly did not want to answer the question. A classic dodge in this type of situation is to answer a question that wasn't asked. One sophisticated implementation of this type of response was to appear to express support for calling a convention but to make the support conditional on the convention referendum already passing—a distinction most readers presumably wouldn't notice. For example, Democratic State House candidate David Tamas stated: "I would advocate for a constitutional convention to reorganize the statewide school district into school districts in each county with elected

school boards in each county school district. The constitutional convention would also be the appropriate forum to reorganize what is the responsibility of the state government and the county government in order to give counties more "home rule" responsibilities. This reorganization of responsibilities would also require a restructuring of our tax code to make sure these newly organized government responsibilities are properly funded."

More often, candidates were direct in refusing to answer the question. For example, incumbent State House candidate Lynn DeCoite said: "I support what the people want." Note that even if this were an answer to the question asked, it is a far more ambiguous answer than readers are led to presume and may mask hidden opposition behavior. For such an assertion begs the crucial question of what majority should be used to determine what the people want. In Hawaii, the majority required to call a convention is a highly controversial issue, with state courts downplaying original intent as a way to interpret the required majority, state and federal courts disagreeing on the required majority, and the Hawaii Legislature acting to codify and otherwise support the majority most favorable to its own institutional interests, including implementing a special constitutional convention referendum in 1998 in part to head off a possible adverse U.S. Supreme Court decision on the issue.

The common political strategy of taking two opposite positions on the same issue was also occasionally used. For example, incumbent State House candidate Tom Brower started explaining his position with a simple endorsement of calling a convention. But he then devoted three paragraphs to explaining why calling a convention is a bad idea. I coded his position statement as a punt because his answer was clearly designed to appeal to both convention supporters and opponents depending on how the political winds were blowing and which audience he was speaking to.

One of the most contentious issues is whether the ordinary Legislature-controlled constitutional amendment process is an adequate substitute for the constitutional convention process, which takes agenda control out of the Legislature's hands. Democratic State Senate candidate Brenda Ford argued that it was vital for Hawaiians to have and use a legislative bypass procedure: "When the Legislature refuses to pass laws that the people want, disregards issues that even legislators try to get passed, and refuses to have a statewide citizens initiative process, it is time for a constitutional convention." In contrast, Democratic State House candidate Justin Hughey, a Hawaii State Teachers Association vice president, argued that there was no need for a legislative bypass amendment process: "While I am in favor of the people ultimately deciding this question, I will always be against a con con…. I believe changing the constitution through a legislative bill is the best way to make changes to our state's founding document. The Legislature can bring up specific issues, debate them, hold hearings, and, if a proposed amendment has enough support, pass a measure placing the question before voters, just like we are doing now with the constitutional amendment to raise property taxes on investment properties in order to adequately fund our public schools."

Data

For all the candidates' positions on the convention issue, as well as my coding of their response, see the Hawaii State Constitutional Convention Clearinghouse under the candidate sub-menu under the pro & con menu.

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Source: Snider, J.H., Analysis of Candidate Position Statements on the Nov. 6 Con-Con Referendum, *Hawai'i Free Press*, August 3, 2018.

Want Term Limits? A Con Con Is Your Only Hope

by J.H. Snider | September 21, 2018 | Civil Beat

Hawaii has arguably the least competitive state legislative elections among the 50 U.S. states. At its Aug. 11 primary, 96.2 percent of elected state legislators seeking re-election won. No incumbent is expected to lose in the Nov. 6 general election.

Another measure of competitiveness is the number of seats in a legislature held by a single party. In Hawaii, it's 93.4 percent, the highest percentage in the United States. In the state Senate, one party holds 100 percent of the seats.

When the monetary advantage of winning candidates is factored in, Hawaii also comes out at the bottom. According to the National Institute on Money in Politics, 100 percent of Hawaii candidates with both an incumbency and monetary advantage won in the last general election — the worst among the 50 states.

In the 2018 primary, all three challengers who beat incumbents were backed by the Hawaii State Teachers Association, one of Hawaii's most powerful trade associations. One was HSTA's secretary-treasurer, one of HSTA's top four positions; another had been deputy director of Hawaii's Department of Labor and Industrial Relations.

Term limits for state legislators would reduce the excessive level of legislative entrenchment. To be sure, term limits are a second-best solution to this problem. In an ideal world, tackling the many contributing factors to incumbent entrenchment, including legislative redistricting, ethics, transparency, campaign finance, voting rules and ballot access, would be a better solution.

But the public rightfully trusts the term limits solution because, although imperfect, they know this solution cannot be rigged to favor incumbents.

In Hawaii, as in other states, legislative terms limits are highly popular. A Civil Beat poll found 68 percent support among all respondents and 81 percent support among respondents expressing support or opposition.

No Initiative In Hawaii

A state constitutional amendment is necessary to enact term limits. But the state Legislature will never place such an amendment on the ballot because it's not in its institutional self-interest to do so. In contrast, it has acceded to popular opinion on term limits for the governor, lieutenant governor, county mayors and county councilors in part because such term limits don't directly limit its own power.

Other states have circumvented state legislature opposition via the constitutional initiative. Although Hawaii lacks that legislative bypass mechanism, it does have the alternative: the periodic state constitutional convention referendum. That's why a convention is Hawaii's only hope to pass legislative term limits.

Throughout most of American history, the average term of a state legislator was relatively short. In a world where legislators were predominantly citizen-legislators rather than career-legislators, legislators couldn't expect to earn a living, let alone make a career, out of serving in office, and voluntary legislator turnover was high, term limits weren't needed.

Despite having an arsenal of arguments to oppose term limits, groups opposing term limits will mostly avoid directly attacking such a popular democratic reform. Instead, they will attack the state constitutional convention as a needless, costly, and risky democratic reform mechanism. But what is costly to special interests may be beneficial to the people of Hawaii. Special interests' organizing and financing the convention opposition in the shadows may be the best reason for the people to support a convention.

Hawaii's framers gave the people the gift of the periodic state constitutional convention referendum so the people could bypass the Legislature on democratic reform problems like legislative term limits. We should accept their gift gratefully.

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Source: Snider, J.H., Want Term Limits? A Con Con Is Your Only Hope, Civil Beat, September 21, 2018.

To Oppose A ConCon Is To Oppose Constitutional Democracy

by J.H. Snider | October 10, 2018 | Civil Beat

A critical function of a constitution is to limit the powers of the people's government agents, including the Legislature.

Perhaps inadvertently, opponents of Hawaii's Nov. 6 state constitutional convention referendum have been vigorously attacking the core principles on which modern constitutional democracy is built.

To understand how, recall that Hawaii's system of constitutional government has two lawmaking tracks: ordinary and higher. Ordinary laws are passed by the Legislature; higher laws by the people via a constitutional referendum. Thus, when opponents attack the people's capacity to approve higher laws in their own self-interest, they are attacking the people's capacity for constitutional government.

A critical function of a constitution is to limit the powers of the people's government agents, including the Legislature. For example, the people oppose granting the Legislature the power to control the length of its members' terms, critical media coverage, and other branches of government.

Hawaii's framers understood that giving a legislature such control would represent a blatant conflict of interest because a legislature would seek to enhance its own power at the expense of both competing government agents and the people. During America's founding era, proposals to eliminate such limits on legislatures were disparaged as "legislative tyranny."

Consequently, we allow our legislatures to pass ordinary but not constitutional laws. In a constitutional democracy, constitutional laws must be approved by the people themselves.

But convention opponents have been arguing that "those with the most money" will win when the people are asked to approve proposed constitutional amendments. If they are right, then Hawaii's experiment with constitutional democracy is a failure. Moreover, their argument implies that Hawaii residents should give the Legislature control over passing all future constitutional amendments. The Hawaii Legislature currently has a dismal 21 percent approval rating.

Obviously, giving the Legislature such control is not something the great majority of Hawaii citizens would want, which is why opponents leave this implication of their argument unstated. Instead, they attack direct democracy — as though direct and constitutional democracy were identical.

Opponents also claim that Hawaiians might be so foolish as to vote against constitutionally protected environmental, health and political rights that polls show the people overwhelmingly support. Such claims are profoundly anti-democratic.

Expanding Rights

Prior to Hawaii's last convention in 1978, opponents made similar claims. But that convention greatly expanded the rights of Hawaii citizens — far more than the Legislature has done during the subsequent 40 years. Indeed, many of the rights opponents now want to protect were proposed at that convention and then approved by voters.

Claims about the people's incapacity for self-rule were all but ubiquitous among government elites from the time of ancient Athens until America's founding in the 18th century. In Hawaii, convention opponents' narrow focus on the people's incapacity for constitutional as opposed to all self-government is a new twist on that hoary argument — but one similarly driven by government elites' desire to retain their hold on power.

For more than four decades, Hawaii's convention opponents, backed by the diehard support of legislative leaders and the money and organization of Hawaii's most powerful special interests, have been making such arguments against the people's capacity to participate in constitutional government.

The question the people should be asking the opposition's key backers is this: If they, as their coalition partners claim, would dominate both the people's vote for convention delegates and the people's subsequent vote over whether to support the convention's policy proposals, then why have they been so unremittingly opposed to a process they would presumably benefit from? And why have the unpopular groups they claim would benefit from a convention not organized or spent money supporting one?

Sure, convention opponents are correct that democracy is a deeply flawed process, partly because money distorts elections. But doing away with constitutional democracy is a remedy worse than the disease.

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Source: Snider, J.H., To Oppose A ConCon Is To Oppose Constitutional Democracy, Civil Beat, October 10, 2018.

Why Con-Con Opponents Willfully Ignore Legislative Bypass Issues

by J.H. Snider | October 13, 2018 | Hawai'i Free Press

Constitutional convention opponents routinely claim that there has been little public discussion concerning what problems a convention could solve. They then assert not only that such a discussion should take place before voters support calling a convention but also that no compelling reason exists for calling a convention that the legislature couldn't address on its own.

Consider the following statement from the *Honolulu Star-Advertiser* op-ed that publicly launched the NoConCon.org coalition on September 30, 2018:

> [W]e are drifting toward voting "yes" to holding a Constitutional Convention (Con Con) without discernibly good reasons for doing so…. A recent four-part forum on Con Con … began with expressions of interest in holding a Con Con. Discussion then revealed that no one had proposals for why it should happen, let alone proposals that attracted significant cross-sections of people.

Both the leading no coalition, Preserve Our Hawaii, and its lead organizer, the Hawaii Government Employees Association, put it more concisely after they publicly announced their no campaign on October 8, 2018: "If there isn't a good reason to have a ConCon, why should we?"

The Political Logic of Such Claims

Ironically, the groups making such claims typically seek to have as little public discussion as possible concerning the types of legislative bypass issues a convention could, would, and should address. If you're a state legislative leader, for example, why raise an issue such as legislative term limits that is overwhelmingly popular but that you don't want to address? Fostering a public discussion would only make you look bad.

Consequently, these types of popular reforms ("legislative bypass issues") are typically buried in committee and never get a floor vote because legislative leaders don't want a public record of their opposition to them. The same political logic applies when the opportunity arises to discuss whether a constitutional convention would address such issues.

Groups opposed to calling a convention have adopted the same political strategy: avoid discussion of popular legislative bypass issues that a convention might address. Instead, they have focused on making vague claims about the risks a convention might pose to highly popular constitutional provisions concerning political rights and the environment. (In doing so, they have also willfully ignored that the public would never approve any amendments that a convention might propose to curtail such overwhelmingly popular and cherished rights.)

If you're a special interest group that has a strong track record of success influencing current legislators, it's in your self-interest not only to not pass democratic reforms that might weaken your power over the Legislature, but also to not call the public's attention to such reforms by publicly debating them.

The opponents' Machiavellian strategy of complaining about not having a public discussion about issues they in fact don't want the public to discuss should be called out. For example, the leadership of the State Legislature and Hawaii Government Employees Association should be invited to public debates to defend their arguments that legislative bypass issues not only haven't been discussed but aren't a good reason to call a convention. Since they're the ones orchestrating such arguments as talking points, they should be the ones defending them.

The Importance of Legislative Bypass Issues

The unique democratic function of the state constitutional convention in Hawaii's Constitution is to bypass the gatekeeping power the Legislature would otherwise have over constitutional amendment. Thus, any serious discussion of issues a convention could, would, and should address must address potential legislative bypass issues. Any position statement on calling a convention that doesn't explicitly address legislative bypass issues should not be treated as a good faith effort to discuss the issues.

We should not be surprised when the political elites who benefit from the current system don't want to engage in such a good faith public discussion. That's a major reason they focus their advocacy efforts on ad campaigns that don't involve public deliberation: ads are a way to control and limit the discussion. Given the unique democratic function of the constitutional convention, it should be the goal of the press to force a public discussion of legislative bypass issues despite the interests of political elites.

Legislative Bypass Issues In the News

To facilitate such a discussion, The Hawai`i State Constitutional Convention Clearinghouse has compiled recent articles from Hawaii and elsewhere on legislative bypass issues that a state constitutional convention could address.

The articles are listed under the following categories: 1) articles that summarize legislative bypass issues and 2) articles that describe a particular legislative bypass issue related to a) the entrenchment of incumbent legislators, and b) the power of the State Legislature versus other parts of government.

A secondary class of legislative bypass issues are issues where special interest groups have a lock on the Legislature. These issues have not been included because I view them as secondary. They are secondary because the root problem is not special interest influence per se but the lack of legislative accountability that gives the special interests, including Big Labor and Big Business, unfair power.

The listed legislative bypass issues related to incumbent entrenchment include:

- Legislative term limits
- Legislative redistricting
- Legislative transparency
- Legislative voting systems
- Legislative ethics
- Legislative ballot access
- Legislative campaign finance

The listed legislative bypass issues related to the power of the Legislature as an institution include:

- Citizen initiative
- Constitutional convention
- Home rule
- A unicameral legislature
- The judiciary

Citizen Initiative vs. Constitutional Convention

Each of the incumbent entrenchment issues listed above has been the subject of citizen initiatives that the people have passed in other states and localities. Since Hawaii lacks the citizen initiative, the only legislative bypass mechanism available to it is the constitutional convention.

To the extent that polling exists on incumbent entrenchment questions in Hawaii, polls have shown substantial popular support for policies to reduce incumbent entrenchment. Not only has the Legislature not responded to this public opinion, it has enacted policies that further its own members' entrenchment.

Regarding the power of the Legislature vs. other government units, the immediate question is less what the balance of power should be than who should decide what it should be. A key concept behind constitutional democracy is that the Legislature shouldn't have the power to decide its own power relative to other government units that constitute the checks & balances system.

The reason the convention process involves a body separate from the Legislature to propose amendments for the people's approval is that the Framers' of Hawaii's Constitution mistrusted the Legislature, including the Legislature's willingness to discuss and propose popular good government reforms that might undercut its own power.

Conclusion

Contrary to the claims of convention opponents, the lack of public debate about legislative bypass issues among our existing political elites demonstrates the need for a convention, not the opposite. Only after a convention is called is it possible to get substantial public deliberation on such issues.

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Source: Snider, J.H., Why Con-Con Opponents Willfully Ignore Legislative Bypass Issues, Hawai'i Free Press, October 13, 2018.

The Advertised Cost of a Constitutional Convention

by J.H. Snider | October 18, 2018 | The Garden Island

In print and TV ads, Constitutional Convention opponents have been claiming that the cost of voting yes for a state constitutional convention on Nov. 6 would be too high. Consider the print ad launched by Preserve Our Hawaii, the leading No Coalition, in the Sunday edition of the October 14 *Honolulu Star-Advertiser*. Run on three different pages, its text reads:

> If we can't afford to repair public facilities, why spend $55 Million on ConCon? Vote 'No!' on the constitutional convention ballot question.

In the same edition, the No Coalition's leading spokesperson from its last campaign in 2008 echoes the same message in an op-ed:

> The estimated cost of a Hawaii Constitutional Convention (ConCon), if approved by voters at the Nov. 6 election is $56 million. Yes, that's right: $56 million…. Are there any changes to our Constitution worth this amount of tax dollars at this time? I conclude the answer is a resounding NO.

A TV ad, launched on October 7, echoes the same message. So do Multiple print and TV adsduring the last campaign against a convention in 2008.

The $55 million figure being promoted by Preserve Our Hawaii is highly controversial. Hawaii's last convention in 1978 cost $2.03 million. In current dollars, that sum would be $7.7 million. Preserve Our Hawaii hasn't cited a source but is presumably working from the Legislative Reference Bureau's 2008 report requested by the Legislature's leadership to provide ammunition to convention opponents. That report estimated that in 2012 dollars a convention would cost between $7.5 million and $48.8 million. The $55 million figure presumably extrapolates from the upper bound $48.8 million figure. Even then, Preserve Our Hawaii is only quoting the report's upper bound. A competing 2008 report published by a workgroup organized by Hawaii's Lt. Governor found the Legislature's cost estimates wildly inflated.

But costs per se mean nothing. To mean something, they must be compared to something else. The comparisons that the No Coalition's political research firms have tested as helping their campaign include comparisons to the average Hawaiian's personal income (far less than a convention's cost) and some of the most popular government expenditures, such as fixing potholes and paying for more teacher supplies.

But many other potential cost comparisons could be made. One category of such comparisons compares aggregate government revenue to the average individual's income. Total government spending in Hawaii is approximately $14 billion a year or $140 billion over the ten-year period between convention referendums. With this comparison, a convention's cost becomes comparable to a rounding error.

Another comparison category is a large individual project. For example, the current estimated cost of Hawaii's rail project is approximately $10 billion, of which the cost of a convention would be approximately one thousandth of its cost, or about 100 feet of the project's length.

Another category is state government waste. Americans believe their state government wastes about 42% of every tax dollar, which would be more than $50 billion between the decennial convention referendums. A poll asked Hawaii voters: "How well do you feel State government efficiently spends our tax dollars?" 57% replied "not well." If a convention reduced government corruption and its resulting inefficiency by only 1% over a decade, it would have more than a 5,000% return on investment.

My own favorite category is the cost of a government without democratic checks & balances. Doing away with costly checks & balances, including the two branches of the legislature, an independent judiciary, and local elected government, would result in a single elected state official. Just think of all the potholes we could fix if we got rid of all those wasteful democracy enhancing expenditures! Indeed, when dictator Benito Mussolini took over Italy in the 1920s, that's what he promised: massive public works! (Note: although the Legislature loves to issue reports on a convention's cost, I haven't been able to find a comparable report on its own costs.)

Of course, most Hawaii residents would recognize that reducing democratic accountability institutions to this bare minimum—no matter how much money it would save—would be penny wise and pound foolish because democratic accountability costs money. The same can be said for the democratic accountability a convention provides, which is why Hawaii's Framers included this legislative bypass mechanism in Hawaii's Constitution. Hawaii's Framers understood that it was essential to provide a mechanism to allow the people to bypass the State Legislature's gatekeeping power over state constitutional amendment. In comparison to the cost of Hawaii's other democratic accountability institutions, a convention's cost would be a rounding error.

Yet another category is the value of passing a specific popular amendment that the Legislature won't pass. For example, how much would the people be willing to spend to pass state legislative term limits or the citizen initiative? Would they be worth the cost of Hawaii's last convention in 1978; that is, $7.8 million in today's dollars?

The list of such alternate comparisons is endless. The key point is that any discussion of a convention's costs without a thoughtful discussion of its potential benefits is inherently misleading. Moreover, a good faith discussion of potential benefits should not focus on fixing potholes but on a convention's potential to help fix Hawaii's democracy.

Of course, it is in the No Coalition's interest to focus on a convention's potential costs rather than benefits. Accordingly, its ad compaigns over recent decades have refused to acknowledge, let alone discuss in good faith, why Hawaii's Framers created the convention process to propose popular democratic reforms adverse to the Legislature's institutional self-interest.

As the No Coalition's ad campaign against a convention gathers steam in the coming weeks, observers should be asking themselves: is it promoting the right cost comparison? And what exactly is it that Big Labor and Big Business, the key financiers and organizers behind the No Coalition, fear from a convention? Might it be that the costs they most fear, such as a reduction of their control over the State Legislature, might actually benefit the great majority of Hawaii?

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Source: Snider, J.H., The Advertised Cost of a Constitutional Convention, *The Garden Island*, October 18, 2018. Also published in *Hawai'i Free Press* on October 17, 2018.

The War Between Civil Beat and Star-Advertiser on the Con-Con Referendum

by J.H. Snider | October 27, 2018 | Hawai'i Free Press

Thank god that Hawaii has at least some newspaper competition. Case in point is the current debate over whether Hawaii on Nov. 6 should call a constitutional convention. You'd think that Hawaii's two leading newspapers, the *Honolulu Civil Beat* and the *Honolulu Star-Advertiser* live in different universes.

Civil Beat v. Star-Advertiser

Civil Beat ran eight editorials over a ten-month period favoring a yes vote, while the *Star-Advertiser* ran one—just one day before early voting on the referendum was to begin.

Civil Beat ran 15 news articles, including ad watches, over the same ten-month period, while the *Star-Advertiser* ran two news articles during the last two months and no ad watches.

Civil Beat conducted three scientific polls over the same ten-month period covering both the convention and potentially popular convention agenda items such as term limits and the initiative. The *Star-Advertiser* conducted none.

Civil Beat, a nonprofit, doesn't publish ads whereas the *Star-Advertiser*, which earns most of its revenue from ads, ran six convention related ads—all in opposition—beginning on October 14, 2018.

Despite *Civil Beat*'s strong support for a convention, it ran numerous op-eds both for and against calling a convention. In contrast, the last supportive op-ed the *Star-Advertiser*published was mine on June 14, 2018—more than four months ago. It has since refused to publish any more supportive op-eds. Between September 30 and October 26, it ran five opposition op-eds along with its own opposition editorial. The first two were published on Sundays, which have the greatest readership.

In the Sunday edition on October 14, 2018—eight days before early voting began—it ran a reader poll on the convention question the same day as three large no opposition ads and an op-ed that echoed the messages of those ads. It was an extraordinary opposition blitz, encompassing the trifecta of the *Star-Advertiser*'s news, ad, and editorial pages.

The *Star-Advertiser* has provided no fact-checking news analysis of the numerous and expensive ads opposing a convention run in its own pages starting on October 14. Only opposition ads would have to be fact checked given that, as of October 26, there had been no ads supporting a convention in any mass media in Hawaii.

Given its much greater size in comparison to *Civil Beat*, the paucity of the *Star-Advertiser*'s news coverage of the convention referendum is striking. In contrast, the *Star-Advertiser*'s much greater news coverage of the other constitutional question on

the ballot, an amendment to increase property taxes, approximately matched that of *Civil Beat*'s.

The *Star-Advertiser* is the 14th largest daily newspaper in the United States ranked by daily circulation. That extraordinary feat of size for the eleventh smallest state in the U.S. ranked by population is due to arguably the highest concentration of media ownership of any state in the U.S. The *Star-Advertiser*'s parent company, Oahu Publications, has revenue about 20 times that of *Civil Beat*. Oahu Publications is a subsidiary of Black Press, a privately held company with some 150 newspapers.

Constitutional Implications

Perhaps no other newspaper company in the United States benefits more from the Federal Government's newspaper anti-trust exemption than Oahu Publications. The exemption was originally granted to preserve First Amendment values (we want to be very careful granting the government the power to regulate newspapers). But in cases of extreme market power, such as Oahu Publications, the exemption may come at a great cost to public deliberation and democracy more generally.

Oahu Publications also benefits from Hawaii State government subsidies and policies that bolster its monopoly power. The most notable subsidy it benefits from are government mandated legal notices, which may constitute more than 10% of its profits.
The laws mandating such subsidies do not mandate public transparency and thus accountability. But newspaper companies know the value of these subsidies and fight for them below the public radar like a lion guarding her cubs. Not only does Oahu Publications benefit from such government mandated subsidies, but the laws are written to specifically advantage it over potential competitors in winning such subsidies.

With the development of modern information technology, this type of public notice has become highly inefficient, ineffective, and anti-democratic. It survives because of Oahu Publications' lobbying prowess over state legislators, who know the famous political maxim that it is never politically wise to "pick a fight with anyone who buys ink by the barrel and paper by the ton."

More generally, the structure of Hawaii's obsolete right-to-know laws benefits local mass media publications such as Oahu Publications at the expense of civil society and democratic participation more generally. For example, any law that relies on the court of public opinion for its practical enforcement (as opposed to, say, proactive online disclosure) is inherently biased to favor established mass media and wealthy special interests at the expense of civil society. There are also many other ways, including informal ways, that government information systems have come to favor the *Star-Advertiser* at the expense of potential competition, including civil society.

These are among the issues that a Hawaii State constitutional convention could address but that the *Star-Advertiser* would view as a direct threat to its bottom line. Expecting

the *Star-Advertiser* or the State Legislature to initiate a genuine discussion of such issues has proven politically unrealistic.

Conclusion

From my perspective, much of newspapers' talk about their public service mission and journalistic ethics amounts to BS. I don't doubt that many journalists sincerely believe such talk and that such public avowals probably have a salutary influence on their work. But given the crooked timber of humanity, the journalistic safeguard that is most important for a community to have is competition. If you doubt that, just compare *Civil Beat*'s and the *Star-Advertiser*'s coverage of Hawaii's constitutional convention referendum.

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Source: Snider, J.H., The War Between Civil Beat and Star-Advertiser on the Con-Con Referendum, *Hawai`i Free Press*, October 27, 2018.

Con-Con: Hawaii's only hope for term limits

by J.H. Snider | November 1, 2018 | Hawai`i Free Press

Hawaii has arguably the least competitive state legislative elections among the 50 U.S. states. At its Aug. 11 primary, 96.2 percent of elected state legislators seeking re-election won. No incumbent is expected to lose in the Nov. 6 general election.

Another measure of competitiveness is the number of seats in a legislature held by a single party. In Hawaii, it's 93.4 percent, the highest percentage in the United States. In the state Senate, one party holds 100 percent of the seats.

When the monetary advantage of winning candidates is factored in, Hawaii also comes out at the bottom. According to the National Institute on Money in Politics, 100 percent of Hawaii candidates with both an incumbency and monetary advantage won in the last general election — the worst among the 50 states.

In the 2018 primary, all three challengers who beat incumbents were backed by the Hawaii State Teachers Association, one of Hawaii's most powerful trade associations. One was HSTA's secretary-treasurer, one of HSTA's top four positions; another had been deputy director of Hawaii's Department of Labor and Industrial Relations.

When voters feel the system is rigged and their vote doesn't matter, they are more likely not to vote. This is a major factor in explaining Hawaii's extraordinarily low voter turnout.

For details on the lack of competitiveness in Hawaii State Legislature Elections, check the Legislature Entrenchment page on the The Hawai'i State Constitutional Convention Clearinghouse.

Term Limits As A Solution

Term limits for state legislators would reduce Hawaii's excessive level of legislative entrenchment. To be sure, term limits is a second-best solution to this problem. In an ideal world, a better solution would be to tackle the many contributing factors to incumbent entrenchment, including pro-incumbent legislative redistricting, ethics, transparency, campaign finance, voting rules and ballot access.

But the public rightfully trusts the term limits solution because, although imperfect, they know this solution cannot be rigged to favor incumbents.

In Hawaii, as in other states, legislative terms limits are highly popular. A Civil Beat poll found 68 percent support among all respondents and 81 percent support among respondents expressing support or opposition.

A state constitutional amendment is necessary to enact term limits. But the State Legislature will never place such an amendment on the ballot because it's not in its institutional self-interest to do so. In contrast, it has acceded to popular opinion on term limits for the governor, lieutenant governor, county mayors and county councilors in part because such term limits don't directly limit its own power.

Other states have circumvented state legislature opposition via the constitutional initiative (often called "direct democracy"). Although Hawaii lacks that legislative bypass mechanism, it does have the alternative: the periodic state constitutional convention referendum. The lack of a constitutional initiative is why a constitutional convention is Hawaii's only hope to pass legislative term limits.

Throughout most of American history, the average term of a state legislator was relatively short, so term limits weren't needed. During that period, legislators predominantly thought of themselves as citizen-legislators rather than career-legislators; couldn't expect to earn a living, let alone make a career, out of serving in office; and had less incentive to fine-tune government institutions to entrench themselves.

Term Limits Politics

The coalition members opposing a yes vote on the Nov. 6 state constitutional convention referendum have avoided discussing the issue of legislative term limits in their ads, op-eds, and news interviews. This is because they know how popular term limits are in Hawaii and the unique ability of a state constitutional convention to bypass the State Legislature's implacable opposition to giving the people what they want on this issue.

Instead, they have attacked the state constitutional convention as a needless, costly, and risky democratic reform mechanism. But what is costly and risky to special interests may be beneficial to the people of Hawaii.

Consider term limits as a case study to think about the cost and risk issue.

Opponents say a convention would cost too much. But would you be willing to spend $5 to win term limits for state legislators? (Hawaii's last convention in 1978 cost $2.03 million, or about $7.5 million in today's dollars, which comes to about $5 per citizen; in contrast, Hawaii state and local government costs about $10,000/year per citizen.)

And how risky would it be if a convention proposed term limits? Clearly, state legislators and the special interest groups that have invested heavily in securing influence over them would view it as a grave risk. But the average citizen would have a very different risk profile.

Conclusion

At Hawaii's revered 1978 constitutional convention, the people won term limits for the governor and lieutenant governor. At Hawaii's next convention, they could do the same for the State Legislature, which has a 21% approval rating, far lower than in 1978 when seats for the Legislature were far more competitive.

Hawaii's Framers created a government based on checks & balances because they feared legislative tyranny if checks weren't placed on the Legislature. Among those checks are the executive branch, judicial branch, local government, and the constitutional convention.

As an integral part of this checks & balances system, Hawaii's Framers created the periodic state constitutional convention referendum so the people could bypass the Legislature when the Legislature's and people's interests conflicted. They understood the Legislature wouldn't call an independent constitutional convention on its own, so the periodic referendum was created to allow the people to call a convention despite the Legislature's opposition.

Term limits is a vivid example of an issue well-suited for a convention to address. But there are also many others. It is these other issues that Hawaii's special interests most fear, and it is why as of Oct. 22 they had already spent more than $600,000 on TV, radio, newspaper, and digital ads opposing a convention. Of that $600,000, 100% was spent by unions, including approximately two-thirds by the National Education Association and two of its Hawaii affiliates, and one-third by the Hawaii Government Employees Association. No money was spent on ads favoring a yes vote.

We should honor the Framers' foresight in granting the people a practical, if flawed, mechanism to bypass the Legislature. The people's right to reform their government, including in the face of a Legislature's self-interested opposition, is their most fundamental and thus precious democratic right.

LINK: Articles by J H Snider PhD

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Source: Snider, J.H., Con-Con: Hawaii's only hope for term limits, *Hawai`i Free Press*, November 1, 2018.

Who Spent What, When, and Where on the Con-Con

by J.H. Snider | November 3, 2018 | Hawai`i Free Press

Hawaii's Campaign Spending Commission states in its mission statement that it is "committed to maintaining integrity and transparency in political campaigns by making sure everyone has the opportunity to 'follow the money.'" How good a job has it done fulfilling this mission in the campaign finance data it has reported regarding the constitutional convention referendum? And how good a job has the press done in not only reporting the flaws in the data reported by the Spending Commission but compensating for them with its own investigative reporting?

The Commission's Con-Con Disclosures

Hawaii's Campaign Spending Commission has four deadlines for reporting campaign finance data related to Hawaii's Nov. 6, 2018 constitutional convention referendum: Oct. 1, Oct. 29, Nov. 5, and Dec. 6.

The end of the reporting period for each deadline precedes the deadline. It is Sept. 26 for Oct. 1; Oct. 22 for Oct. 29; Nov. 2 for Nov. 5; and Nov. 6 (Election Day) for Dec. 6.

Since reports are often filed at the last minute (filings are accepted until 11:59 pm), the press waits at least one extra day before reporting the results. For example, the press reports for the period ending Oct. 22 appeared on Oct. 31 in the *Honolulu Star-Advertiser* and Nov. 1 in the Honolulu Civil Beat.

For the period ending Sept. 26, no contributions or expenditures were reported for either a yes or no campaign.

For the most recent period ending Oct. 22, the No Campaign under the name "Preserve Our Hawaii" reported contributions of $665,000 and expenditures of $612,513. Consistent with press reports observing no organized yes campaign, there were no reported contributions or expenditures for a yes campaign.

All the contributions to Preserve Our Hawaii were made by government unions. The National Education Association and its two Hawaii affiliates (the Hawaii State Teachers Association and University of Hawaii Professional Assembly) contributed 60% ($400,000), the Hawaii State Government Employees Association contributed 36% ($240,000), and the Hawaii Fire Fighters Association contributed $25,000 (4%). The dominant role of government unions in financing the no campaign is consistent with campaign finance disclosures in both other states and Hawaii during recent decades.

The contributions began on Sept. 28, thus missing the Sept. 26 close-of-business filing deadline by little more than 24 hours. Absentee ballots were mailed to voters on Oct. 17, with some receiving them as early as Oct. 18. Early walk-in voting began on Oct. 23. Given that the first news report on contributions and expenditures was Oct. 31, there were eight days of early voting and nineteen of absentee ballot voting before the public had

any authoritative information about who was financing the no campaign, including the countless "Preserve Our Hawaii" ads shown on virtually every radio, TV, and newspaper outlet in Hawaii. According to Civil Beat, "By [Oct. 29], it's likely that a majority of Hawaii voters will have already cast their ballots." After the start of absentee and early voting, news and op-ed coverage of the convention referendum greatly diminished, so ads became the principal source of new information about the convention.

More than 99% of Preserve Our Hawaii's reported expenditures cover the cost of producing and distributing ads. Between Sept. 28 and Oct. 22 ads were reported placed in the following media:

- Radio ads: KNDI, KKEA, KKOL, KDDB, KUMU, KRTR, KINE, KPHW, KUCD, KDNN, KZOO, KPOA, KJMD, KJKS, KLHI, KITH, KJMQ, KFMN, KQNG, KSHK, KSRF, KUAI KRYL, KRKH KHBC, KWXX/KAOY, KNWB-KMWB, KAP,KKBG, KKPV;
- TV ads: KIKU, KITV, CW (NHON), Spectrum, KBFD, KHNL, KGMB, and KFVE;
- Print ads: Honolulu Star-Advertiser, Hawaii Tribune, West Hawaii Today, Maui News, and The Garden Island;
- Digital ads: Goodway, Spotx, Hawaiinewsnow.com, and Staradvertiser.com.

The first contribution to Preserve Our Hawaii was reported on Sept. 28, the same day ads were purchased and possibly launched on the following radio stations: KAPA, KKBG, KPVS,KWXX/KAOY, KNWB-KMWB, KHBC, KRYL, KRKH, KQNG, KSHK, KSRF, KUAI, KFMN, KITH, KJMQ, KPOA, KJMD, KJKS, KLHI.

The dates of Preserve Our Hawaii's first contributions and expenditures are remarkable for two reasons. First, they both occur on the same date. Normally, substantial contributions come days or weeks before substantial expenditures. Businesses, too, generally won't sell on credit to a major new customer, such as a short-lived political action committee, lacking an established credit record or assets to seize in the case of non-payment. One would also normally expect that professionally made ads take at least days, if not weeks or months, to prepare prior to being run on a commercial radio station. Leaving aside the question of how focus-group tested and professionally produced ads could have been generated in a fraction of a day, one might marvel at the masterful coordination required to do the following all on Sept. 28: 1) transfer money to Preserve Our Hawaii, 2) transfer money from Preserve Our Hawaii to Core Group One for its professional services, 3) transfer money from Preserve Our Hawaii to more than a dozen radio stations, and 4) get presumably some of the radio stations to run the ads on the same day, including during the narrow drive time windows most sought by advertisers. (Note that the campaign expenditure report provides information about the dates ad expenditures were made, not the dates that the ads were run. But it can reasonably be inferred that the ads did not run before the expenditures were made.)

Second, the contributions and expenditures both occurred little more than 24 hours after the disclosure deadline for reporting such contributions and expenditures. This fits the long-term pattern of no campaigns making contributions shortly after reporting deadlines.

Why would they do this? A major argument against calling a convention promoted by Preserve Our Hawaii is that well-heeled special interests favor a yes vote and will therefore, presumably, spend money to support a convention. As the Treasurer of the Hawaii State Teachers Association wrote in an op-ed: "Across the nation, support for … state-level Constitutional Conventions predominantly comes from right-wing organizations and Wall Street…. [V]oters should oppose a ConCon this year and… put people before profit." But if no campaign contributions outgun yes campaign contributions by a factor of more than 100:1 and are also dominated by some of the most powerful special interests in contemporary Hawaii State politics—that is, government unions—this message is undercut, as people might ask themselves: "why would special interests spend so much to defeat a referendum on whether to call a state constitutional convention?" A related theme, that special interests favoring a yes campaign are from out of state, is also undercut when the only out-of-state money, in this case the National Education Association's $250,000 contribution as of October 22, is on the side of the No Campaign.

If the past is a guide, most no coalition contributions and expenditures won't occur until after the Oct. 22 deadline, when there are still 15 days to influence the election under the cover of darkness. The next reporting deadline doesn't occur until the evening before the election, when most people have already made up their minds and the media in any case has no time to analyze the convention referendum reports—as well as the reports for more than a hundred candidate races.

And all this assumes that the reports are accurate. But the campaign finance disclosure system tends to depend on the court of public opinion rather than the court of law. And even when the press is remarkably diligent reporting irregularities after an election, it is hard to go after the PACs making the contributions and expenditures, when they will soon depart forever from the face of the earth and the public has already moved on to other interests. Rhode Island's repeated experience with campaign finance disclosure violations by constitutional convention opponents illustrates how flawed and impractical enforcement can be.

A remarkable feature of constitutional convention news coverage is that it tends to wind down just as a no campaign's advertising campaign accelerates and voters are paying most attention. The news media seems to feel that it should publish its coverage before early voting begins. But that's when no campaigns, which have the only substantial advertising budgets, go into high gear—assuming they are still worried that they might lose.

In short, Hawaii's campaign finance disclosure rules, especially its deadlines, create opportunities to ensure that disclosures don't occur when they are politically relevant.

Internal vs. External Disclosures

Campaign finance disclosure laws for ballot referendums focus on contributions for an organization's external rather than internal expenditures. Consequently, they have been most complete in encouraging disclosure of mass media advertising, including the hiring of vendors who are experts at developing and distributing such ads.

Campaign expenditures made within an organization need not be disclosed. These include having a staffer who is an expert on constitutional convention referendums, internal staff who are experts in conducting focus groups and in message development, internal staff who organize and administer the No Coalition, internal staff who conduct the tracking polls to see whether additional expenditures are needed to win the campaign, internal staff who are expert in writing grant proposals to seek money for an advertising campaign (in this case, from the National Education Association's $60 million ballot initiatives fund), office space already owned or leased by the organization, and communications to members via email, newsletters, phone banks, and social media.

When there is a two-step flow of communications from an organization to its members and then to the general public, these are also considered non-disclosable internal contributions and expenditures. For example, if an organization distributes yard signs, handbills, car bumper stickers, and other media to its members, these are non-disclosable even if the members then use those media to influence the general public. A case study is New York in 2017, when the various unions opposed to a convention distributed more than 300,000 free yard signs to their members, who then placed those signs on their yards for tens of millions of New Yorkers to see. None of the production or distribution expenses associated with those yard signs needed to be disclosed.

Large vs. Small Organization Disclosures

The disparate treatment of internal vs. external expenditures means that large interest groups with massive organizations and memberships have an advantage over small ones, assuming it's to a group's advantage to keep its expenditures secret. That's because small organizations must spend money externally to do what large organizations can do internally. The National Education Association and the Hawaii State Government Employees Association, the two leading contributors to Preserve Our Hawaii, are examples of large interest groups with massive organizations and memberships.

Direct vs. Indirect Disclosures

Only direct expenditures need to be disclosed. For example, if Organization X contributes to Organization Y, who then either contributes or advocates in a way aligned with the interests of Organization X, the contribution of Organization X need not be disclosed. A case study is Rhode Island in 2014, when a union opposed to calling a constitutional convention referendum took advertising in the program brochure for the Rhode Island ACLU's annual meeting, and the ACLU then contributed to the no coalition and advocated on its behalf. The contribution to the ACLU did not have to be

disclosed because it was indirect and could arguably be said to be unrelated to the convention referendum.

Understated vs. Overstated Disclosures

The law is geared to prevent under reporting of campaign finance disclosures. Thus, there is little to prevent campaigns from overstating disclosures when it is in their interest to do so. Overstating contributions may work best with so-called in-kind contributions, which are non-cash contributions. Examples of common in-kind contributions are the value of campaigners' time and the office and other materials allocated to their campaign.

From an individual filer's perspective, the option to report a given in-kind contribution may be viewed as discretionary, which it is from a legal perspective. But from the perspective of a member of the public trying to compare the relative strength of yes and no campaigns, contribution totals can be misleading.

The problem is that whereas no advocates have traditionally sought to minimize the visibility of their contributions, yes advocates may seek to do the opposite. The reason is that yes campaigns tend to be tiny in comparison to no campaigns and their advocates know that journalists will be looking at and reporting on the campaign finance disclosures. A high contribution figure will give a yes advocate more credibility and publicity in major media for the issue or issues they are promoting. The publicity they seek may include not only the initial campaign finance news reports but follow-up interview shows and news reports where reporters want to fairly provide both yes and no advocates. Thus, they have an incentive to provide high estimates for the value of in-kind contributions, such as the value of their time and office space, devoted to advocating for a convention.

To my knowledge, no contributor listed on a campaign finance disclosure form has ever been punished for overstating contributions.

In 2018, no in-kind contributions were reported by Preserve Our Hawaii, the only group to file a campaign finance disclosure statement.

The Citizens United Bogeyman

Hawaii's Campaign Spending Commission mission statement begins: "Since the U.S. Supreme Court's landmark Citizens United decision in 2010, there has been a nationwide concern about the influence of big money being raised and spent on campaigns." The Commission's narrow focus on countering the impact of Citizens United may help explain its poor rules regarding periodic constitutional convention referendums.

Regardless of the problems with the Citizens United decision, it doesn't justify the No Campaign's overbroad use of it as a bogeyman to explain why dark money would dominate the convention process.

None of the campaign finance disclosure flaws described here relate to the U.S. Supreme Court's 2010 Citizens United v. Federal Election Commission ruling. That's because

the rulingaffected candidate, not referendum, campaigns. Prior to 2010, ballot committees in Hawaii could already spend unlimited amounts of cash for or against a referendum.

Press Coverage

The press should do a better job reporting on the strengths and weaknesses of the Campaign Spending Commission's information, and supplement it by additional information, especially about ad campaigns.

The single biggest easy-to-correct omission is the press's lack of reporting on the specific ads paid for with those campaign expenditures. Why this is so is unclear to me. One contributing factor might be the media's positive dislike of reporting this type of information. Media outlets generally have a rule against mentioning the name of a competitor, which is hard to follow when analyzing ad campaigns on competitors' media. They also as a rule don't criticize substantial advertisers; that is, bite the hand that feeds them.

Another contributing factor may be the relatively high cost of gathering such information. The government (i.e., the Campaign Spending Commission) doesn't collect detailed ad information, so news outlets would have to incur the expense of gathering the information on their own. Doing so may be especially costly for radio and TV ads concerning statewide issues (which are exempt from government mandated disclosure rules concerning federal issues) because such ads are not searchable on the web. If a reporter doesn't watch them in real time—and there are more than 40 such media outlets in Hawaii—they effectively become invisible. The problem of tracking social media ads may be even greater. Indeed, Congress is trying to mitigate this tracking problem with the Honest Ads Act, which would regulate online campaign advertisements on platforms such as Facebook and Google. On the other hand, social media advertising remains a relatively small part of the overall advertising mix.

Nevertheless, given the pervasiveness of no campaign ads during the immediate runup to the Nov. 6 referendum, the costs of gathering timely information about such ads should be minimal. Reporters, for example, could monitor the drivetime radio ads while walking or driving to work in the mornings and evenings. In any case, the media is likely to analyze those ads in their post-mortem after the election, so the question is one of timing. From the standpoint of meaningful democratic accountability on a periodic constitutional convention referendum, the only useful time to analyze those ads would be before the Nov. 6 referendum.

Press and Public Policy Recommendations

The Campaign Spending Commission exists because it provides valuable information to voters. The central importance of campaign spending in determining voters' decisions on the convention referendum is reflected in the focus that the No Campaign has placed on the issue in its advertising, op-eds, and news interviews. There it argues that wealthy and

out-of-state special interests favor a convention because a convention is an opportunity to effectively push their agenda.

Meanwhile, the groups making such claims have sought to hide their own outsized contributions to no campaigns because open disclosure would conflict with their ad campaigns and other messaging. This pattern of hiding one's out-sized resources is part of a larger messaging strategy, which includes hiding the No Campaign's financiers and organizers behind a façade of more popular surrogates. It is these surrogates, in turn, who primarily make the Machiavellian argument about the role of monied interests favoring a state constitutional convention in Hawaii.

Despite the many flaws in Hawaii's campaign finance disclosure system concerning periodic state constitutional convention referendum campaigns, it does provide valuable information to voters. But to the extent the press doesn't report on the data and its significance, collecting it is a waste of the public's money.

The press should also do original research to supplement the Campaign Spending Commission's data. For example, it should attempt to report on the type of internal organization expenditures that the Commission's data omits, and it should provide more timely information on the ads that constitute the bulk of the expenditures.

The press also needs more public policy help to do its job. The campaign finance disclosure regime should be reconceptualized and reformed. For example, online disclosure of radio and TV ads for statewide issues should, at a minimum, be brought up to the same standard of disclosure mandated by the FCC for federal issues. And for the first time, as proposed by theHonest Ads Act, internet ads should be brought under a similar disclosure regime.

Conclusion

The next round of Campaign Spending Commission disclosures on the constitutional convention referendum should be posted by 11:59 pm on Monday, Nov. 5. Let's hope the news media stay up until the wee hours of Nov. 6 so they can not only publicize the disclosures by the time the polls open on Election Day the next morning but do so with thoughtfulness. I wouldn't bet on it.

LINK: Articles by J H Snider PhD

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Source: Snider, J.H., Who Spent What, When, and Where on the Con-Con Referendum, *Hawai`i Free Press*, November 3, 2018.

Hawaii's Failed Campaign Finance Law: The Case of the Star-Advertiser's Missing Front Page Ad Disclaimer

by J.H. Snider | January 19, 2019| Hawai`i Free Press

Hawaii's Campaign Spending Commission claims that its "mission is to maintain the integrity and transparency of the campaign finance process by enforcing the law," including "making sure everyone has the opportunity to 'follow the money,'" especially for "ballot issue committees." Unfortunately, in the leadup to last November's state constitutional convention referendum, this language proved to be mere feel-good political pablum.

The Violation

On November 5, 2018, one day before the election, convention opponents ran an ad on the front page of the *Honolulu Star-Advertiser*, the most valuable print real estate in the State of Hawaii, as the *Star-Advertiser* is Hawaii's dominant daily newspaper.

Missing from the ad was the legally required disclosure of who paid for it. This disclosure requirement is important because without it voters cannot "follow the money," which, as noted above, is the reason the Campaign Spending Commission exists. If Hawaii's most powerful special interests found it in their self-interest to voluntary disclose their campaign spending, Hawaii wouldn't need a Campaign Spending Commission.

The Campaign Spending Commission's Response

On the morning of Nov. 5, immediately after I spotted the violation, I called the Commission after first notifying the Board of Elections. Given that it was only one day before the election, time was of the essence. After the election, people wouldn't care, as breaking the campaign disclosure law would make no practical difference. So, after calling, I emailed and then called again. My hope was that the Commission would issue a press release—or at least send out one of its innumerable tweets—notifying the public of the violation.

The day after the election, General Counsel Gary Kam finally got back to me. He immediately acknowledged that the ad violated the law, but he said he couldn't do anything until the *Star-Advertiser*, which ran the ad, confirmed that Preserve Our Hawaii had bought it. The penalty to Preserve Our Hawaii for the violation would be $25; the penalty to the *Star-Advertiser* would be nothing, as newspapers are not penalized for running illegal political ads even if they know they are illegal.

Two days later I received an email from the Commission claiming that for them to pursue the $25 fine against Preserve Our Hawaii, I would have to fill out, sign, and notarize their formal complaint form alleging the violation the Commission had already acknowledged was an obvious violation.

I explained to General Counsel Kam that such a request would make "a mockery of the Campaign Spending Commission, and the trust the public has placed in it." He apparently agreed. On November 13, he withdrew the request and notified me that both the *Star-Advertiser* and Preserve Our Hawaii were being asked for information regarding the violation and that he would notify me when he heard back.

The complete correspondence can be found on the Hawai`i State Constitutional Convention Clearinghouse.

The Bystander Effect

Perhaps the most remarkable feature of the front page political ad violation was that no one else reported it to the Commission despite the fact that thousands of people, including most *Star-Advertiser* staff, anyone who has ever run as a political candidate in Hawaii, and every Commission staff member, presumably both saw the front page ad and immediately knew it was illegal.

Such behavior reminded me of the "bystander effect," often taught to social psychology students by means of the Kitty Genovese story. While Ms. Genovese was murdered in front of her New York City apartment building, dozens of the apartment dwellers heard the drawn-out and very loud murder as it was taking place. But no one alerted the police, reasoning that they had more to lose than gain by doing so.

In the ad disclaimer case, the bystanders could have reasonably worried about needlessly getting on the bad side of some of Hawaii's most feared political players, including the *Star-Advertiser*, the government unions who paid for the ad, the Campaign Spending Commission, and the politicians who created Hawaii's dark money ballot issues system while pretending to do otherwise. To alleviate such fears of retribution, inspectors general and other government watchdogs (but not the Campaign Spending Commission) institute systems allowing citizens to report waste, fraud, and abuse through anonymous "hotlines."

The Violators' Responses

After eight weeks had passed and I hadn't heard back from the Commission, I requested an update on the case. General Counsel Kam replied that on December 4, more than a month earlier, Preserve Our Hawaii had paid the $25 fine. Although December 4 was before the Commission's final December 6 deadline for reporting campaign expenditures, the $25 penalty was apparently not disclosed because only expenses prior to the election needed to be reported. Thus, any reporter looking at the Commission's final report on Preserve Our Hawaii, let alone its November 5 report deadline (more than 12 hours after the violation occurred), would have had no knowledge of either the violation or the penalty.

After the *Star-Advertiser* was asked who had paid for its front-page ad violating the campaign finance law, it presumably didn't think the violation newsworthy, as it didn't report on it, even to bury it in a short notice on its rarely read back pages.

The Deterrence Effect of the $25 Fine

The deterrence of the $25 fine on Preserve Our Hawaii was obviously negligible. As of the Nov. 6 election, Preserve Our Hawaii had raised $740,000.00 and spent $662,529.5 to defeat the referendum. Virtually all that reported sum went to advertising, including the design and distribution of the ads. Note that most non-media expenditures were exempt from disclosure, including in-house staff used for conducting polls, focus groups, and other research on the referendum; organizing the no coalition; and hiring and then managing the various outside contractors.

Preserve Our Hawaii's last payment to the Star-Advertiser was $23,283.01 on Oct. 30, presumably for its Nov. 5 front page ad. Adding the disclaimer to the ad covering the most expensive print advertising real estate in Hawaii would have taken up far more than $25 worth of space. My guess, then, is that the payback for violating the law and thus saving on extraordinarily precious ad space was more than 100:1.

Obeying the law would also have significantly reduced the effectiveness of the ad. All of Preserve Our Hawaii's contributions came from government unions, including four-fifths from two of Hawaii's most powerful unions, the Hawaii Government Employees Association and the Hawaii State Teachers Association (most of the latter's contribution came from its parent union's $60+ million ballot campaign fund). Disclosing this information would have undercut Preserve Our Hawaii's message about powerful special interests supporting but not opposing a convention.

Some readers would also have reasonably assumed that the front-page message was the *Star-Advertiser*'s own editorial position. After all, not only was the message its editorial position, but the law required that if it wasn't the ad would have to include a disclaimer. Trusting readers would presumably have expected the *Star-Advertiser* to comply with Hawaii's campaign finance disclosure laws, given that it has often editorialized in favor of the principle behind those laws.

In short, on strictly economic grounds, the deterrence effect of the $25 penalty, the equivalent of about a .1% tax, was negligible. It was like having the government offer a blatant lawbreaker the following two options: pay a $25 fine to earn a $1,000 profit or don't break the law and earn nothing.

The Court of Public Opinion Rationale

Politicians and the media often argue that small penalties for campaign finance violations are all that is necessary because the most practical deterrent for such violations is the court of public opinion, not the court of law. But Preserve Our Hawaii, unlike candidates who will be up for election in the future, had no reputation to lose after the election because it ceased to exist.

If the public had been widely informed of the violation on Nov. 5, this argument would have been credible. But the Campaign Spending Commission refused to issue a press release or other communications alerting the public of the violation. And the *Star-*

Advertiser not only had no incentive to alert the public to the violation but had a significant economic incentive to turn a blind eye.

To be fair, it's very hard to enforce conventional campaign finance disclaimer laws in the court of public opinion shortly before an election, as there isn't enough time to correct the record. But it should never have been necessary to correct the record, as the *Star-Advertiser* should simply have refused to run an ad that its political advertising staff and senior editors undoubtedly knew was illegal.

Recommendations

The conventional villains in campaign finance disclosure stories, as told by news media, are politicians and special interests. But I'd suggest the greatest villain in this story is the *Star-Advertiser*, which has more monopoly power over its state's news than any other newspaper in any other state in the United States. For example, the *Star-Advertiser* ranks 12th in total daily circulation, even though Hawaii is only the 40th largest state in the United States.

Why did the *Star-Advertiser*'s editorial and advertising staff choose to run an ad that they must have known was illegal? From a short-term business perspective, the answer is clear. There is no financial penalty in Hawaii when a media outlet publishes a political ad that fails to include a disclaimer. The penalty only applies to the entity placing the ad, not the entity that runs it. In this case, the financial reward was great (ads running the day before an election often cost the most) and the reputational risk the least (which helps explain why negative ads predominate just before an election).

But if Hawaii had a competitive media system the *Star-Advertiser* would have had to think twice about not only abetting the violation of a law but violating the type of law it claims it supports as the people's tribune. When you have substantial monopoly power over information—whether you're a politician or media outlet—you have much less reputational risk to fear from bad behavior.

A good starting point to break the *Star-Advertiser*'s monopoly power in Hawaii would be to end its highly profitable monopoly over government mandated legal advertising, which the state legislature granted it. No government should grant one competitor in a marketplace a 15% revenue advantage, which results in a 50% profitability advantage (due to the very high profitability of the legal ads), over potential competitors. (These amounts are only estimates, as the actual amounts and profits the *Star-Advertiser* receives from legal ads is a closely guarded secret.) The subsidy also makes the *Star-Advertiser* beholden to legislative leaders, which is bad for press independence.

Government mandated legal ads once fulfilled an important information function, just as newspaper classified ads provided a valuable information service before the advent of the Internet and the emergence of more efficient and effective services such as Craigslist. But they now hinder the public's right to know, just as would a government mandate to continue using the horse-and-buggy after the automobile had been invented. Many

Hawaii politicians are aware of the problem. But they are terrified of getting on the *Star-Advertiser*'s bad side. As the famous political adage goes, "Never pick a fight with someone who buys ink by the barrel." (The same adage also applies to reporters who want to preserve their option open of one day working at the *Star-Advertiser*.)

Hawaii deserves an honest and open discussion about the *Star-Advertiser*'s role in subverting Hawaii's campaign finance disclosure laws, just as it deserves an open and honest discussion about the merits of government mandated legal ads. Alas, neither the *Star-Advertiser* nor Hawaii's politicians are likely to engage in such a discussion.

Fixing the perverse incentives in Hawaii for last minute violations of its campaign finance disclosure law regarding Hawaii's periodic state constitutional convention referendum could arguably require a state constitutional convention, as Hawaii's dominant media outlet and most powerful politicians benefit from such violations. If so, the incentives constitute a Catch-22.

LINK: Articles by J H Snider PhD

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Source: Snider, J.H., Hawaii's Failed Campaign Finance Law: The Case of the Star-Advertiser's Missing Front Page Ad Disclaimer, *Hawai`i Free Press*, January 19, 2019.

For the correspondence on which this article is based, see Snider, J.H., Correspondence Concerning the Star-Advertiser's Front-Page Campaign Finance Ad Disclosure Violation, *Hawai`i Free Press, January 9, 2019.*

NEW YORK:
NOVEMBER 7, 2017

Preparing for New York's Next Constitutional Convention Referendum

by J.H. Snider | June 24, 2015 | Gotham Gazette

New York's Constitution mandates a statewide referendum every twenty years on whether to convene a state constitutional convention. The time has come to begin preparing for the next referendum on Nov. 7, 2017, at which time voters will decide whether there is a convention the following April after the next general election. Steps must begin to be taken now so that New Yorkers are ready to make an informed decision.

The referendum has two special democratic functions. First, to allow voters to bypass the legislature's gatekeeping power over constitutional amendment. The legislature has an institutional conflict of interest proposing amendments that would enhance the power of competing branches of government (e.g., the executive and judicial branches) or make itself more democratically accountable (e.g., legislative redistricting, ethics, transparency, term limits, and campaign finance).

Second, is to streamline a constitution. New York's current constitution is over 50,000 words long—approximately seven times the length of the U.S. Constitution. It is practically unreadable, encrusted with 225 amendments and numerous obsolete provisions. Conventions have proven better suited than legislatures at creating concise, readable constitutions.

American states have convened 236 conventions since 1776, including nine in New York. But the politics of convening one has become dismal due to opposition from legislatures, big business, and, especially since the 1970s, big labor. Unlike legislatures, powerful producer groups don't have an institutional conflict of interest. But they prefer to exercise influence through the legislature, where they have invested heavily in relationships and favorable institutional procedures. Sucked into this power vortex are many public interest groups who depend on the goodwill of these powerful political players to win legislative support for their primary institutional agenda, which rarely includes good government constitutional reform.

However, the politics of calling a New York convention are not hopeless. Thomas Jefferson, author of the U.S. Declaration of Independence and often credited as the inspiration for New York's periodic convention referendum, argued that America's state constitutions should be living documents, revisited every twenty years. Until the last fifty years, this vision had an extraordinarily rich history in New York.

New York's convention tradition can be reinvigorated—but only with an innovative educational campaign. Most New Yorkers don't even know they have a state constitution,

let alone what's in it. As for state conventions, the vast majority of New Yorkers are unfamiliar with their history, function, and procedural safeguards.

New Yorkers wouldn't tolerate voting for a governor in such ignorance; neither should they tolerate such ignorance voting for a convention. To facilitate public understanding of the tradeoffs between legislature and convention initiated constitutional reform, the public deserves more than soundbite-sized yes and no ballot advocacy campaigns.

Governor Andrew Cuomo should create a commission composed of respected retired journalists to solicit, moderate, and publish public feedback on whether New York should convene a convention. This should include webcast public hearings and a public website modeled after the public commenting system used for regulatory proceedings. When campaigning for governor in 2010, Cuomo announced support for convening a convention and a commission to prepare for it, but his proposed commission was to convene after rather than before the referendum and to make rather than exclusively solicit recommendations.

High school debate teams should be invited to debate the question as written in New York's Constitution: "Shall there be a convention to revise the constitution and amend the same?" High school history and government classes should invite students to vote on the question in mock elections.

New Yorkers should have an opportunity to learn about their rich convention history via a televised documentary and museum exhibit. Events during 2017 on New York State History Day and Constitution Day could contribute to this effort.

Think tanks, museums, and other nonprofits should conduct webcast pro-and-con discussions about convening a convention. All the major viewpoints should be given a thorough public airing.

Media outlets should assign a reporter to cover the convention referendum just as they assign reporters to cover major statewide elections. They should also survey the public about its knowledge of New York's state constitution and convention process so that key areas of ignorance can be publicly exposed and addressed.

In our day-to-day lives, we are as oblivious to the impact of constitutions as to the impact of the air we breathe. But a well-designed, up-to-date state constitution built on an effective updating mechanism is as vital to our body politic as air to our physical body.

Nov. 7, 2017 may seem like a long way off. But for the public to be able to make a well-informed vote on that date, preparations should begin immediately.

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Source: Snider, J.H., Preparing for New York's Next Constitutional Convention Referendum, *Gotham Gazette, June 4, 2015.*

Convention a basic N.Y. right

by J.H. Snider | August 24, 2015 | Albany Times Union

New York's constitution mandates a statewide referendum every 20 years on whether to convene a state constitutional convention. This referendum is next on the ballot on Nov. 7, 2017. If voters pass it, they would then elect convention delegates who would then propose constitutional amendments for voters to approve or reject.

The unique democratic function of this periodic referendum is to provide an opportunity for the people to bypass the Legislature's veto power over constitutional amendment. The people are thus empowered to amend the constitution in ways the Legislature would oppose, including making legislative elections more competitive and strengthening competing branches of government.

To alleviate the problem of voter ignorance prior to the last referendum in 1997, Gov. Mario Cuomo signed an executive order creating a preparatory commission to enable voters to make an "informed decision on whether a convention is desirable in 1997." The commission of 17 gubernatorial appointees collected public recommendations about what a convention should do and then publicly reported its own recommendations.

Cuomo's son Andrew, the current governor, should follow in his father's steps by creating a preparatory commission via executive order that is independent of the Legislature. But its structure and mission should capitalize on the opportunities for public deliberation created by modern communications technology.

Such a preparatory commission would focus on gathering and disseminating recommendations on convention-related issues but not take on the additional task of making its own recommendations. The commission would be very small, say, five members. And rather than being selected from government experts or stakeholders, commissioners would be selected from among retired judges and journalists with a lifelong reputation for fairness. It would let the public submit and view comments on a public website that it moderates and organizes, similar to what's done in the federal rulemaking process. Of course, written comments could be supplemented with conventional public hearings.

Comments would be made in phases; for example, initial comments by August 1, 2017, reply comments by Sept. 15, 2017, and final comments by Nov. 1, 2017. Each round would stimulate discussion and be a point for coverage.

Alternatively, a nonprofit press association, such as the Legislative Correspondents' Association—the organization of journalists who cover state government in Albany—could take on such a crowdsourcing function, similar to the way the press combines resources for a "press pool" for certain events. Foundation money would likely be needed to fund such a system.

Another similar service is provided by the national Democratic and Republican Party organizations when they produce a series of presidential primary debates that help educate reporters and the general public.

Most New Yorkers don't even know that they have a state constitution, let alone what a state constitutional convention might reasonably be expected to do. This commission proposal could help ensure that the public's deliberation on whether to vote for a convention is not dominated by last minute fearmongering, soundbites, and ads.

A sovereign people has no right more fundamental than the right to alter its constitution. This right is embodied in the U.S. Declaration of Independence's assertion that the people have an "unalienable" right to "alter" their government, It is also embodied in the first article of many state constitutions' declaration of rights; and in New York's Nov. 7, 2017 referendum.

The periodic convention referendum implements that inalienable right in its most difficult case: when the people's agents have a conflict of interest with the people. A crowdsourced commission could help the people make that choice in a well-informed way.

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Source: Snider, J.H., Convention a basic N.Y. right, *Albany Times Union*, August 24, 2015.

Board, independent of Legislature, key to constitution fix

by J.H. Snider | November 22, 2015 | Albany Times Union

In early November, the New York State Bar Association released a report calling on state officials to create a "preparatory commission" to prepare New York for the Nov. 7, 2017, statewide referendum on whether to call a state constitutional convention.

The report addresses an important need: New York has a badly outdated constitution in need of repair. Meanwhile, the public is mostly clueless about what's in the constitution — or even that New York has a constitution. And getting a discussion going about how to fix the constitution is not something that comes naturally to either the people or their legislators, who are both distracted by their day-to-day problems. To get a thoughtful discussion going, the best way is indeed a preparatory commission.

So what's not to like? It turns out, plenty.

The report observes in great detail that, since the late 19th century, New York has had a tradition of convening preparatory commissions. But it provides minimal guidance as to which of the different commission types is best. Worse, it implicitly endorses giving the Legislature effective veto power over the commission's work.

The fundamental problem with the bar's proposal is that it undermines the unique democratic function of New York's constitutional convention process, which is to bypass the Legislature's gatekeeping power over constitutional amendments. By design, a convention is a checks-and-balances institution, so a legislature has an institutional conflict of interest when given control over its agenda. A bipartisan commission staffed by experts doesn't solve that conflict of interest.

Once upon a time, convention politics were different. In early New York history, a convention was the primary mode of constitutional change. Legislators may have disliked giving up control to a convention, but they had to take the good with the bad. But with the development and widespread use of the legislatively initiated constitutional amendment process, including various forms of constitutional commission, legislators no longer felt they needed to give up control to get their favored constitutional change.

During the 20th century, incumbent legislators also increasingly came to see serving in the Legislature as their primary career, which made them even more hostile to an institution that could open up a Pandora's box of political competition and democratic accountability.

Preparatory commissions dominated by legislatures propose reforms that don't require a convention. This, in turn, allows legislators and their allies to claim that the Legislature can do everything a convention could at less cost and with less risk. Voters are thus provided with an excellent reason to vote down both calling a convention and a convention's work.

The bar's plan is not without some merit. The Legislature has the money to fund the bar's ambitious and admirable research agenda. The resulting reports may even be excellent, as the Legislature is not an implacable opponent of much useful constitutional reform, including streamlining the constitution. But for such reform we don't need a convention.

I prefer the type of preparatory commission former Gov. Mario M. Cuomo implemented in preparation for the 1997 convention referendum — one that is created by executive order, is relatively inexpensive, and is independent of the Legislature.

But the archaic communications technologies relied on by that commission — a subject on which the bar report says nothing — need to be revisited. Figuratively, we need to move beyond a quill pen-and-ink commission design.

I also prefer allowing a convention to take over most traditional commission functions. This would entail dividing a convention into two stages, an educational stage followed by a traditional convention stage.

It's not enough for a well-designed preparatory commission to be nonpartisan and have expert staff. It must also be independent of the Legislature. Otherwise, a commission will serve as a Trojan horse to undermine the constitutional convention's democratic function. The bar's recommendations fail the Trojan horse test, even as they highlight a problem desperately in need of solution.

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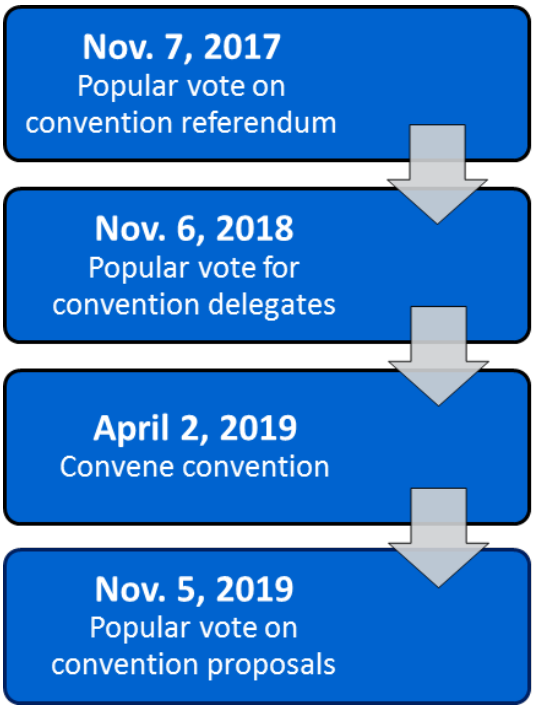
Snider, J.H., Board, independent of Legislature, key to constitution fix, *Albany Times Union*, November 22, 2015.

Cuomo's Preparatory Commission Should Prioritize Fixing Con-Con Process

by J.H. Snider | Jan 19, 2016 | Gotham Gazette



In his 2016 State of the State Address, Governor Andrew Cuomo promised to "invest $1 million to create an expert, non-partisan commission to develop a blueprint for a [constitutional] convention." New Yorkers will vote on Nov. 7, 2017 on whether to call a state constitutional convention and the commission would educate the public on what a "yes" vote might entail.

Traditionally, such commissions have taken the constitutional convention process itself as a given and focused on the substantive changes to state government a convention might propose; for example, today's hot-button issue of legislative ethics. But that agenda is too limited. The commission should also consider reforms to update the convention process.

In the past, a potent argument against calling for a convention has been that a convention would merely replicate the Legislature's corruption. For example, some major New York good government groups opposed calling a convention in 1997, the last time the question was on the ballot, by arguing legislators elected as convention delegates would dominate a convention (approximately 5% of the delegates elected to New York's last convention in 1967 were sitting legislators). Legislators elected as delegates would also unjustly receive two salaries: one for serving as a legislator; another for serving as a convention delegate.

Clearly, fixing such procedural problems is critical to winning popular support for a convention.

Governor Cuomo has taken a good first step in addressing such arguments by announcing that the commission will be "authorized to recommend fixes to the current convention delegate selection process, which experts agree is flawed."

But that is not ambitious enough.

The Legislature currently controls too much of the constitutional convention process. In passing enabling legislation, it has every incentive to exacerbate rather than fix procedural problems so as to make a "yes" vote as unappealing as possible to the electorate. The Legislature has this incentive because New York's Constitution includes a

convention process designed to serve as an effective check on the Legislature's power. That—and not because a convention would be no different than itself—is why the Legislature is an intractable enemy of conventions.

Other states have used the constitutional convention process to fix the constitutional convention process itself, and that should be a major goal of New York's next convention. For example, concerns about legislators serving in a convention could be easily addressed if legislators were banned, as is done in Missouri and Michigan, from running as convention delegates.

Such a ban shouldn't be controversial. Plural office holding is universally banned in American state constitutions because it violates the checks and balances principle. Elected officials, for example, cannot simultaneously serve in the legislative and executive branches. Some states ban public officials from simultaneously holding two public offices even when not violating the checks and balances principle. The more universal principle involved is that it is hard for officials simultaneously holding two separate public offices to fulfill their fiduciary duties of care and loyalty to the public.

But the plural office holding problem is merely one of many procedural issues that a constitutional convention could fix. Instead of New York's past practice of making procedural concerns an objection to calling a convention, they should be one of its chief attractions because a convention is the most realistic opportunity to fix them.

Consider what is at stake. A constitutional convention is the only democratic mechanism New Yorkers have to introduce constitutional amendments that aren't in the institutional self-interest of the Legislature. That's far too important a democratic function—a function that implements the people's most fundamental right, the right to alter their constitution—to allow easily fixable problems to serve as an excuse for preserving the status quo.

Fixing the problems would require a genuine concern for future generations of New Yorkers—something the public and our leaders often profess but rarely do. The question is not merely what the convention New Yorkers would call in 2017 could do to create tangible benefits for our generation, but how that convention could improve future conventions a generation or more hence, when the politicians of today will have left office.

It turns out that democratic theorists think very highly of designing democratic institutions when those doing the designing cannot know whether the rules they design will benefit themselves at the expense of others. For example, you don't want politicians to design presidential rules of succession after a president has died and they know which specific politicians will benefit from a given succession rule. Under such a "veil of ignorance," as democratic theorists label it, delegates can act with the greatest degree of civic virtue.

Paradoxically, then, the set of procedural problems convention opponents use to disparage conventions should actually be one of the best reasons to call one.

Fixing the procedural problems should be a major priority of the governor's commission not merely because it wants to submit its recommendations to the Legislature, but because it ultimately wants to submit them to the convention, which should be spurred on, not hindered, by the Legislature's obstreperousness. Coming up with the right policies for New York—not merely what is politically feasible given expected Legislature opposition—should be the commission's goal.

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Source: Snider, J.H., Cuomo's Preparatory Commission Should Prioritize Fixing Con-Con Process, *Gotham Gazette*, January 19, 2016.

New York's Coming Con-Con Battle

by J.H. Snider | March 24, 2016 | Gotham Gazette

New York's Constitution mandates that every 20 years New Yorkers be granted the opportunity to vote on whether to call a state constitutional convention. This referendum is next on the ballot on Nov. 7, 2017.

The unique democratic function of this referendum is to provide New Yorkers with a mechanism to bypass the Legislature's gatekeeping power over constitutional reform, which is a problem when the Legislature has an institutional conflict of interest with the people. Such a conflict occurs when the Legislature controls the constitutional powers of competing branches of government (e.g., the judicial and executive branches of government) and its own internal powers (e.g., legislative ethics, term limits, campaign finance, ballot access, and redistricting).

Since 1776, what is now the United States has had 236 state constitutional conventions and New York nine.

Fourteen states, including New York, have the periodic convention referendum. The last one to pass in the U.S. was in 1984.

My research finds two stages to the recent pro and con lobbying campaigns over convention referendums. The first stage is dominated by "yes" advocates; the second, which only occurs if the referendum polls well, is dominated by "no" advocates.

So far, New York is following this pattern, as it did in 1997, the last time the referendum was on the ballot. Since January 2015, 16 newspaper op-eds have called for a convention, while none has opposed. Governor Cuomo has announced support for a convention, including setting up a $1 million preparatory commission, while no prominent state politician has announced opposition.

Partially due to such one-sided public arguments, calling a convention is way ahead in the polls, leading 69% to 15% according to a Sienna Research Institute poll. Despite this lead, most political experts believe that the convention referendum will lose because waiting in the wings for a last minute PR blitz is a well-organized and deeply-financed opposition, which includes the special interest groups that excel at influencing the Legislature and fear the convention as a populist institution.

Opponents' campaign arguments directed to the general public will include: A convention will be outrageously costly, thoroughly corrupted by both the Legislature and special interests, wastefully redundant with the Legislature, likely to result in either too little or too much change, and controlled by majorities who will violate minority rights and minorities who will violate majority rights.

These arguments need to be subject to well-informed scrutiny. This can only be accomplished if media, think tank, and other public opinion leaders bring the opposition

out of the shadows. Two-sided public debates, including dueling op-eds and interview programs, should begin now.

In a democracy, one reason public campaigns for vital elected offices, such as U.S. President, start many months before election time is that time is needed to have a well-informed debate. Open, sustained conflict also breeds popular interest. If opponents aren't willing to engage publicly, the public and press will remain uninformed, which allows last minute, sound-bite sized fearmongering to thrive.

Starting a two-sided public debate early also helps compensate for New York's loophole-ridden campaign finance referendum disclosure laws, which aren't a match for modern, anti-convention referendum politics, including the complex influence-laundering schemes that accompany them. For example, New York doesn't require disclosures during the last 19 days before a referendum—just when the attack ads become most intense.

No more fundamental right exists in a democratic system of government than the people's right to reform their government despite legislative opposition. New York's upcoming debate over how best to implement that right should be treated as seriously as the U.S. presidential election. The framers of New York's 1846 Constitution who bequeathed this right to us in the form of the periodic state constitutional convention referendum would have wanted no less.

Instead of a one-sided pro convention "debate" followed by a one-sided last-minute anti-convention "debate," we need a sustained multi-sided debate commensurate with its importance.

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Source: Snider, J.H., New York's Coming Con-Con Battle, *Gotham Gazette*, March 24, 2016.

The Best Delegate Election Process for a New York Constitutional Convention

by J.H. Snider | November 17, 2016 | Gotham Gazette

On November 7, 2017, New Yorkers will be asked to vote on whether to call a state constitutional convention. When this question was last on the ballot in 1997 (it's required to be on the ballot once every 20 years), the most publicized argument not to call a convention was that the convention delegate election process would be dominated by the same interests that dominate New York's Legislature.

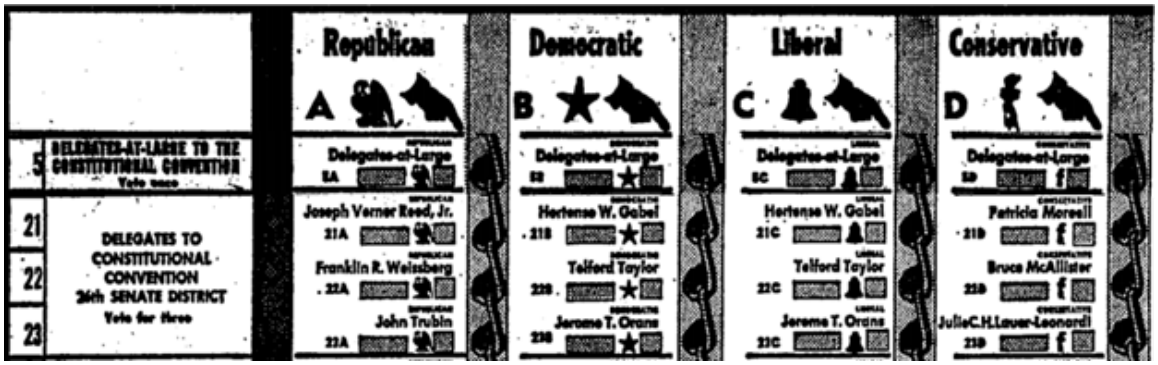
That argument fails to account for the many successes of America's 236 state constitutional conventions since 1776, including New York's nine. It also fails to explain why the same special interest groups who would supposedly benefit from a convention will spend millions of dollars opposing one. Except for the fact that incumbent public officials can run as delegates, New York has one of the best delegate election processes among the states.

But, there is still much room for improvement.

New York's Delegate Election Process

New York's Constitution mandates what's known as a mixed delegate election system. Of the 204 delegates to be elected, 189 are elected from New York's 63 state Senate districts (three from each district) and 15 elected at large for the entire state. Crucially, the details of how this mixed system works are left up to the discretion of the Legislature.

The last time the Legislature chose the election details it created a system whereby in each Senate district voters voted up or down for three candidates, and in the at-large election voted up or down for a party-based slate of candidates (see the sample ballot below).



A Better Delegate Election Process

A better mixed system would be built on a foundation of what political scientists call Mixed Member Proportional (MMP), a type of electoral system used in Germany and New Zealand at the national level; and Scotland, Wales, and more than a dozen German

states at the regional level. In a 2006 survey, political scientists who specialize in electoral systems ranked MMP as the best family of electoral systems.

Part of the MMP mix would include ranked-choice voting, a type of electoral system used in Ireland and Australia at the national level, and in many U.S. cities at the local level. In 2016, Maine voters approved a ballot initiative to choose the Governor and state Legislature via ranked-choice voting. In the same 2006 survey, ranked-choice voting was ranked the second-best family of electoral systems.

In an MMP system, voters cast two types of votes: one for candidates in their local district, and one for a party. The votes, in turn, count for two tiers of seats: a local candidate tier, and a compensatory tier for parties that didn't win seats in the candidate vote in proportion to their party vote. Within the constraints of New York's current constitution, this could work as follows:

In choosing candidates from their local three-member Senate district, voters would rank their preferences rather than vote up or down for each candidate. Such a "ranked-choice" voting system wouldn't require separate primary and general elections because runoffs are instant. Most important, it wouldn't penalize voters for voting for their first choice rather than a less preferred candidate with a better chance of winning. With New York's three-member districts, any district candidate with 25% of the vote plus one would win a district seat, thus strengthening party competition and mitigating the harmful effects of partisan gerrymandering.

The party votes would be used to ensure that the ratio of seats to votes is proportional. For example, assume the Democratic Party gets 49% of the vote, the Republican Party 46%, and an independent party 5%. Under the current delegate election system, the Democratic and Republican parties would most likely win 100% of the seats. But under MMP, the independent party would be entitled to 5% of the overall seats and thus win ten of the fifteen at-large seats, with the balance divided proportionately among the Democrats and Republicans. The result of such compensatory seats is that small parties and political entrepreneurs would have a much greater incentive to compete in the election.

Each party would compile its list of candidates for proportional allocation the way it wanted. For example, a party could add the proportion of a candidate's district vote (e.g. the number of top-three votes) to the proportion of the party's district vote to come up with a candidate's party list ranking. Many other methods could also be used.

When a delegate's seat became vacant, the party would choose the next name on its list as a replacement. No special election would be held.

Although the 15 at-large, compensatory seats might seem to guarantee a relatively small amount of proportionality, the combination of ranked-choice voting in the three-member districts plus the compensatory seats would lead to a remarkably high degree of proportionality (although having more compensatory seats would be even better).

A state-of-the-art electoral system should provide not only voters, but also parties and candidates, with more options consistent with the principle of political equality and robust public deliberation. Mixed Member Proportional (MMP) combined with ranked-choice voting accomplishes that.

Party-Based Electoral Competition is Good

In the United States, the media teaches the public to think disdainfully of political parties. Consequently, the word "partisan" has become a dirty word. But contemporary democracy is unthinkable without parties, and party labels are an extremely efficient and effective system for educating the public about candidates. MMP offers the best of both party- and candidate-centered elections while radically diminishing the need for public financing of elections.

States have had many democracy enhancing constitutional conventions that were dominated by two-party delegate competition, including New York's famous state ratifying convention in 1788 that was dominated by Federalists and Anti-Federalists (the Anti-Federalists won the most delegate seats but were eventually convinced to side with the Federalists). The chief worry should not be party but incumbent legislator dominated conventions. Only the latter type of domination violates the core democratic function of a convention, which is to bypass the Legislature's gatekeeping power over constitutional amendment. Still, using MMP to lower barriers to entry for both parties and candidates would greatly strengthen the delegate election process by providing voters with more meaningful choices.

New York's past practice of having candidates outside the two major parties run as a slate is a vastly inferior alternative to MMP but probably the best that New York's Legislature would allow if voters approved calling a convention. Thus, reform groups may focus their efforts on putting together a slate. In 1966, when New York last had a delegate election, such efforts were remarkably successful—albeit still inadequate (7% of the elected delegates were incumbent legislators).

Getting to MMP

The politics of improving the delegate election process are admittedly dismal. Legislatures hate conventions because they function as a check on their power, so the last thing they want to do is strengthen the institution. Ditto for the powerful special interest groups that thrive working through the Legislature and thus view a convention as a threat.

One reason for hope is that federal courts could rule that the delegate election system approved by the Legislature for the three-member districts violates the proportional requirements under Section 2 of the Voting Rights Act. The 1965 Voting Rights Act was passed just before the last delegate election took place in 1966. If the Legislature doesn't change the type of system it approved in early 1966, it is likely to be sued under that law. That could give the federal courts the ability to design a more proportional electoral system such as single-member districts (the courts' conventional remedy based on using

an up-or-down voting rule) or ranked-choice voting within the constraints of New York's constitutionally specified three-member districts.

The best long-term hope for meaningful delegate election reform is the political logic of the famous "veil of ignorance" effect regarding democratic reforms that won't take effect for at least 20 years into the future. The basic idea is that even crassly self-interested convention delegates would have an incentive to support democracy enhancing reforms such as MMP if they wouldn't take effect until after those delegates would be retired from politics and couldn't foresee how they would personally benefit from preserving an otherwise inferior status quo.

Most of those using the delegate election process as an argument against calling a convention are using that argument as a pretext for opposition on other grounds. But they do have a point, so those who aren't using that argument as a pretext should direct their energies to fixing the process either through the Legislature and courts or, if that's not possible, the next convention.

The U.S. Declaration of Independence asserts that Americans should have an "unalienable" right to "alter" their form of government, including the right to peaceably bypass their legislatures' gatekeeping power over needed democratic reforms. The inter-generational struggle to protect and enhance this most fundamental of all democratic rights should dwarf considerations of short-term expediency. The cure for the deficiencies of the current process, like democracy itself, is a better process, not the eternal tyranny of the legislature over the constitutional amendment process.

Like all electoral systems, a Mixed Member Proportional (MMP) system with ranked-choice voting is not perfect. But to safeguard our most fundamental of all democratic rights, it would be a great legacy for us to leave to future generations of New Yorkers.

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Source: Snider, J.H., The Best Delegate Election Process for a New York Constitutional Convention, *Gotham Gazett*e, November 17, 2016.

New York Needs a Political Primer on the State Constitutional Convention Referendum

The following essay is a slightly edited version of J.H. Snider's introduction to a Fall 2016 symposium, "The Politics of State Constitutional Reform," published by the Law & Courts Section of the American Political Science Association. The symposium provides a summary of notable presentations at a short course, A Political Primer on the Periodic State Constitutional Convention Referendum, presented at the 2016 Annual Meeting of the American Political Science Association, whose theme for 2016 was "Great Transformations: Political Science and the Big Questions of our Time." The short course and symposium provide an inter- rather than intra-state perspective on New York's November 7, 2017 referendum on whether to call a state constitutional convention. Gotham Gazette has previously published four op-eds by J.H. Snider providing an intra-state perspective on the upcoming referendum.

by J.H. Snider | December 5, 2016 | Gotham Gazette

At the 2016 Annual Meeting of the American Political Science Association, I produced a short course, "A Political Primer on the Periodic State Constitutional Convention Referendum." The short course consisted of two parts.

Part I included a two-hour compilation of TV documentaries and political ads. The TV documentaries included excerpts from past constitutional conventions, mostly U.S. state constitutional conventions held during the latter half of the 20th Century, plus a smattering of recent path-breaking constitutional conventions held in other countries. The unedited TV ads, mostly 30 seconds in length, were either for or against calling a state constitutional convention at an upcoming referendum. The TV documentaries generally described the past constitutional conventions in hagiographic terms. Most of the professionally produced TV ads were negative and characterized a future constitutional convention as a grave threat to the people's rights.

Part II consisted of four panels of experts, each panel approximately 30 minutes long. The first panel focused on New York, which on November 7, 2017 has the next referendum on whether to call a state constitutional convention. The panel included a history of New York's 11 state constitutional conventions since 1777 (by me) and an argument why New York's upcoming referendum was of national interest (by Sandy Levinson).

The second panel reviewed the history of U.S. state constitutional conventions (John Dinan) and changing public opinion towards them (William Blake). The third panel examined the merits of alternative legislative bypass mechanisms, including Ireland's 2012 constitutional convention with randomly selected members (David Farrell), Florida's periodic constitutional revision commission (Carol Weissert), and the constitutional initiative (Craig Holman and John Dinan). The fourth panel focused on the

politics and policy of New York's upcoming constitutional convention referendum, including an identification of the political actors (me) and arguments generally for (Richard Briffault) and against (Craig Holman).

The short course, which was recorded and posted online at The State Constitutional Constitution Clearinghouseand The New York State Constitutional Convention Clearinghouse, is intended as a resource for local opinion leaders in states with upcoming state constitutional convention referendums.

Between 2016 and 2034 at least one U.S. state every two years will have a referendum on whether to call a state constitutional convention: New York (2017), Hawaii (2018), Iowa (2020), Alaska (2022), Missouri (2022), New Hampshire (2022), Rhode Island (2024), Michigan (2026), Connecticut (2028), Hawaii (2028), Illinois (2028), Iowa (2030), Maryland (2030), Montana (2030), Alaska (2032), New Hampshire (2032), Ohio (2032), and Rhode Island (2034).

No periodic state constitutional convention referendum has passed since 1984—contributing to the longest drought in convening a state constitutional convention in U.S. history. After reviewing many debates leading to constitutional convention defeats, I concluded that the debate discourse was often ill-informed, partly because of a lack of local experts on whom the press could rely for historical and comparative information about state constitutional conventions.

To rectify this problem, I have sought to provide easily accessible background information in a variety of different formats, including newspaper op-eds, online information clearinghouses, scholarly articles, public history events, and this short course.

My information clearinghouse on Rhode Island's November 4, 2014 state constitutional convention referendum, the most recent such referendum, is the most comprehensive online documentation of the politics of such a referendum ever compiled online. The results of my research will be published in Snider, J.H., "Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other U.S. States 1776-2015," The Journal of American Political Thought.

Since only a tiny fraction of Americans has lived through a state constitutional convention in their adult lifetimes, and since Americans are not taught about state constitutional conventions (as opposed to the federal constitutional convention of 1787) during their formal schooling (even those such as myself who received a Ph.D. in American government), Americans approach these referendums starting with a huge knowledge deficit, making local opinion leaders that much more influential in public debates.

Too often local opinion elites and the public don't focus on the referendum until only weeks or days before the vote, when the debate is dominated by lowest common

denominator sound bites, including poorly informed opinion elites distracted by higher profile candidate races.

Such a lack of attention and expertise should not be confused with lack of importance. As every young student learns, the preamble to the U.S. Declaration of Independence states that the American people have an "unalienable" right "to alter" their government. Thirty-seven of 50 U.S. states would eventually include similar rights language in their state constitutions; and all 50 state constitutions include some type of mechanism to implement that right. Clearly, the right to alter one's constitution is one of the most fundamental, perhaps even the most fundamental, political rights Americans have. Implicit in that right is the right of the people to peaceably alter their constitution in the face of legislative opposition.

Fourteen states implement that right in part by granting the people the right at periodic intervals (ranging from 10 to 20 years) to call a state constitutional convention via a statewide referendum. This institution, like the constitutional initiative, dramatically reduces the legislature's gatekeeping power over constitutional amendment. Since legislatures have an institutional conflict of interest in proposing reforms that might weaken their own power, this institution serves a vital democratic function–albeit one that is rarely politically salient to the average voter.

Motivating voters to care about the direct provision of collective goods, such as education or transportation, has proven hard. Harder still has been motivating people to care about indirect collective goods such as redistricting, campaign finance, or other "good government" reforms that serve as the platform for providing direct collective goods. Hardest of all may be motivating average voters to care about infrequent and unfamiliar mechanisms for creating good government—arguably, the ultimate collective action problem.

The price of serving as a check on legislatures is that legislatures are this institution's intrinsic enemy. Powerful special interest groups with a track record of successfully influencing legislatures are also intrinsic enemies, as their ability to control a constitutional convention is a wildcard. Partly as a consequence of this intrinsic opposition and the collective goods nature of this institution for average voters, campaigns that oppose calling a state constitutional convention have tended to be much more sophisticated and better funded than campaigns that support calling a constitutional convention.

A state constitutional convention referendum has the ingredients of a collective action problem: concentrated benefits for opposing one and diffuse benefits for favoring one.

Better educating the public about this institution via local opinion elites cannot eliminate this classic political problem, but it can mitigate it.

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On the short course page at NewYork.ConCon.info, links can be found to the essays of the other symposium contributors as well as a two-hour documentary researched and compiled by J.H. Snider that consists of excerpts from TV documentaries and political ads on state constitutional conventions.

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Source: Snider, J.H., New York Needs a Political Primer on the State Constitutional Convention Referendum, *Gotham Gazett*e, December 5, 2016.

[**Note:** This is part one of a two-part series entitled *Needed: Fresh Eyes to Improve New York's Constitution*.]

Needed: Fresh Eyes to Improve New York's Constitution– Part 1: New York's Mandarin Constitutional Culture

by J.H. Snider | March 3, 2017 | Gotham Gazette

During the last 500 years, a culture of innovation set off the West from the rest of the world, allowing it to achieve far higher living standards. Incentives for innovation have remained strong in the private sector but have greatly weakened in the public sector.

The United States and its most innovative state, New York, have led the West in innovation. During the 18th and 19th centuries, this included leading the world in constitutional innovation, which is arguably the most important type of public sector innovation. But present-day New Yorkers and their opinion leaders are as allergic to such innovation as Chinese emperors and Mandarins were in the 18th and 19th centuries.

Symbolic of the decline are the stale ideas currently dominating New York's debate over whether to call a state constitutional convention. Every 20 years the state constitution mandates that New York voters be asked whether they want to convene another state constitutional convention. To date, New York has convened nine proposing and two ratifying conventions. On November 7, 2017, this question is next on the ballot.

The unique democratic function of a state constitutional convention is to provide a mechanism to bypass the state Legislature's veto power over constitutional amendment when the Legislature's institutional interests conflict with those of the public. The result is that not only the Legislature but also the most powerful special interest groups that thrive exercising influence over the Legislature are implacable enemies of state constitutional conventions.

The current debate in New York has been dominated by opinion leaders who were already adults when New York's last constitutional convention convened in 1967. They have much to bring to the current debate, especially a sense of history, and we are lucky to have them. But too often their and their allies' reform ideas are from a different generation. Their ideas may be improvements over the antiquated status quo, but so were the now obsolete audio and video tape recorders from the second half of the 20th Century that replaced paper-based recording technologies.

In contrast, when Thomas Jefferson wrote the U.S. Declaration of Independence and when James Madison and Alexander Hamilton both participated at the 1787 national constitutional convention and then defended it in the Federalist Papers, they were all under 40 years of age. The three leading figures behind the design of New York's first constitution in 1777 — Gouverneur Morris, Robert Livingston, and John Jay — were all 30 years of age or younger. They brought to the design of our federal and state governments fresh eyes and many innovations from which we have greatly benefited.

A better balance between the old and new is needed. Unfortunately, getting true innovators involved in democratic reform is one of the hardest parts of democratic reform, as the rewards for such innovation are often negligible at best. Consider just one reason: why do the immensely difficult and costly work of developing an innovation that has no chance of being implemented because of a legislature's institutional conflict of interest?

A state constitutional convention is one of the few institutional mechanisms in our democracy with the potential to stimulate fresh thinking. It would be a tragedy to squander that opportunity.

My greatest worry is not, as convention opponents argue, that special interests will derail a convention by getting it to place harmful proposals on the ballot. If special interests do corrupt a convention—and they will certainly try—the people have shown they can be trusted to veto the resulting proposals. This, after all, is why New York's and other states' most powerful special interests hate the institution of the state constitutional convention and have spent so much to oppose convening one: they are more confident in their typical, ongoing control over legislatures.

A greater worry should be that New York's opinion leaders, including its press, academics, advocates, and politicians, will continue to treat democratic innovators the way Chinese Mandarins did during the era when the United States was founded. New York needs to breed a new generation of Alexander Hamiltons, and the time to begin that effort is now.

New York, despite its vast human and material wealth, has become too much like 18th century China, when China was a vastly larger, more sophisticated, and more prosperous country than ours but became arrogant and thus complacent in its superiority. New Yorkers should look to democracies, including Estonia, Iceland, and Sweden—two of them about the size of New York when it drafted its first constitution—where a can-do culture of democratic innovation survives.

New York, like China thought it was for hundreds of years, remains at the center of the world. But it won't remain there unless it proves capable of developing an outward looking culture characterized by both constitutional humility and innovation.

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Source: Snider, J.H., Needed: Fresh Eyes to Improve New York's Constitution–Part 1, *Gotham Gazett*e, March 3, 2017.

[**Note:** This is part two of a two-part series entitled *Needed: Fresh Eyes to Improve New York's Constitution*.]

Needed: Fresh Eyes to Improve New York's Constitution– Part 2: Implementing First Amendment Values in the 21st Century

by J.H. Snider | March 10, 2017 | Gotham Gazette

Drawing an analogy between Chinese Mandarin culture of the 18th and 19th centuries and New York's constitutional culture in the early 21st Century, I argued in Part I of this series that New York's current debate over constitutional reform lacks fresh ideas for systemic reasons. One reason stems from the incentive of legislatures to veto democratic reforms in areas, such as legislative redistricting, term limits, and ballot access, where they have a conflict of interest with the public. That's a problem because for democratic innovators to do the difficult and costly work of innovation, they need to believe that their ideas have a chance of being implemented. Another reason is that the young are usually society's innovators. But New York's mandarin constitutional reform culture favors the old.

I propose an idea emblematic of the type that should but hasn't been part of the current debate over New York State constitutional convention based reform. Its goal is to dramatically enhance First Amendment values in the election process, and it is premised on the close but rarely recognized link between technology and constitutional design. Specifically, new information technology has made ballot access ripe for constitutional innovation.

Currently, New York government has exclusive control over both ballot data and ballot interfaces. I propose requiring it to give up control over ballot interfaces while retaining its control over ballot data.

In the pre-internet era of paper ballot technology, this couldn't be done without sacrificing important democratic values, notably the secret ballot. Until the late 19th Century, control of ballot data and interfaces were separate. For example, political parties would print pre-filled ballots (called "party tickets") and distribute them to voters. But this rightly came to be viewed as intolerable because the party officials and others who handed out the ballots at the polling booth could keep track of which ballot a voter submitted and reward voters who submitted their preferred, prefilled ballot. The solution was the "secret ballot," which is now mandated in New York's Constitution and gave government control over the ballot interface as well as ballot data.

Unfortunately, giving government control over the ballot interface came with huge costs. It gave legislators much greater control over both which candidates are included on the ballot presented to voters and how information about them, including endorsements (popularly known as party labels), are used. Such control is inconsistent with First Amendment values of public participation and free speech.

Modern information technology makes it possible to separate ballot data and interfaces without the compromises associated with print technology. Specifically, voters should be allowed to choose non-government ballot interfaces that are directly linked to public ballot data. Ironically, we currently allow the public access to non-government media, except the media most vital to preserve First Amendment values: the ballot interface.

Online voting, such as has already been successfully implemented in Estonia, could one day greatly improve the implementation of this idea. But its successful implementation does not depend on online voting. As with absentee voting, the voter could simply print a machine-readable ballot with the necessary data and then either bring it to the voting booth or mail it in.

Effectively separating ballot data and interfaces is a non-trivial matter of both technology and institutional design. It is probably comparable in difficulty to the online voting system developed by Estonia. But it also isn't a moonshot. Most important, it would generate a huge payoff, especially for down ballot elections where ballot interfaces have been most influential.

Candidates, interest groups, and political parties currently spend billions of dollars every major election cycle on providing repetitious, soundbite-long, and often misleading information trying to influence voters. Not only is the quality of information very poor, but the high cost of paying for it heavily tilts the playing field in favor of deep-pocketed special interests.

Providing a voter friendly ballot interface when voters are most motivated and able to use election-related information would radically reduce barriers to political entry, thus revolutionizing campaign finance and providing a fundamentally different paradigm for campaign finance reform.

Legislatures opposed to separating ballot interfaces from data will use the admittedly difficult technological challenges to doing so as their primary excuse. But the primary roadblock to implementing this innovation is no longer technological; it is that incumbent legislators—regardless of party—view such a separation as a threat to their incumbency advantage. For them, opening the ballot interface is tantamount to giving free publicity to their opponents.

Thus, in New York, only through a constitutional convention can this barrier to political competition be removed.

Government control over ballot interfaces may one day be viewed as hostile to First Amendment values as the 17th century British government's practice of licensing access to the printing press. A state constitutional convention is the most plausible institutional mechanism to address this First Amendment abomination. But if New York's mandarin state constitutional culture persists, that won't happen. A similar failure to innovate didn't work out well for the late 18th Century Chinese when they were the world's leading power.

New York's motto, excelsior, for "Ever Upward," clearly indicates that preserving the status quo at the expense of the people isn't the goal. But if Exelsior excludes modernizing New York's constitution, then in the long run the rest of the Excelsior agenda won't matter.

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Estonia's 36-year old prime minister *explains* Estonia's e-voting system for parliament. According to *Freedom House*, the world's *leading source of data on the comparative democratization of countries, Estonia ranks #1 on Internet freedom.*

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Source: Snider, J.H., Needed: Fresh Eyes to Improve New York's Constitution–Part 2, *Gotham Gazette, March 10, 2017.*

A Constitutional Right to Healthy Schools?

When voting Nov. 7, 2017 on whether to call a state constitutional convention, New Yorkers should consider enhancing social welfare rights.

by J.H. Snider | April 21, 2017 | Gotham Gazette

New York's Constitution mandates that every 20 years New Yorkers be asked via a statewide ballot referendum whether they want to call a state constitutional convention. The next such referendum is on the ballot on November 7. If passed, the agenda for the constitutional convention that then occurs should include enhancing social welfare rights, including healthy public schools.

The state constitutional convention held in New York in 1938 passed amendments mandating healthy work conditions for government employees, including healthy work hours. These amendments were added at a time when the conditions in public schools were very different. For example, the one-room schoolhouse remained common, dedicated public bus transportation to schools was just emerging, and forcing children to attend school before dawn was exceptional. If New York's Constitution guarantees healthy work conditions for government employees, it should do the same for children attending public schools, who have even less choice over the place and hours of their work.

The Proposal

I recommend two additions to New York's Constitution. Currently, its bill of rights includes the following provision: "Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. No laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency."

Analogous to this bill of rights for government employees ("labor"), I recommend one for public-school students: "The state shall not compel students to sacrifice fundamental biological needs to attend public school." This would include forced attendance at school prior to dawn and at times that make it impossible to get appropriate sleep.

I also recommend adding a health provision to the education clause in the main body of the Constitution (addition marked in *italics*): "The legislature shall provide for the maintenance and support of a system of free *and healthy* common schools, wherein all the children of this state may be educated."

Note that in New York's Constitution the term "common schools" refers to what we nowadays call public schools. Although this clause may appear vague and unenforceable to the casual reader, New York's top court has interpreted it to mean that the Constitution

guarantees every New York student, including disabled, delinquent, neglected, and dependent children, a "sound basic education" through high school.

As applied to school start times, the proposed change to the education clause could be interpreted to entail a due process requirement when a public-school district mandates pre-dawn start times; for example, that a school district couldn't arbitrarily schedule a poor child to take a public-school bus at 5:55 a.m. (before dawn) to attend a high school starting at 7:17 a.m. (also before dawn during winter months) without providing a reasoned, public explanation for its decision that explicitly considers children's health and safety.

Manageable court remedies for a school district with persistent unhealthy bus pickup or school start times could include mandating a healthy time or, less onerously, that the district offer the harmed students a voucher based on the district's current average student cost. The voucher could then be used to allow the student to get a sound healthy education at another school.

Additional Resources

U.S. Government & Professional Health Organizations

- American Academy of Pediatrics. Recommends that middle and high schools start no earlier than 8:30 a.m. for the sake of sleep, health, and learning, Aug. 25, 2014.
- American Medical Association. Encourages middle and high schools to start no earlier than 8:30 a.m. for adolescent wellness, June 14, 2016.
- American Sleep Association. Middle school and high school should not start before 08:00. A time closer to 09:00 or later would be preferable, Feb. 7, 2016.
- Centers for Disease Control and Prevention. Recommends that middle and high schools push back start times to 8:30 a.m. or later, Aug. 6, 2015.
- Education Commission of the States. Later School Start Times in Adolescence: Time for Change, May 2014.
- U.S. Department of Transportation's National Highway Traffic Safety Administration. Asleep At The Wheel, March 2017.

Conference

- The RAND Corporation, Yale School of Medicine's Department of Pediatrics, Robert Wood Johnson Foundation, and Start School Later, Adolescent Sleep, Health, and School Start Times National Conference, April 27-28, 2017, Washington, DC.

Website

- Start School Later. An information clearinghouse on the science and public policy of healthy (post-dawn) K12 school hours.

It's arguable that New York's clause, "No person shall be deprived of life, liberty or property without due process of law" already includes a right to sleep and health more generally. For example, on February 28, 2016, India's Supreme Court ruled that "sleep is

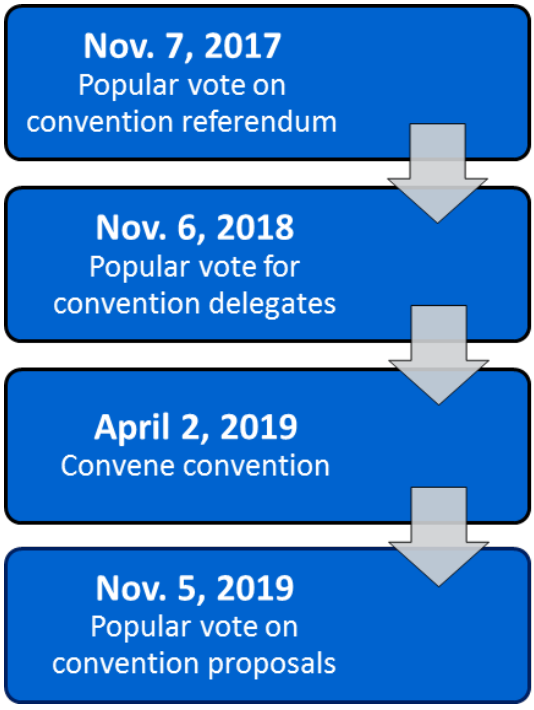
a fundamental human right" based on the clause in its constitution protecting the "right to life." But given the history and wording of New York's Constitution, such a court interpretation in the context of public schools is unlikely.

New York also has a clause mandating that its "state board of social welfare shall make inspections… as to matters directly affecting the health, safety, treatment and training of [reformatory institutions'] inmates." But public school children are clearly exempt from this requirement.

Other social welfare clauses likely to be proposed at a New York State constitutional convention would be a guarantee of affordable basic healthcare coverage for all; affordable, debt-free tuition at public institutions of higher education; and a clean and healthy environment, including water and air. Redefining the definition of "needy" in the "aid, care and support of the needy" clause would also be likely. Consequently, it could be smart politics for the social welfare groups backing such proposals to form an alliance prior to the Nov. 7 referendum.

The Process and Opposition

The constitutional convention process grants the public three votes (see graphic): 1) whether to call a convention, 2) who to elect to a convention, and 3) whether to approve any of the convention's proposals. The purpose of the mandatory referendum provision is to provide a mechanism to bypass the Legislature when the Legislature would otherwise have veto power over constitutional amendments involving its own power and the special interests to which it is beholden. In other states, the constitutional initiative serves a similar function, albeit in a less deliberative and democratic way.



Since the institution of a constitutional convention is a check on the Legislature, its natural enemies include the Legislature and any powerful special interest group that has a successful track record of influencing the Legislature. Coalition partners of these groups, who fear opposing their most powerful allies, are also its natural enemies, which may entail either taking a neutral position or actively opposing a measure that, absent the imperatives of coalition politics, they would support. Alas, many of these coalition partners are social welfare groups.

A primary argument that state constitutional convention opponents make is that a convention cannot be controlled by the Legislature and is thus a "Pandora's Box." But

that is its prime virtue because if a Legislature could limit its agenda it would defeat the purpose of calling a state constitutional convention in the first place.

The more relevant question is whether the people can be trusted to vote in their own self-interest. For thousands of years, the enemies of democracy argued that the people were incapable of making reasoned judgments about their own self-interest. They have a point, but in the long run actions premised on the people's incapacity for democracy—including their incapacity to override a legislature's veto power over constitutional amendment—have proven far more harmful.

Conclusion

The health of our children should not be subject to the special interest politics that too often dominate American public education and intimidate parents whose children are held hostage. If Big Education views the cost of healthy public schools as a zero-sum game that comes out of its members' paychecks, then it should be bypassed. In New York, the only available bypass mechanism is the state constitutional convention. If government workers have a right to healthy work conditions, so do children—even more so because they are children and have no say in the matter.

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Source: Snider, J.H., A Constitutional Right to Healthy Schools?, *Gotham Gazette*, April 21, 2017.

Opportunity for Reform: Educate New Yorkers on Constitutional Convention

by J.H. Snider | June 11, 2017 | Albany Times Union

On Nov. 7, New Yorkers will be asked whether they want to call a state constitutional convention. New York's Constitution mandates that every 20 years this question be placed on the ballot. Based on the recent history of New York and other states, New Yorkers will most likely vote no.

New York's constitutional convention process grants the people three sets of votes: to call a convention, to elect delegates to a convention, and to vote convention proposals up or down. The unique democratic function of this process is to provide the people with a mechanism to bypass the state Legislature's veto power over constitutional amendments. Ordinarily, this veto power doesn't hinder needed constitutional amendments. An exception occurs when a legislature's and people's interests conflict, including issues involving a legislature's internal powers (e.g., legislative term limits, redistricting, ethics, transparency, and ballot access) and competing branches of government (e.g., judicial, executive, and local).

Never in U.S. or New York state history has there been such an extended drought in calling state constitutional conventions. Since 1776, the United States has convened 236 such conventions but none during the last 25 years; New York state has convened nine but none during the last 50 years.

In an article published in the *Journal of American Political Thought*, I explain this decline in terms of three long-term political forces:

- **Legislature opposition has increased:** Since a convention checks a legislature's powers, legislatures intrinsically oppose them. But this opposition has increased, partly because of the rise of career-oriented incumbent legislators with their greater incentive than citizen legislators to oppose democratic reforms that might weaken their incumbency advantage. For example, Jeffrey Stonecash calculates that New York legislative turnover dropped from 67.3 percent in the 1870s to 10.2 percent in the 1980s.
- **Special interest group opposition has increased:** Successful special interests, especially unpopular ones in heavily regulated industries, prefer to exercise influence through a legislature rather than a constitutional convention, where their legislative allies cannot veto reform proposals. Consider the evolution of Big Labor in New York. When in the early 20th century it was popular but couldn't get what it wanted from the Legislature, it championed conventions such as New York's 1938 convention, where it won the pension protections it now fears losing. Since the 1980s, the political dynamics have reversed, with Big Labor, especially government unions, taking the lead in organizing and financing convention opposition.
- **Public ignorance of the state constitutional convention has increased:** This makes it easier for legislators and special interest groups to paint a convention as a wasteful

> Pandora's box controlled by the very political actors it was designed to check. This ignorance has grown partly because students don't learn about state constitutional conventions in school and adults no longer have any direct experience with one. Nowadays, less than half of New Yorkers even know they have a state constitution.

Given its vital democratic function, the state constitutional convention's decline has become symptomatic of democratic decline. But countervailing political forces do exist, including New Yorkers' growing disgust of Albany and mistrust of Albany's capacity to reform itself.

If the experience of other states in recent decades is a reliable guide, convention opponents will come out of the woodwork in the weeks and days before the referendum. Their campaign will be orchestrated in the shadows under the direction of some of the most accomplished political operatives in America and with a budget dwarfing convention proponents.

In preparation for this onslaught, opinion leaders should provide New Yorkers with a sense of the special purpose, history, and politics of this institution in not only New York but other states. Given the current level of ignorance about this institution, this is a daunting task. But given that this institution protects a core democratic right, arguably the most fundamental of all political rights — the sovereign people's right to reform their government — it is a task well worth undertaking.

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Source: Snider, J.H., Opportunity for Reform: Educate New Yorkers on Constitutional Convention, *Albany Times Union*, June 10, 2017.

Pension Issue Surreptitiously Drives New York Con-Con Politics

J.H. Snider | July 12, 2017 | City & State

The New York Constitution mandates that a question be placed on the ballot every 20 years asking New Yorkers whether they want to call a state constitutional convention. On Nov. 7, this question will be on the ballot. If voters support calling a convention, their next steps are to elect delegates to the convention and then vote up or down any constitutional amendments proposed by the convention.

Fourteen states have similar periodic referendums. As I describe in a recent journal article, government employee unions, especially teacher unions, have in recent decades led the opposition to a "yes" vote, in terms of both organization and money.

The unions fear that a convention would reduce their bargaining power, especially over pensions worth hundreds of billions of dollars. These fears are highlighted in their communications to members. For example, in one widely used line, members are told, "If you stay home and don't vote [on the convention referendum], that's the same as voting against your pension."

Pro-convention groups, attempting to defuse opposition from this 800-pound gorilla of constitutional convention politics, have usually claimed that a convention would not risk union pension protections. For example, Bill Samuels, who leads the advocacy group "People's Convention," argues, "there is no risk in New York State of labor unions losing their pension protections or other rights enshrined in our current constitution."

But such claims have been ineffective because the unions have been too smart to be fooled. They are keenly aware of the public's envy of government pensions, which tend to be more generous than private pensions, and fear a convention would enable the public to act on its envy. Supporting their fears, Princeton Survey Research Associates International found:

- 59 percent of Americans favor shifting *current* public employees from guaranteed pensions to 401(k)-style accounts.
- 72 percent of Americans are concerned their state and local governments may not be able to fund currently promised public employee pensions.
- 76 percent of Americans say pension reform should be a priority.
- 77 percent of Americans oppose reducing spending on services, like education, health care, so that public employee benefits could be paid at current levels.
- 78 percent of Americans say taxpayers should get to vote on pension increases for government employees.
- 82 percent of Americans favor requiring current public employees to contribute more toward their own future pensions and benefits.

Given these poll numbers, unions spending millions of dollars to protect billions of dollars is a no-brainer.

Unfortunately, unions' presentation of their concerns to the public has been grossly misleading. As with any politically sophisticated special interest group pursuing an unpopular agenda, the unions have tried to exercise their influence in the shadows while framing their opposition in terms of popular causes and groups.

With both convention proponents and opponents avoiding the pension issue – albeit each for different reasons – no state in recent decades has included a thoughtful debate about public pension policy as part of the larger conversation on whether to call a convention. But if unions have good reason to believe that a convention would debate pensions – and I believe they do – then the public deserves to have that debate prior to voting for a convention on the November ballot.

Here are some questions to jumpstart such a debate:

- Why are government unions so concerned about preserving their pension protections? Is the public's pension envy reasonable?
- How do private and government pension benefits compare?
- Why do government pension benefits have better protections than private pensions?
- Is it either efficient or just that only a small fraction of government employees – those who become fully vested after decades of work – receive the lion's share of pension benefits?
- Is the principle of equal pay for equal work violated by the growth of tiered pensions, where there is a permanent pension benefits gap between new and old hires that perform the same work?
- If the public is ill-informed about pension benefits, how does accurate information affect their views?
- Why has New York's contribution to its Employees Retirement System skyrocketed from 1 percent of payroll in 2000 to 20 percent of payroll in 2015?
- How are pension obligations crowding out funding for other government programs such as education, healthcare, and other social welfare programs?
- Why have unfunded pension liabilities reached $1.2 trillion nationally and $56 billion in New York City alone?
- Do unfunded pension liabilities violate the rights of future generations who cannot vote?

The periodic constitutional convention referendum was designed as an institutional mechanism – the only such mechanism in New York state – to allow the people to bypass a Legislature that either won't reform itself or is unduly influenced by special interests. In

the coming months, government unions will spend millions of dollars promoting the argument that a convention won't function as intended. But perhaps the unions' true fear is that it will function as intended – at least regarding the big-dollar issue driving their opposition: preserving the unpopular status quo on government pensions.

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Source: Snider, J.H., Pension Issue Surreptitiously Drives New York Con-Con Politics, *City & State*, July 12, 2017.

Why Foes Of A State Constitutional Convention Have The Upper Hand

by J.H. Snider | September 10, 2017 | City & State

When New Yorkers decide on Nov. 7 whether to support or oppose calling a constitutional convention, the only mechanism for the people to bypass legislative opposition to popular constitutional reforms, people naturally want to know what issues are at stake. But answering that question is a highly politicized issue on which supporters and opponents strenuously disagree, so understanding how the issues are politicized becomes critical to understanding the issues themselves.

Based on my study of the 14 states with a periodic state constitutional convention referendum, convention opponents have significant advantages in framing the issues, owing to their superior monetary and organizational resources.

The heavily regulated "producer groups" that form the core of the opposition coalition, including more than 50 unions, typically have fewer of what political scientists call "collective action" or "free rider" problems, which better positions them to raise money and organize. This is especially true of government unions, where group membership and dues are mandatory, and are often more than 20 times larger than what a citizen group can charge its members. These producer groups disproportionately join the opposition because of their proven track record of successfully influencing state legislatures and the fear that they would have less control over a constitutional convention. My focus here is on how these monetary and organizational advantages play out in practice given the current media environment.

RELATED: Pension issue drives New York con-con politics

Letters to the editor: Opponents have provided their better organized members with easy-to-use templates for writing letters to the editor, and the result has been a flood of opponent letters sticking to a short list of poll-tested phrases and talking points shortly before the referendum. Similar advantages have favored opponents' phone banking and distribution of yard signs, flyers and car bumper stickers. In New York state, just one opposition organization, NYSUT (which represents all of New York's unionized teachers), has more members (over 600,000) than the entire supporters' coalition.

Debates: High-profile debates about an upcoming convention referendum have been hard to organize because the key opposition organizers prefer not to use the debate format to get their message across. For example, a March 21 forum co-sponsored by CUNY was unable to find a representative from the public unions who were mobilizing the opposition. The difficulty getting key opponents to engage in sustained, high-profile public debate weakens what has otherwise been a resource favoring supporters.

Ads: Opponents have consistently used their substantial fundraising advantage to fund superior advertising campaigns. For example, during the 2008 convention referendum in Connecticut, opponents outspent supporters by a ratio of 49:1, with most of the money

spent during the last few weeks before the referendum when supporters were still ahead in the polls.

Ratio of news to non-news coverage: Compared to statewide candidate elections, convention referendums have received relatively little news coverage, partly because they lack newsworthy events such as primary elections, high-profile candidate debates, and early mass media ads. Since the business model of conventional news media requires coverage to appear even-handed, while most other media face no similar penalty for being one-sided, one-sided non-news media grab a disproportionate share of attention in convention referendum campaigns. Given the opposition's advantage in non-news media, a high ratio of non-news to news coverage favors opponents.

Secrecy and credit taking: The key political actors that organize the convention opposition prefer to operate in the shadows. For example, American Federation of Teachers President Randi Weingarten, whose organization and affiliates during the last 20 years have spent many millions of dollars opposing state constitutional convention referendums, prefers to promote other organizations and unaffiliated individuals as the opposition's face. In contrast, Bill Samuels, who runs New York People's Convention, routinely starts his radio show on the upcoming referendum with **"**Bill Samuels is leading the effort in New York for a constitutional convention." Giving credit to other fosters a culture of cooperation among the opposition.

Websites: A consequence of the culture of cooperation among opponents has been a cohesive coalition with a single, convenient website for the public. In contrast, even when supporters form a coalition, they have tended to direct the public to their own scattered websites. When opponents have their own websites, they tend to be directed at their own members, not the public.

Public vs. member messaging: The trade associations that represent the producer groups that form the opposition's core are more likely than citizen groups to provide different messaging to their members versus the public. This targeted messaging helps mobilize members, including writing letters to the editor, placing yard signs and promoting social media.

Rhetorical styles: Opponents are seeking to preserve the constitutional status quo; supporters to seek reform. These different goals have resulted in different rhetorical styles. Since the public tends to be risk averse about changing their state constitution – a document often treated as sacred as the Bible – opponents have thrived by sowing fear, uncertainty and doubt (a strategy known as FUD). In contrast, supporters have tended to appeal to the public's hopes rather than fears. To the extent that the public views state constitutions as sacred documents, opponents' ability to pursue a FUD strategy gives them an advantage.

Nonpartisan coalition partners: The competing convention coalitions haven't fit the traditional Democratic and Republican pattern of interest group alliances because the goal of preserving the constitutional status quo crosses party lines. For example,

incumbent legislators from both major political parties as well as select Democratic and Republican constituencies have joined the opposition. Similarly, those who believe that they have a popular cause that the Legislature hasn't responded to, such as nonpartisan good government groups seeking ethics reform, have tended to support a convention. This framing sows confusion among the public. Not only does the public rely on partisan cues to understand politics, but it has been trained to equate bipartisanship with public consensus. Any type of public confusion makes the public more likely to vote "no" on opening up a document it views as sacred, especially when opponents have the larger bipartisan coalition.

Coalition logrolling: Opponent organizers have had far more economic and political clout than supporters to bring to coalition logrolling efforts, whereby different organizations support each other's political agenda in the expectation that the other will reciprocate. With such valuable resources to trade, they can ally with popular groups, such as New York's Planned Parenthood, which would otherwise be an obvious convention beneficiary. Even if good government groups had the resources to offer potential allies a long-term advantageous relationship based on mutual support, such quid pro quos would be viewed as anathema to their core missions. Perhaps no area of convention referendum politics is less well understood than the incentives for logrolling among convention supporters.

Free publicity for unpopular adversaries: In politics, a commonly employed strategy is to portray adversaries as extremists. The superior resources of convention opponents have given them an advantage in pursuing this strategy. Once opponents have succeeded in getting the media to frame convention issues in terms of unpopular supporters, it becomes a self-fulfilling prophecy as the media serves to legitimize and energize the unpopular groups while discouraging the popular groups who don't want to waste resources on a hopeless effort. To date, this has not been a major factor in New York's convention politics. But assuming President Donald Trump continues to be unpopular in New York, many expect the opposition will somehow cast him in this bogeyman role – despite his not yet taking a position on the referendum.

Alliances with unpopular groups: Given that unpopular groups pose a greater risk of being promoted as the public face of convention supporters, coalitions of supporters are more wary of allying with such groups. For example, supporters haven't aligned with a group that wants upstate New York to secede from the rest of New York, but opponents have allied with the New York State Rifle Association. Indeed, it was the rifle association's unpopularity that led it to join the opponents' coalition. As its president explained to his members: "In a constitutional convention, of course, the preponderance of voters is going to make the decisions. … We don't have the numbers upstate in order to derail the downstate politics." Note that his explanation would have been a gaffe if expressed to a general audience, as it conflicts with the opposition

coalition's public messaging that a convention would help special interests; that is, interests lacking popular support.

Campaign timing: As with most election campaigns, campaigning has tended to intensify near election time, and the same is true of convention referendum politics, only amplified. Convention opponents excel at the sound-bite style of campaigning that dominates the days before Election Day. The consistent pattern of convention referendums that have been ahead in the polls until the last few weeks and then lost in a last-minute advertising blitz by the opposition has been striking.

Campaign professionalism: The political professionals who run opponents' convention referendum campaigns have been part of national organizations that have run many such campaigns and share their knowledge with trusted allies. Supporters, in contrast, have hired staff with less relevant experience.

The public's decision on whether to call a convention depends on its perception of the types of issues a convention would be likely to address – including legislative term limits, ethics and transparency. The public should understand that this is a highly politicized question currently biased in favor of opponents for systemic reasons.

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Source: Snider, J.H., Why Foes Of A State Constitutional Convention Have The Upper Hand, *City & State*, September 10, 2017.

Don't trust a Constitutional Convention? Then you don't trust the people

by J.H. Snider | September 13, 2017 | U.S.A. Today Network

New York State's Constitution mandates that a question be placed on the ballot every 20 years asking New Yorkers whether they want to call a state constitutional convention. On Nov. 7, this question will next be on the ballot.

In New York, the unique democratic function of the periodic constitutional convention referendum is to provide a mechanism for the sovereign (the people) to bypass the state Legislature's gatekeeping power over constitutional amendments. This mechanism protects the people's right to reform their government when the Legislature has an institutional conflict of interest with the people. Examples of such conflicts include issues involving legislators' incumbency advantage (e.g., legislative term limits, ethics, and ballot access) and the relative powers of the competing branches of government (e.g., judicial, executive, and local).

The constitutionally mandated convention process grants the public three votes:

1. Whether to call a convention
2. If a convention is called, to elect delegates to the convention
3. To vote the convention's proposed amendments up or down.

Of the three votes, the third is the critical one because it involves passing law rather than agenda setting.

The crux of the difference between supporters and opponents of a convention involves the third vote. The "no" camp argues the people lack the competence to vote in their own self-interest. But it prefers to avoid making this claim directly because doing so would insult voters.

This indirection is achieved by omitting a key fact — the existence of the third vote — while emphasizing the second vote. In combination, this implies that the function of convention delegates is to not only propose but ratify amendments. This sleight-of-hand is effective partly because much of the public assumes that a convention not only proposes but passes laws — just like a legislature does when passing statutes.

When addressing more sophisticated voters who know of the third vote, the focus of convention opponents shifts away from the people's competence to a vague mistrust of the democratic process, especially special interests' ability to hoodwink voters. In a political environment where a large faction of the public widely distrusts democratic institutions and believes its opponents are winning (e.g. a Pew Research Center report found that most Democrats think Republicans are winning and vice versa), this can be an effective strategy, provided it is couched in carefully coded language.

One problem with this anti-democratic argument is that it is based on a slippery slope. If the public can't be trusted to vote on an amendment that comes out of a convention, how can it be trusted to vote on any constitutional amendment or, for that matter, anything at all? If democracy is to be sustainable, the public must be allowed to vote on constitutional amendments. The no camp seeks to avoid such awkward questions by relying whenever possible on one-way communications such as 30-second ads, bumper stickers, and yard signs.

It's also telling that the no camp, while arguing that the convention could be hijacked by special-interests, is the side spending big on lobbying. According to Politico, groups opposing a convention, mostly unions, spent $10.6 million on lobbying in 2016, while supporters spent $353,585. Who is doing the hoodwinking?

Ultimately, the question of how much to trust one's fellow Americans comes down to the alternatives. Polls show remarkable contempt for our democratic institutions, including Albany. So do our state legislators, who routinely run for Albany by running against it. However, most Americans also agree that non-democratic forms of government are even worse.

The merits of holding a convention boil down to which of New York's two types of constitutionally specified amendment processes — one controlled by the Legislature and the other not — is better suited to addressing constitutional reforms where the Legislature has an institutional conflict of interest with the people.

Some of America's most notable historians believe that as a method of institutionalizing popular sovereignty, America's invention of the constitutional convention was one of its greatest contributions to democracy's development across the world. This innovation removed the legislature from the constitution-making process, where lawmakers would have an obvious conflict of interest in drafting law designed to limit their own powers. Since the late 18th century, every U.S. state has institutionalized the convention process as a check on legislative power. It has been used 236 times, including nine times in New York.

The framers of New York's Constitution didn't trust New York's Legislature with gatekeeping power over all future constitutional amendments. Nor should we. When the convention process is disparaged, popular sovereignty is disparaged.

Perhaps democracy really is an unworkable form of government. But until a better alternative is clearly specified and tested, we should stick with democracy.

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Source: Snider, J.H., Don't trust a Constitutional Convention? Then you don't trust the people, *U.S.A. Today Network*, September 13, 2017. The *U.S.A. Today Network* also published a video version of the op-ed in their New York State papers: Trust New Yorkers? Then trust a Constitutional Convention, September 13, 2017.

The Historical Antecedents for New York's Con-Con Debate

by J.H. Snider | October 15, 2017 | City & State

When New Yorkers decide on Nov. 7 whether to support or oppose calling a constitutional convention, the only mechanism for the people to bypass legislative opposition to popular constitutional reforms, they want to know how this democratic institution has worked in the past. As the famous aphorism goes, "those who do not learn history are doomed to repeat it."

But what is the appropriate history to learn? During the past year, convention opponents have argued – usually without bothering to justify their claim – that it was New York's last convention in 1967. Between now and Nov. 7, they are likely to spend many millions of dollars on ads promoting that claim.

Given the political importance of the 1967 convention, *Politico New York* recently devoted a four-part series to explaining what happened there. In its first article, it justified its narrow historical focus:

> The experience of 1967 looms large over the debate, because even though the state's political landscape has changed significantly since then, the '67 convention is the only one held since the Depression-era convention of 1938, making it the only concrete example of what a convention might look like if it is held in 2019.

This justification, taken directly from the opposition's playbook, is dubious. Excluding the 52 state conventions to vote on proposed federal constitutional amendments, including two in New York (1788 and 1933), America has had 236 state conventions since its founding, including nine in New York. Arguing that New York's last convention is the only relevant reference point is like arguing after the Yankees lose a game that they both learned nothing valuable from the loss and will lose every additional game during the rest of the season.

RELATED: Pension issue drives New York's con con politics

1970 Illinois Constitutional Convention

I suggest a different comparison: Illinois's 1970 convention. The Illinois convention is a good comparison because it happened at approximately the same time as New York's 1967 convention. Illinois also includes Chicago, which was then the second-largest city in America after New York City.

For purposes of this comparison, I will use the evaluation metrics used by those arguing that the 1967 convention was a dismal failure. As the *Politico* series accurately reported, many disagree with those metrics. For example, just because the 1967 referendum was defeated doesn't mean it didn't contain many excellent provisions, many of which either were later incorporated into New York law (such as its Freedom of Information Law, although the version that passed exempted the state Legislature) or are still sought by

good government groups (such as a redistricting commission independent of the Legislature). It also dramatically reduced the length and increased the readability of New York's exceedingly long, stylistically inconsistent, and amendment plagued constitution, much of which had been made obsolete by changes in federal law (federal law trumps state constitutional law). But here I want to use the opponents' metrics to argue that the Illinois convention was a success.

The most notable rap against New York's 1967 convention is that it bundled all its proposed amendments into a single amendment that the voters then rejected, thus implying that the convention was a waste of taxpayer resources. In contrast, Illinois adopted the more common method of bundling non-controversial amendments into a single amendment and unbundling the controversial amendments into separate amendments. The voters then passed the non-controversial package of amendments while defeating most of the controversial ones. The convention cost $3 million in 1970 dollars; $19 million in 2017 dollars.

Another criticism of the 1967 convention is that its delegates included too many state legislators and thus merely mimicked the Legislature's politics. The implication is that this explains why New Yorkers rejected the convention's proposals. Consistent with this narrative, 4.8 percent (9 of 186) of the convention delegates were incumbent state legislators that would run again after the convention. The comparable figure for Illinois was 1.7 percent (2 of 116). Convention opponents would have the public believe that the relevant comparison is the total number of delegates who had ever served in public office (82 percent). But that figure ignores the convention's unique democratic function in New York as a legislative bypass mechanism. Given that function, the only type of public official that would directly subvert it is an incumbent state legislator seeking re-election.

The 1967 delegates also elected New York's speaker of the Assembly to serve as convention chair, significantly bolstering the opposition's stance that the institutional interests of the Legislature had undue convention influence. The Illinois delegates elected a leading advocate for calling the convention. That chair, in turn, was careful not to include any poison pill amendments in the bundle of non-controversial amendments the convention proposed to the voters.

Implicit in the opposition's current no-holds-barred attack on the convention process is that its opposition to the process has been consistent over time. But support for Illinois's 1970 convention was vigorous among many of the same interest groups that currently oppose New York's proposed convention. For example, the general counsel of the Illinois ACLU served as a delegate and championed the convention's proposed bill of rights that he helped draft. And the head of the Illinois PTA, which had close ties with the Illinois teacher unions, served as executive secretary for the yes campaign and helped get the public schools to distribute millions of ballots to school children on the day before the election.

Other Constitutional Conventions

Other constitutional conventions and constitutional convention eras should also be part of the discussion. My personal favorite is Montana's in 1972. One of the many things that New York could learn from Montana's convention is its ban on incumbent legislators serving as delegates.

Then there's New York's 1938 convention, which proposed nine amendments and included no poison pills in its non-controversial amendment bundle. That's also the convention that won the unions the provisions that they now fear another convention would remove. The 1938 convention illustrates convention opponents' propensity to laud past conventions (where they won) while disparaging future ones (where they fear losing).

My favorite era of the state constitution is the Founding Era when America invented the convention process. The process they invented, which is now being smeared by opponents, was eventually adopted by all fifty states, hailed by scholars as one of America's great contributions to the development of democracy worldwide, and ruled by state courts as an inalienable right of the people.

America's 1787 convention, which proposed the now revered U.S. Constitution, vividly illustrates how opponents can easily find excuses to attack the convention process. Contrary to widely held modern democratic norms, delegates to the 1787 convention were racist (they endorsed slavery and included many slaveholders) and unrepresentative (they disproportionately represented white males in the top 1 percent by wealth). Many were driven by narrow economic and political interests; shirked their responsibilities by missing convention proceedings, drinking excessively, or philandering; and proposed unrealistic good government reforms (such as abolishing slavery). Many anti-federalists claimed the convention's proposed Constitution would lead to tyranny, not democracy.

Conclusion

How could it be that New York has conducted such an infantile debate about relevant historical precedents to 2017's convention call? I'd suggest that the problem lies not in the opposition, which shrewdly picked the 1967 convention to make its case, but in the narrow-mindedness, narcissism and mutual backscratching culture of New York's convention advocates, which the press has dutifully reflected (see New York's Mandarin Constitutional Culture). They have lived in and studied New York, so they naturally talk about what they know best. They have assumed that it isn't necessary to study conventions in other U.S. states, let alone other countries such as Iceland or Ireland, because New York is the center of the universe. And they have engaged in the intellectually stifling politics of mutual backscratching, which quashes fresh voices.

The next time advocates for or against calling a convention conduct an argument in the media over the merits of New York's 1967 convention, ask them why that convention is

the best point of comparison to the present. After all, learning the wrong lessons from history is worse than learning any history at all. As another aphorism goes, "a little learning is a dangerous thing."

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Source: Snider, J.H., The Historical Antecedents for New York's Con-Con Debate, *City & State*, October 15, 2017.

11th Hour Barrage: Why Opponents Attack The Constitutional Convention Process—Not Its Substance

by J.H. Snider | October 23, 2017 | City & State

On Nov. 7, New Yorkers will vote on whether to call a state constitutional convention. In the lead-up to this election, convention opponents have already spent millions of dollars employing the political strategy known as swift boating, which can mean attacking an opponent's strengths rather than their weaknesses.

The term entered the lexicon after the 2004 presidential election, when President George W. Bush's top campaign adviser, Karl Rove, used the method to attack John Kerry, the Democratic presidential nominee. Kerry had a heroic record of military service as the commander of a swift boat during the Vietnam War and the Republican nominee had dodged military service. Rather than concede this point, Rove attacked Kerry's military service via surrogates who were swift boat veterans.

Most political campaigns focus on attacking an opponent's weaknesses rather than their strengths. But attacking an opponent's strengths can be more effective in low-information environments, such as in the last few days before an election when the public has the most trouble sorting through competing claims.

Given the public's minimal knowledge of state constitutions in general, and constitutional conventions in particular, swift boating has proven to be a shrewd political strategy in the 14 states, including New York, that have a periodic constitutional convention referendums. Most Americans, including reporters, learn nothing in school about their state constitutions, let alone their state constitutional conventions. They've not read their state constitution or experienced a convention in their lifetime, and they may not even know they have a state constitution. Convention opponents exploit this knowledge deficit, most notably during the last few weeks before a convention referendum, when they launch a blizzard of negative advertising built on a swift boating strategy.

The framers of the New York Constitution designed the periodic convention referendum as a check on the state Legislature, specifically, as a mechanism to bypass the Legislature's veto power over constitutional reform. They implemented this check by granting the public three votes over the convention process: to call a convention at periodic intervals, to elect delegates to a convention and to vote up or down any amendments a convention might propose.

RELATED: Why foes of a con con have the upper hand

Consider the following swift boat claims and the responses that I believe the framers would have if they were still alive and could defend their work.

Swift Boat Claim: A convention would open a Pandora's box.

Framers' Response: An unlimited convention, the claimed Pandora's box, is a design feature, not a bug, because we designed the periodic convention referendum to provide a way to bypass the state Legislature's veto power over constitutional amendments. If a legislature could limit a convention's agenda, it would defeat that purpose.

Swift Boat Claim: A convention cannot do anything a legislature cannot.

Framers' Response: We designed the New York Constitution to provide for two modes of proposing amendments: one by the state Legislature and the other by convention. The reason there are two and not one is that we designed each to serve a different function.

Swift Boat Claim: The same legislators who control the state Legislature would control a convention; so convening one would be a complete waste of taxpayer money.

Framers' Response: Not so in our day and not so today. American states have convened 236 conventions, including nine in New York, since 1776. The reason the convention process is now part of all 50 states' constitutions, and viewed by courts as an inalienable right of the people, is that it is independent of a legislature, which would have a blatant conflict of interest if granted exclusive power to propose limits on its own constitutional powers. In our design, we trusted the people for good reason. No convention called via periodic referendum during the 20th century has had incumbent state legislators constitute more than 10 percent of its delegates. The people understand that electing legislators as delegates would defeat the purpose of calling a convention; consequently, most incumbent legislators won't even run.

Swift Boat Claim: As indicated by the "no" coalition's name, New Yorkers Against Corruption, powerful special interests will have even more control over a convention than the state Legislature.

Framers' Response: We granted the public three votes over the convention process to check, not enhance, legislative corruption. Our sound basic design is illustrated by the fact that powerful special interests – those with a demonstrated track record of successfully influencing legislatures – consistently oppose conventions because they have less control over them. For example, in 2016, those opposing the convention spent 400 times as much as supporters ($13.7 million vs. $35,800) on state candidates, parties and super PACs. In contrast, good government groups support conventions because state legislatures won't pass popular democratic reforms, such as independent legislative redistricting.

The opposition's swift boating strategy focuses on a convention's process rather than the agenda. Thus, it can avoid debating unpopular policies its members want to protect, such as assault weapon protections (New York State Rifle and Pistol Association), government pensions (New York State United Teachers) and abortion (New York State Right to Life). It can even express great sympathy for the good government community's popular reform agenda (ethics, redistricting and term limits reform) while denigrating the democratic process that would enable that agenda.

If he were alive today, Niccolò Machiavelli, the 16th century diplomat who famously explained the political logic of asymmetric information between rulers and the ruled, might admire the opposition's skilled use of swift boating. But Machiavellian politics denigrate the democratic process, which is why public officials in democracies never publicly endorse them. The silver lining is that such politics are risky, for when they are publicly exposed, a backlash ensues.

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Source: Snider, J.H., 11th Hour Barrage: Why Opponents Attack The Constitutional Convention Process—Not Its Substance, *City & State*, October 23, 2017, pp. 20-1. Republished as Dueling Experts, Part II: The Pros and Cons of Con Con, October 25, 2017.

A con-con is a check on legislative corruption

by J.H. Snider | October 26, 2017 | Albany Times Union

New York's state constitution provides for two methods of proposing constitutional amendments — by the Legislature, and by a constitutional convention. Once every 20 years — next on Nov. 7 — New Yorkers are granted the option to utilize the second method.

The second method allows the people to bypass the Legislature's gatekeeping power over constitutional reform. This right of the people is important when constitutional amendments cover the Legislature's own power, including its members' incumbency advantages (e.g., their ethics, term limits, redistricting, transparency, campaign finance, and ballot access) and power compared to competing branches of government (e.g., the executive, judicial, and local).

The right of a people to call a convention is one of the few rights widely recognized by the courts to be inalienable, which helps explain why all fifty U.S. states constitutionally sanction this right. America's invention of the convention has been hailed worldwide as a foundation of modern, constitutional democracy.

In New York, the convention's role as a check on the Legislature is implemented by granting the public three votes:

- **First, a vote on whether to hold a convention.** This is critical because legislatures are implacable opponents of constitutional conventions and won't call one unless forced to. A similar checks and balances problem prodded the framers to mandate periodic elections for the Legislature. In colonial America, a governor could terminate or not call a legislature when it was expected to act adverse to his interests. This made the legislative branch subservient to rather than an effective check on the executive branch.
- **Second, a vote for convention delegates.** Electing delegates creates a body independent of the Legislature, which would have a conflict of interest proposing constitutional amendments limiting its own power.
- **Third, a vote on whether to ratify proposed amendments.** This is necessary for both methods of constitutional amendment. Since a constitution embodies the people's sovereign will, only the people can ratify proposed amendments to it.

Opponents of the upcoming convention referendum have argued that New York already has a constitutional amendment method that can do everything a convention can and at less cost. This is a penny-wise, pound-foolish argument. They are correct that legislatively-initiated amendment is generally less costly, but they overlook the much greater costs of eliminating vital checks and balances. As an analogy, consider the cost savings from eliminating the legislative and judicial branches of government while keeping an executive branch controlled by a single individual. Such cost savings would

be dwarfed by the increased costs from the resulting increased corruption and, ultimately, tyranny.

The framers of New York's constitution were guided by such checks and balances reasoning, which is why they designed New York's second method of constitutional reform to serve as a check on the Legislature. Today, the fundamental soundness of their vision is best illustrated by the interests of those who disparage it, including the Legislature and the special interest groups that excel at influencing the Legislature.

Convention opponents argue that since legislators and their powerful special interest cronies would dominate a convention, the public shouldn't call one. But if so, they would be arguing against their own political self-interest, which by their own logic would dictate that they support rather than oppose a convention. Such Machiavellian hypocrisy is like incumbent legislators and their special interest allies who routinely run for Albany by running against it.

Should the people mistrust themselves when voting on constitutional amendments proposed by a state convention? Answering yes is tantamount to giving up on American democracy, which is founded on a written constitution sanctioned by a popular sovereign — we the people — responsible for approving constitutional changes. Accordingly, when the merits of the convention process are debated, the burden of proof should be on those disparaging it — especially when their arguments are formulated, financed, and cheered on by Albany. The fundamental question to ask the naysayers is this: If the people cannot be trusted to approve constitutional amendments, who can?

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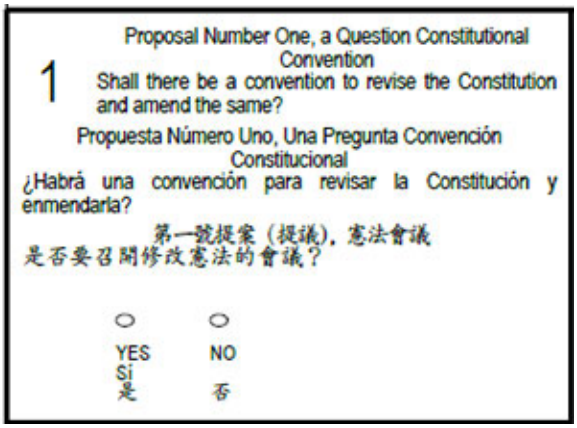
Source: Snider, J.H., A con-con is a check on legislative corruption, *Albany Times Union*, October 26, 2017.

New York's Con-Con Ballot is Biased

by J.H. Snider | November 3, 2017 | Gotham Gazette

When New Yorkers vote on Nov. 7 on whether to call a state constitutional convention, the question they will see on the ballot is: "Shall there be a convention to revise the constitution and amend the same?" This ballot text is the only form of convention related media that every voter will see immediately before voting—and when many voters are most impressionable.



Unfortunately, this seemingly innocuous question is highly biased because it doesn't specify whether it refers to the federal or New York state constitution. Close to 100% of New Yorkers know they have a national constitution, but less than half know they have a state constitution. Thus, millions of New Yorkers may go to the polls assuming that what is being referred to is the United States Constitution. And since Americans are taught to revere their federal constitution like the bible, the question could just as well have been worded: 'Shall the Bible, written by god, be rewritten?"

In short, the ballot language is strongly biased against a "yes" vote.

In 1846, when this language was first inserted into New York's Constitution, it wasn't biased in the same sense that it wasn't then biased to refer to voters as white males. Only since the Civil War, with the growing chasm between knowledge of the federal and New York state constitutions, did it become biased.

Prior to the Civil War and the passage of the 14th Amendment to the federal constitution (which extended federal rights protections to the states), states played a much greater role in American government. The pre-Civil War era was one of state rights, state power, and state glory. The federal government was often subservient to state government, provided far fewer services, and was even often viewed by some politicians as a stepping stone to serving in state government. Since the state and national constitutions were largely co-equal, students studied both. State constitutional reform was also often in the news, partly because New York's constitution had been the subject of high-profile revision during every middle-aged adult's lifetime (e.g., conventions in 1777, 1801, 1821, and 1846), something that wasn't true of the federal constitution. Between 1803 and 1865 there were no federal constitutional amendments, let alone high profile conventions.

Today, in contrast, New York's constitution is often treated as a ragamuffin. Those who attend New York's K-12 schools, visit its leading museums, and watch its history on TV, will rarely if ever be told that New York even has a constitution, let alone what's in it or

how New York's nine state constitutional conventions shaped it. In contrast, the federal constitution has retained and even raised its position atop its Bible-like pedestal.

To be fair, by the time most voters enter the voting booth on Nov. 7, they will know they have a state constitution. The ballot abstract provided by the New York State Board of Elections does explicitly refer to the constitution as a "State Constitution." But the fraction of voters who read the abstract will be exposed to an arguably even worse type of bias. For the abstract describes only the cost of a convention; nowhere does it describe any benefits. Thus, a rational person who reads this description would infer that a convention only involves costs—which mimics the message being promoted by legislative leaders and others who are leading the campaign to oppose a "yes" vote.

Instead of focusing on a convention's costs and other procedural details, the ballot abstract should explain the convention's democratic purpose in the context of the constitution. This would include explaining why New York's framers provided for two methods of constitutional amendment, why New York courts have ruled that calling a convention is an inalienable right of the people, and why New York's constitution(Article XIX, §3) specifies that when there are two conflicting amendments ratified by the people, the convention-proposed one trumps the legislature-proposed one.

This year Evan Davis, a leading advocate for calling a convention and former Counsel to Governor Mario Cuomo, sued New York State's Board of Elections regarding its placement of the convention referendum question on the ballot. The suit's admirable goal was to have the question more prominently placed on the ballot. This would signal its importance to voters and thus encourage them to vote on it. The remedy sought, which the court denied, was to have the ballot question placed on the front side of the ballot, where voters choose candidates.

A better proposed remedy, which would have avoided forcing judges to decide on the relative importance of candidate versus referendum questions, would have been to place the two different categories of questions on different ballots. This remedy would have treated candidate and convention questions equally, and it is used by legislators in other states when they want to discourage voters from leaving a legislature-initiated constitutional amendment question blank.

On the other hand, since the convention question embodies New Yorkers' most fundamental of all democratic rights—the people's right to constitutional reform—it should arguably be given the most high-profile ballot position. Many states have granted it that position by calling a special election, but that remedy is both undesirable (e.g., it reduces turnout) and illegal (New York's constitution specifies that the convention referendum be held at a general election).

My own preferred approach would be to eliminate government control over ballot media—a power that government officials routinely abuse despite claiming to practice objective ballot journalism. But as I argued in a prior column, New York currently lacks

the election infrastructure to make this reform viable. Fixing that antediluvian infrastructure should be a priority for any convention the voters approve.

With only days to go before the election, the press should educate the public on the most basic constitutional and convention facts that New York's public and non-profit educational institutions have shamefully failed to teach.

First, a New York state constitution exists, and the convention referendum refers to it.

Second, the New York constitution greatly differs from the federal constitution. It is about seven times as long (about 8,000 versus 55,000 words); full of provisions made obsolete by new federal laws; pockmarked with hundreds of legislatively-passed amendments that make the document incoherent and unreadable; and shunned by New York's most prestigious educational institutions, including schools and museums, as unworthy of their educational efforts.

Third, the framers of New York's convention process believed that it had not only costs but great benefits, as it is New York's only available mechanism to bypass the Legislature's gatekeeping power over constitutional amendment—an essential component of New Yorkers' right of constitutional reform.

Fourth, the question's obscure placement on the ballot should only signal incumbent state officials' political self-interest, not the question's importance as a safeguard of a vital democratic right–the people's right to alter their constitution in the face of a legislature's opposition. There is no more important question on the ballot, as signaled by the many millions of dollars New York's most powerful legislative lobbying groups are spending to defeat it.

Addendum: Readers, including Karen Biesanz from the League of Women Voters, and Evan Davis from the Committee for a Constitutional Convention, have pointed out to me that the wording of the ballot question also misleadingly implies that a convention will not only propose but ratify amendments. In Ms. Biesanz's words, it "implies that there WILL be revisions/amendments" despite a convention's proposals not being "a done deal till the electorate votes to accept [them]." They have made an excellent point. The ballot's wording bolsters the opposition's strategy of implying that the people lack the power to vote a convention's proposals up or down; it should have clarified that the people retain a veto power over any convention proposed constitutional reforms.

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Source: Snider, J.H., New York's Con-Con Ballot is Biased, *Gotham Gazette*, November 3, 2017.

RHODE ISLAND:
NOVEMBER 4, 2014
R.I. needs a constitutional convention

by J.H. Snider and Sage Snider* | March 21, 2014 | Providence Journal

This November, Rhode Islanders will vote on whether to convene a constitutional convention. Throughout most of American history, state constitutional conventions were a regular occurrence. But not one has been approved during the last 30 years, the longest stretch in U.S. history. Understanding why should help you decide how to vote.

Rhode Island's own history regarding constitutional conventions is extraordinary. Of the original 13 U.S. states, it was one of only two that didn't convene a constitutional convention to change its colonial charter. It was the only state to refuse to attend the federal constitutional convention in 1787, the last to ratify the Constitution, and the only one to attempt ratification via a popular referendum.

By the early 1840s, Rhode Island's constitution, the last state constitution derived from a colonial charter, was highly undemocratic. It let a small rural elite control the legislature, and that elite refused to convene a constitutional convention to reallocate power. This led to one of the few incidents in Rhode Island history taught in introductory American history textbooks: the Dorr Rebellion. The Dorrites forced the government to adopt a new, more democratic constitution.

The Dorr Rebellion profoundly influenced other states, encouraging four states between 1846 and 1851 to adopt the periodic (also called the "self-executing") constitutional convention referendum, whose goal was to make it possible for citizens to use the ballot box rather than violence to democratize their constitutions in the face of a recalcitrant legislature. Today, 14 states have such referendums, but Rhode Island would be the last of these to get one — in 1973.

In 1984, Rhode Island was also the last state to actually approve a constitutional convention — a convention that was widely reported as a great success.

The decline in convening state constitutional conventions as a way to fix dysfunctional state politics can largely be explained by the growth of incumbent entrenchment, big business and big labor.

As serving in state legislatures evolved during the last several hundred years from being a part-time, volunteer activity to a career, incumbent legislators came to see state constitutional conventions as a threat to their continuing entrenchment in office.

Joining forces with incumbent legislators were big business in the late 19th century and big labor, especially public employee unions, in the late 20th. These powerful special interest groups saw the unlimited constitutional convention as a threat to their power because, compared with the legislature, it's a relatively transparent and accountable

process. Over many months and much public deliberation, the public gets three votes: to convene a convention, to elect its members, and, most important, to ratify its proposals. In contrast, the legislative process allows special interests to insert provisions into must-pass bills at the last minute and secretly.

After big labor joined the coalition of incumbent legislators and big business strongly opposed to convening state constitutional conventions, the politics of approving a referendum became untenable. To win, this coalition has often adopted Machiavellian tactics, so expect the following:

The coalition may try to corrupt the delegate selection process as much as possible and then use that as an argument against voting yes for the convention. But remember: you not only get to vote for the delegates but can reject any reforms they propose.

The coalition may try to shift attention from the primary democratic function of a periodic state constitutional convention referendum — to address democratic reform issues such as legislative redistricting, transparency, term limits, campaign finance and ethics, where its interests may diverge from the public's — to controversial social value issues, especially unpopular ones that are unlikely to pass but can be used to build opposition to a yes vote. If the press relies on its usual method for framing "objective" news reports — asking self-interested incumbents of both political parties what a debate is about — the coalition will gain a huge free PR advantage.

Finally, if polls show the yes vote could win, the coalition may launch a massive last-minute media campaign, vastly outspending the yes supporters. One strategy portrays a state constitutional convention as a special interest-dominated and corrupt lawmaking body with too much power — without noting the irony of who finances the campaign. Another hides behind citizen groups that may care little about constitutional conventions but benefit from allying with the powerful, including receiving millions of dollars' worth of free publicity for their issues and organizations.

A state constitutional convention is no panacea for Rhode Island's problems. But if the public is to vote one down, it should at least do so knowledgeably. The press and public during the coming debate should look beyond the spin. Rhode Island's small size and intimate politics may make it uniquely positioned to do so, thus helping resuscitate a vital institution for reforming state government in the face of an entrenched, recalcitrant legislature.

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Source: Snider, J.H., and Sage Snider, R.I. needs a constitutional convention, *Providence Journal*, March 21, 2014.

*Sage Snider is a graduate student in the Public Humanities Program at Brown University.

'Dark money' drives R.I. constitutional convention votes

by J.H. Snider and Beverly Clay* | June 13, 2014 | Providence Journal

Rhode Island's campaign finance disclosure law explains its purpose in high-minded democratic terms: "the source of political spending is vital information for voters," as it "allows voters to properly weigh speakers and messages based on their affiliations."

That's a good start.

The problem is one of implementation. Powerful special interests will always try to exert influence in the dark. Unfortunately, for Rhode Island constitutional convention referendum campaigns during the past 20 years, the implementation has failed; dark money has swamped the clean money.

The Rhode Island Constitution specifies that every decade a referendum on whether to convene a constitutional convention must be placed on the ballot. The next such referendum is on the Nov. 4 ballot.

During the last two constitutional convention campaigns, in 1996 and 2004, the no campaign spent the great majority of its money without public disclosure prior to the election, and repeatedly violated Rhode Island's campaign finance disclosure laws without any type of meaningful penalty. The largest contributors to the no campaign were public employee unions.

The 2004 campaign illustrates the pattern of contemporary constitutional convention politics. Several weeks before the election, a Rhode Island College poll found that the yes campaign was ahead 2:1 (44 percent for, 17 percent against, 26 percent undecided, and 9 percent won't vote on it). This helped motivate the no campaign to engage in a massive advocacy campaign, including robocalls, signs and TV ads, during the last week before the election. The union expenditures on the ads were not publicly disclosed until after the election.

The final vote was 48 percent for, 52 percent against.

After the election, Operation Clean Government, which led the yes campaign, filed a complaint with the Rhode Island Board of Elections concerning the no campaign's 11 alleged violations of campaign finance laws. Ten months later, OCG's chairman, Bob Arruda, wrote to the Board of Elections: "We have yet to receive clarification as to the status of these verified complaints which have gone through rigorous research by OCG's legal team."

The chair of the Board of Elections, Roger Begin, explained that the present ballot disclosure laws were "ambiguous and impractical, resulting in an unenforceable law."

Nine years later, Arruda reports that "sadly, despite modifications in 2006 and 2012, the law remains as ineffective as it was in 2005, when the chair of the State Board of Elections made that statement."

The campaign that was largely untraceable in Rhode Island during 1996 and 2004 was more transparent for Connecticut's 2008 constitutional convention referendum. A week before the election, the Hartford Courant published a poll of voters finding that 50 percent favored a yes vote, with 39 percent opposed and 11 percent undecided. Days later, a massive no campaign was launched. Newspaper accounts place the no campaign expenditures at $829,350, of which the public teacher unions alone spent $765,000, with the yes campaign at $12,000.

The last-minute ad campaign, which blitzed the airwaves, depicted a constitutional convention as dominated by special interests: men in business suits smoking cigars in smoke-filled rooms — with no mention of the unions that funded the ads. The referendum was defeated 59 percent to 41 percent.

The root of Rhode Island's dark-money problem in constitutional convention referendum campaigns is an implicit philosophy that the best enforcement mechanism is the ballot box. That may be an effective mechanism for candidates, who must face elections every few years and have highly skilled opponents motivated to highlight noncompliance. But it has not been an effective mechanism for a constitutional convention referendum, where elections are spread out every 10 years, the names of the players change, records become effectively inaccessible after only a few years, and public ignorance of the institution is sky high.

A new, much more rigorous ballot campaign finance disclosure system is needed for state constitutional conventions. The disclosure systems other states have created for gambling referendums could be a starting point. Since gambling interests are immensely wealthy and will seek to hide their financial influence, gambling referendums often have special and better-enforced campaign finance rules. (Not surprisingly, during 1996 and 2004, a top gambling and labor lobbyist, Guy Dufault, filled out the paperwork for the no campaign.)

Given the public's remarkable ignorance of the institution of the state constitutional convention and thus vulnerability to massive last-minute ad campaigns, state constitutional conventions need even more rigorous disclosure requirements than gambling referendums.

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Source: Snider, J.H., and Beverly Clay, 'Dark money' drives R.I. constitutional convention votes, *Providence Journal*, June 13, 2014.

*Beverly Clay was Operation Clean Government's research director from 1993 to 2011.

R.I.'s poor preparation for convention

by J.H. Snider and Beverly Clay | August 2, 2014 | Providence Journal

In another case of the fox guarding the chicken coop, Rhode Island's bipartisan preparatory commission has been a failed experiment in explaining to the public the advantages of constitutional convention over legislature-initiated democratic reform.

Rhode Island's next state constitutional convention referendum, which its Constitution mandates be held every 10 years, is scheduled for Nov. 4. The Constitution also mandates that prior to that referendum "the general assembly, or the governor if the general assembly fails to act, shall provide for a bipartisan preparatory commission to assemble information on constitutional questions for the electors."

Under legislation passed to implement that requirement, General Assembly leaders were required to appoint 12 members to a preparatory commission that would issue a report by July 30. The commission failed to issue its report by that deadline, so at this writing there is no report to evaluate.

But the dismal history of implementing the bipartisan preparatory commission provides some guidance. The clause was inserted into Rhode Island's Constitution in 1973 and first implemented in 1984. In 1984, the high-water mark for its implementation, the commission met 14 times over many months and issued its report on July 5 that year.

In 1994, the legislature failed to appoint a commission. As the constitutional backstop for the legislature, the governor appointed commission members — but not until Nov. 7, only one day before the election. The commission issued no report.

This constitutional violation led to a lawsuit, which Rhode Island's Superior Court dismissed, arguing that the plaintiffs lacked standing. Essentially, the court signaled to the legislature and governor that it viewed this part of Rhode Island's Constitution as nonjusticiable; that is, it would rely on the court of public opinion, the ordinary political process, for its enforcement. Despite the court's ruling, the legislature retains a legal incentive to appoint a commission, because otherwise the governor would have that power by default.

In 2004, the commission met seven times and issued a report on Aug. 20. Its report explained why a legislature was a better mechanism to propose constitutional reforms than a constitutional convention. Only one of eight pages was devoted to listing potential issues a state constitutional convention could address. Most of the listed issues involved no legislative conflict of interest. None of the ideas were new; some were archaic.

These failures demonstrate that mandating a legislature to engage in public deliberation adverse to its own interests is unrealistic. To the extent that it is in the interest of a legislature to convene a constitutional convention, a commission may be desirable. But in that case, there is no need for a constitutional mandate.

We recommend a different educational approach. Rhode Island's secretary of state should set up a public website inviting proposals on why Rhode Island should or shouldn't convene a state constitutional convention. A commission of three individuals appointed by Rhode Island's secretary of state, governor and Supreme Court chief justice could moderate the website for spam. The proposals should be machine-readable so private media outlets could easily download them, set up interfaces to foster public deliberation via reader commentary and ratings, and include the results in news articles and commentaries.

Admittedly, the website would attract many crazy proposals and Machiavellian information strategies (such as the current practice of convention opponents promoting unpopular proposals that they can then attack). But readers of reviews on Yelp, TripAdvisor, Amazon and other web-based services have proven that a vigorous marketplace of ideas, even if it includes many bad ideas, is better than the type of top-down information control that previously existed.

Most important, the track record of the bipartisan preparatory commissions remind us why a constitutional convention is needed in the first place. The same conflicts of interest that have prevented incumbent legislators from engaging in serious deliberation about democratic reforms that would reduce their power and the power of their special interest allies also cause them to veto constitutional amendments adverse to their interests.

A constitutional convention is no panacea, but it is premised on a realistic assessment of the limited trust that should be placed in a legislature to make itself more democratically accountable. For serious discussions and proposals on issues where the legislature has a blatant conflict of interest, such as redistricting, ethics, transparency, campaign finance, ballot access, term limits and executive power, neither a legislatively appointed commission nor the legislature itself is the right institutional vehicle.

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Source: Snider, J.H., and Beverly Clay, R.I.'s poor preparation for convention, *Providence Journal*, August 2, 2014.

R.I. handbook shows blatant bias

by J.H. Snider and Beverly Clay | September 25, 2014 | Providence Journal

In the Internet Age, Rhode Island style voter information handbooks have become a First Amendment archaism, in the way the government-imposed Fairness Doctrine became after Americans got access to dozens of TV channels.

It has become absurd to let a single politician secretly write an "objective" voter information guide about controversial referendum questions, and then use taxpayer money and the prestige of his office to distribute it to every registered voter shortly before an election.

Consider the periodic constitutional convention referendum, Question No. 3 on the Nov. 4 ballot. The secretary of state is tasked with writing "a brief explanation of the measure" for the 2014 Voter Information Handbook. It is arguably an impossible task, but he has not acquitted himself well.

Rhode Island's Constitution mandates that, every 10 years, the public be granted an opportunity to vote on whether to convene a constitutional convention. It also mandates that prior to that vote, the legislature appoint a preparatory commission "to assemble information on constitutional questions for the electors."

No law requires that a secretary of state defer to the resulting commission report in drafting his handbook, but since 2004 this has been the practice. The commission has evolved into a thinly disguised arm of the legislative leadership, which appoints all 12 commissioners, including eight legislators. The handbook, in turn, has become a reflection of the commission's anti-convention bias.

For example, nowhere in either the 2014 Commission Report or 2014 Voter Information Handbook is there an explanation of the unique democratic function of the periodic constitutional convention referendum, which is to implement Article I, Section 1 of the Constitution granting "the right of the people to make and alter their [constitution]."

With legislatively initiated constitutional revision this right is only partially realized because the people are only granted the right to vote on constitutional alterations the legislature proposes. But the legislature may have a conflict of interest in placing certain popular democratic reforms on the ballot. Examples include expanding the powers of the executive and judiciary, and legislative redistricting, ethics, and term limits.

Similarly, the Handbook's cost analysis, mimicking the Report's, is slanted. The law only requires cost estimates for bond referendums, so any estimate for another referendum type is inherently biased when provided inconsistently.

At the commission's three public hearings, convention opponents emphasized costs, whereas supporters emphasized benefits. But only the opponents' arguments were included in the Report and Handbook. As supporters observed, the legislature justified

the 1973 Convention's $20,000 cost by the millions of dollars in new gambling tax revenue it would generate. Similarly, supporters argued that the cost savings from merely adding a gubernatorial line-item veto to the Constitution could repay a future convention's cost many times over.

The Handbook chose to use the Commission Report's $2.5 million estimated cost of voting yes on the Nov. 4 referendum. But that estimate was approved by the Commission at its last meeting without an opportunity for the public to see or comment on the assumptions on which it was based.

Yet the Commission's assumptions are suspect. The $2.5 million was presented as an extrapolation from the $891,000 cost of the 1986 Convention. But in inflation-adjusted dollars, $891,000 is now only $1.94 million. And since the size of the convention would be reduced from 100 to 75 delegates, that estimate could arguably be reduced by 25 percent to $1.45 million. Whereas the cost estimate for the 1973 Convention excluded the cost of using the State House and legislative staff, now the costs of a location and staff were added without specific numbers or general explanation.

For relatively straightforward bond referendums, the current voter information handbook process may work reasonably well. But for other types of referendums, such as for Question No. 3, the current process concentrates too much power in the secretary of state.

Advocates pro and con that receive a minimal number of petition signatures should be allowed to submit their own explanations to the Secretary of State, which could then publish them on his website. From this and other data, search engines that compile ratings and the press that create them could highlight the most useful pro and con statements and allow voters to compile their own voter guide.

This type of decentralized control over information is the best type of future platform on which to build a well-informed electorate. In the 21st century, the type of abuses that have characterized the old-fashioned 2014 Voter Information Handbook should become a distant memory.

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Source: Snider, J.H., and Beverly Clay, R.I. handbook shows blatant bias, *Providence Journal*, September 25, 2014.

1787: Vote No Against Convening a National Constitutional Convention

The following is a satire on the current debate concerning the November 4 referendum on whether to call a state constitutional convention.

by J.H. Snider | October 17, 2014 | GoLocalProv

The Coalition for a Responsible National Government opposes convening a national constitutional convention on May 14, 1787.

We are the first to admit that the national government is not perfect and needs fixing. We are vulnerable to attack on our borders by three of the greatest military powers in Europe: Britain, France, and Spain. We are vulnerable to rebellion within our borders (recall the recent Shays' Rebellion in Massachusetts). The states are deadbeats and won't fulfill their tax and military obligations to the national government. We cannot even pay wages promised to the soldiers who defended us in our recent war against Britain. Not surprisingly, public trust in Congress is at an all-time low.

But we don't need a constitutional convention to fix these problems. Congress can fix them by amending the Articles of Confederation.

Convening a convention would also be an irresponsible risk. Such a convention has never been used before in the history of humanity. And there is a good reason: it could replace our democracy with a monarchy or oligarchy. Indeed, we know of at least one expected delegate who plans to propose such a plan.

A convention wouldn't function any better than Congress. It would be dominated by special interests: wealthy, white landowners and slaveholders who are unrepresentative of the general populace. Indeed, they are the same special interest groups who currently dominate Congress.

A convention would also likely take away our rights, which are better protected in our state constitutions such as the Virginia Declaration of Rights. It won't protect the rights of blacks or women or Indians or the non-propertied class, who won't even have the right to vote on ratifying the proposed constitution. A national bill of rights passed by such a convention would only serve to protect special interests while trampling on the rights of minorities.

Surely, the money required to pay delegates for weeks of travel to and from the convention, plus convening for more than 100 days in Philadelphia–the largest and most expensive city in America–could be better spent providing basic public services.

Proponents of a convention argue that its proposals will have to be ratified by the sovereign states so a bad constitution that harms the people's rights wouldn't be approved. But they are wrong. Wealthy, out-of-state interests would conduct information campaigns to fool the people into voting against their own interests. For example, we hear rumors of a months-long PR campaign called the "Federalist

Papers." The Federalist Papers will be written and paid for by wealthy, white slaveholders (James Madison is purported to be the ringleader of this group) and distributed anonymously to newspapers throughout the 13 states. The plan is to use mass media to argue in favor of ratifying the proposed constitution, which would create a strong national government in the short term and then inevitably devolve into monarchy– all the while depriving us of our sacred political rights, including free speech, free assembly, and trial by jury.

If, against our recommendation, we do have a national constitutional convention, the state legislatures, not special state constitutional conventions, should ratify its proposals. Advocates of a national convention argue that state ratifying conventions are necessary because the state legislatures would never approve the needed constitutional changes, which would be perceived as strengthening the national government at their expense.

But they are wrong. Convening thirteen state constitutional conventions is an unneeded and outrageously wasteful expense. The money could be better spent providing valued services to our citizens and paying off the state debts overdue Congress. Moreover, delegates to the state ratifying conventions will be elected the same way that delegates to the state legislatures are elected. If the state legislatures are corrupt, the state constitutional conventions will be equally corrupt.

The British system of government, established by its Glorious Revolution of 1688, has led to the creation of the most powerful and liberal democratic country in the history of the world. In that system, Parliament, not the king or people, is sovereign. All constitutional change must come from and be approved by Parliament. Unlike the American system, the people are not entrusted with the ratification of fundamental law, for the illiterate and easily manipulated masses are recognized to be incompetent to do so. That is why Britain doesn't have a written constitution; it is simply unnecessary.

If legislative sovereignty has worked well for Britain, it should work well for us. If Congress and the country ain't broke, don't fix them.

For all these reasons, we urge you to oppose convening both a national constitutional convention and state constitutional conventions to propose and ratify reforms to the Articles of Confederation.

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Source: Snider, J.H., 1787: Vote No Against Convening a National Constitutional Convention(a satire), *GoLocalProv*, October 17, 2014.

Constitutional Convention purpose? Democratic reform

by J.H. Snider and Beverly Clay | October 21, 2014 | Valley Breeze

In their letters regarding the Nov. 4 referendum on whether to convene a constitutional convention, Steve Brown and George Nee raise a laundry list of objections to a constitutional convention. The list reads like a clever lawyer's legal brief, with the hope that if enough plausible sounding charges are brought, at least one will stick. Another term for this laundry list objection style is fear-mongering.

Rather than responding to all their charges – impossible to do in the space available to us (but check RhodeIsland.ConCon.info for all the arguments that have been presented pro and con for convening a convention) – we'd like to focus on the most important point their laundry list ignores: why the periodic constitutional convention clause was inserted into Rhode Island's Constitution.

The unique democratic function of the periodic constitutional convention is to propose democratic reforms for popular ratification when the General Assembly has an inherent conflict of interest in doing so. It is to implement Article 1, Section 1 of Rhode Island's Constitution, granting the sovereign (the people) the right to alter their constitution, which cannot be fully realized if the General Assembly retains a veto power over proposed democratic reforms.

Examples of the type of democratic reform issues the legislature is ill-suited to address include legislative redistricting, ethics, transparency, and term limits, as well as enhancing the powers of the competing executive and judicial branches of governments via measures such as the line item veto.

Ignoring the democratic function of the periodic constitutional convention allows Brown and Nee to present arguments that would otherwise appear absurd. For example, they fear an unlimited convention. But the whole point of a periodic constitutional convention is to avoid legislative control over its agenda. If the legislature can limit a convention's agenda, then the convention cannot fulfill its unique constitutional mandate. The unlimited (read "independent") constitutional convention is a feature, not a bug. Moreover, it's not just any feature; it is the feature.

Among the achievements of constitutional conventions in Rhode Island history include a comprehensive bill of rights, removal of the real-estate (property) requirement for native-born citizens to vote, voting rights for Catholic (notably Irish) immigrants, voting rights for the urban working class, voting rights for servicemen on active duty, elimination of anti-democratic constitutional amendment rules designed to entrench the power of past majorities (the rural, white, propertied classes who controlled the legislature), campaign finance disclosure rules, ethics rules to reduce political corruption, environmental protections, a relatively concise, logical, and readable constitution with embarrassing sexist and other archaisms deleted, and a procedure for calling a constitutional convention independent of the legislature. Arguably as important has been the mere

threat of convening a constitutional convention to get the legislature to pass rules it had long opposed, including reducing the legislature's ability to remove Supreme Court judges for political reasons (1994), enhancing separation of powers (2004), and eliminating the master lever (2014), all done in years when the constitutional convention referendum was also on the ballot.

Opposition to constitutional conventions in Rhode Island have largely been driven by two powerful political forces: 1) dead (past) majorities seeking to protect their privileges against living (current) majorities, and 2) special interests who have huge investments in legislators and recognize that the legislative process has been better designed for them to exert their influence. This helps explain Rhode Island's Dorr Rebellion in the mid-19th century. It also helps explain why the most powerful special interests fund the campaigns against constitutional conventions and why their expenditures dwarf the expenditures of corresponding yes campaigns. A third factor, the logic of modern coalition politics, is also vitally important but cannot be covered in the space available here.

Sure, democracy can be abused. But the same can be said about legislatures. Both constitutional conventions and legislatures have unlimited subject matter power to propose constitutional amendments (but not pass them into law). In both cases, the "unlimited" ability to propose reforms, like the freedom of political speech, is a feature, not a bug. Americans don't like "kings" restricting what ideas their elected representatives can propose. The ultimate check in both cases is not agenda restriction but popular ratification.

A final point: taken as a whole, Brown's and Nee's arguments come across as an attack on the institution of democracy, especially its core value of political equality, rather than on constitutional conventions per se. Sure, democracy is pretty awful. As Winston Churchill said, "Democracy is the worst form of government except all those other forms that have been tried from time to time." But just because the legislature is influenced by unsavory politics doesn't mean we should abolish it. Similarly, a constitutional convention is not a perfect institution – but it's the best institution we have available to solve a particular type of democratic problem.

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Source: Snider, J.H., and Beverly Clay, Constitutional Convention purpose? Democratic reform, *Valley Breeze*, October 21, 2014.

Constitutional Convention and the out-of-state-money bogeyman

by J.H. Snider and Beverly Clay | October 24, 2014 | Providence Journal

The group Citizens for Responsible Government has led the "no" campaign against the Nov. 4 referendum question on convening a Constitutional Convention. It claims that "our concern about a Constitutional Convention is that it opens the rulebook of our democracy to wealthy outside special interests." We have analyzed this claim for the three elections associated with a Constitutional Convention, and have found it to be baseless:

•The referendum on convening a convention: When polls indicate a "no" campaign could lose (as in Rhode Island this year), "no" expenditures have dwarfed "yes" expenditures.

For example, in Connecticut in 2008, 98 percent of the total money was against ($17,597 for; $846,669 against), and in Illinois, 92 percent ($147,765 for; $1.7 million against). In both states, outside money played a small role in the no campaigns; specifically, the national teachers union contributed 21 percent of the total opposition expenditures, with its state affiliates more than matching it. In contrast, no national organizations or out-of-state individuals contributed to the yes campaigns. In Rhode Island in 2004, both the yes and "no" campaigns appeared to rely exclusively on local money.

•The delegate election: Outside money tends to play a large role in candidate elections, especially for members of Congress. But they have not played a similarly large role in convention delegate elections.

During Rhode Island's last Constitutional Convention, in 1986, 558 delegates ran for 100 seats, with an average expenditure by winning candidates of $282 ($612 in current dollars). We found no evidence that outside money from organized interests (as opposed to, say, friends and family) played a significant role. A good reason for this may be that outside money tends to go to incumbent legislators with senior legislative positions who are expected to hold power for more than a few months. By their nature, convention delegates lack such appeal.

•The ratifying referendum: A Constitutional Convention is an advisory body that proposes reforms to the sovereign (the people) for ratification. In 1986, Rhode Island's Constitutional Convention submitted 14 proposals for ratification. Eight passed; six were rejected. The two major convention proposals passed: the rewrite of the Constitution (to eliminate embarrassing, obsolete language) and ethics reform (to reduce political corruption). We found no evidence that these two proposals and the other six that passed were the subject of mass media advertising campaigns.

By far the most contentious proposal was Question 14, which proposed reducing a woman's right to choose. Despite an organized antiabortion campaign, the referendum was defeated by a margin of 2 to 1.

Campaign finance data weren't available in 1986, but good data are available from Rhode Island and other states for recent years. One relevant finding is that a small percentage of referendums receive the lion's share of the money. For example, in 2010, the United States had 184 ballot referendums, only 48.9 percent of which received any funding.

Another finding is that the referendums that receive the most funding aren't of the good-government type. For example, Rhode Island had 22 referendums between 2006 and 2012. On two gambling referendums (only 9 percent of the referendums), $27.9 million was spent, which amounted to 91 cents of every dollar spent. In 2012, the United States had 186 referendums. Two categories of referendum issues (gambling and labor unions) involved only 7 percent of total referendums but generated 41 cents of every dollar spent.

If good-government issues such as legislative redistricting, ethics, transparency, term limits, judicial selection, or veto restrictions were on the ballot, it is unlikely they would receive significant outside funding.

Significant outside money is likelier on issues directly affecting organized economic interests or high-profile social issues, which could be part of a convention's agenda. Even here, however, the normative significance of such contributions is unclear. For example, the vote no coalition includes members whose parent organizations are among the largest outside contributors in U.S. politics.

As for outside money available to support bans on either a woman's right to choose or same-sex marriage, that's unlikely because outside money is smart money. It would want a return on its investment and those would be losing propositions here in Rhode Island.

For example, Planned Parenthood of Southern New England (whose parent organization is one of the largest outside contributors on social issues) summarized a public opinion survey it conducted in June 2014 as follows: "Rhode Island is pro-choice by huge margins: those who believe abortion should be generally available outnumber those who believe abortion should be illegal 8 to 1."

The unique constitutional function of the periodic constitutional convention is to propose good government reforms when the legislature is the problem and therefore wouldn't propose them. In fulfilling that limited function, evidence from Rhode Island and other states indicates that "the rulebook of democracy" wouldn't be controlled by "wealthy outside special interests" — except possibly to defeat this unique opportunity for good-government reform.

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Source: Snider, J.H., and Beverly Clay, Constitutional Convention and the out-of-state-money bogeyman, *Providence Journal*, October 24, 2014.

Constitutional Convention records speak for themselves

by J.H. Snider and Beverly Clay | November 4, 2014 | Warwick Beacon

In response to Steve Brown's attack on Rhode Island's 1986 constitutional convention (see Constitutional convention: The General Assembly's kid brother), we'd like to note that eminent Rhode Island historians disagree with his historical assessment. Pat Conley, Rhode Island's historian laureate, has summarized the convention's contribution as "highly productive," including the integration of the 44 amendments added to Rhode Island's 1843 Constitution into a concise, streamlined rewrite. If having a readable constitution is one of the most important political rights a people can have, the 1986 rewrite greatly contributed to Rhode Island's democracy.

In addition to the rewrite, the 1986 Convention proposed seven amendments the voters approved, including creation of an ethics commission, expanded environmental protections and enhanced powers for the governor. Brown mentions none of these accomplishments, instead focusing on a proposal that was defeated 2-1 by the voters.

There is little that Brown says about the 1986 Convention that couldn't also have been used to disparage the U.S. Constitutional Convention of 1787 (see J.H. Snider's satire, 1787: Vote No Against Convening a National Constitutional Convention). Indeed, opponents of that convention argued that constitutional changes should be proposed via the Continental Congress and that constitutional proposals should be ratified by state legislatures rather than state ratifying conventions. Supporters knew that would be the kiss of death for reforming the Articles of Confederation despite the fact that the state legislatures and state constitutional conventions were both popularly elected by similar means.

Moreover, the independent constitutional conventions that Rhode Island has convened have been among the highlights of the state's political history and are symbolized by the prominent position of Thomas Dorr's statue in Rhode Island's State House. (Dorr was Rhode Island's most famous advocate for a state constitutional convention and his battles with a recalcitrant legislature are taught today in high school history textbooks throughout the 50 U.S. states).

Among the achievements of constitutional conventions in Rhode Island history include a comprehensive bill of rights, removal of the real estate (property) requirement for native-born citizens to vote, voting rights for immigrants (notably Catholic and Irish), voting rights for the urban working class, voting rights for servicemen on active duty, elimination of anti-democratic constitutional amendment rules designed to entrench the power of past majorities (the rural, white, propertied classes who controlled the legislature), campaign finance disclosure rules, ethics rules to reduce political corruption, environmental protections, a relatively concise, logical, and readable constitution with embarrassing sexist and other archaisms deleted, and a procedure for calling a constitutional convention independent of the legislature.

Arguably as important has been the mere threat of convening a constitutional convention to get the legislature to pass democracy enhancing rules it had long opposed, including reducing the legislature's ability to remove Supreme Court judges for political reasons (1994), enhancing separation of powers (2004) and eliminating the master lever (2014) – all done in years when the constitutional convention referendum was also on the ballot.

None of this is to say that state constitutional conventions have been perfect. But when it comes to restricting the rights Brown says he cares about, legislature initiated constitutional amendments have a far worse track record than constitutional convention initiated constitutional amendments. That's the real comparison that is relevant.

The most powerful special interests fear constitutional conventions and provide the overwhelming majority of the money behind no campaigns because they know that constitutional convention politics are different from legislature politics: the special interests cannot so easily kill proposals opposed to their interests or slip bills through favorable to their interests. So no, a constitutional convention is not "The General Assembly's kid brother." If it were, there would be no statue of Thomas Dorr in the State House.

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Source: Snider, J.H., and Beverly Clay, Constitutional Convention records speak for themselves, *Warwick Beacon*, November 4, 2014.

MARYLAND:
NOVEMBER 2, 2010

Maryland's Ballot Surprise

Voters in November will have a rare opportunity to shape the state's constitution.

by J.H. Snider | January 8, 2010 | Baltimore Sun

This November, Marylanders will have a once-in-a-generation chance to shake up the political process. Yet few know about it, and even fewer are talking about it.

Maryland's Constitution stipulates that, every 20 years, the General Assembly must place on the general election ballot a binding referendum asking voters whether they want to convene a constitutional convention. If it passes, it could be the most politically momentous event in Maryland during 2010.

Since the U.S. was founded, states have convened more than 230 constitutional conventions, five of them in Maryland. During the 20th century, Marylanders had six ballot opportunities to convene one. Three times supporters outnumbered opponents, but only once was a convention convened because Maryland's Constitution requires a majority, not a plurality, of voters. In 1950, for example, 200,439 voters supported a convention while only 56,998 opposed it, but the referendum failed to pass because 388,284 voters in the election left the ballot item blank.

The only convention referendum to win the necessary votes occurred in 1966. In 1964, the U.S. Supreme Court ruled that Maryland's legislative districting violated the U.S. Constitution's one-person, one-vote requirement. For example, many rural legislators had far fewer constituents than urban legislators. Maryland's governor, over the legislature's initial objections, strongly supported holding a convention. Convention delegates, elected in a special election, convened during 1967-68 and placed their proposal on the ballot for ratification in 1968. Opponents successfully focused public attention on the proposal's most controversial features, and it was defeated - although many of the proposed changes were subsequently adopted through constitutional amendments.

Constitutional conventions have been held for many reasons, including expanding white male suffrage (the early 19th century), expanding black suffrage (the late 19th century), expanding direct democracy (the early 20th century), and reapportioning legislative districts (the mid-20th century).

One common argument in their favor during the 20th century in Maryland was the current constitution's style, which is suitable for lawyers and lobbyists, not average citizens. Many Marylanders have read the U.S. Constitution, but few have read the Maryland Constitution, which at approximately 47,000 words is more than five times as long as the U.S. Constitution.

Another justification for a convention - one that I prefer - is that it is the preferred venue to propose democratic reforms where elected officials have a blatant conflict of interest with the public. Such issues include term limits, redistricting, campaign finance, ballot access and legislative transparency. When no conflict of interest exists, the constitutional amendment process, controlled by the legislature, is satisfactory.

The conflict-of-interest rationale for constitutional conventions goes back to the framers of the U.S. Constitution. As George Mason of Virginia explained the need, "It would be improper to require the consent of the National Legislature, because they may abuse their power and refuse their consent on that very account."

Another remedy for legislative conflicts of interest is the ballot initiative, by which citizens can put items on the ballot that incumbents oppose. But Maryland is not one of the 24 states that use ballot initiatives. In any case, a constitutional convention, if designed well, can be superior to a ballot initiative, partly because elected rather than self-appointed representatives craft the proposals and because the process is more transparent and deliberative.

In 2010, the best argument for a constitutional convention could be the redistricting triggered by the next decennial U.S. Census taken in April. Maryland's legislators will no doubt use redistricting to entrench themselves, creating partisan and pro-incumbent gerrymanders that disenfranchise moderates and suppress political competition. A convention could propose an independent body, such as a redistricting jury or bipartisan commission, to constrain gerrymanders.

Like any other democratic process, a constitutional convention is no panacea. Delegates would be elected in districts that mimic the size and district geography of Maryland's current General Assembly, and incumbents and special interests would be sure to influence the elections to favor their own interests. Nevertheless, no better vehicle is available for voters to break up Maryland's incumbent protection racket. And if voters don't like the convention's recommendations, they need not ratify them.

In 1967-8, the convention delegates were elected in a nonpartisan election, with candidates trying to distance themselves from the elected legislature's partisan, special interest and pro-incumbent politics. The nonpartisan election system should be retained, although enhanced with instant runoff voting.

Mobilizing the public on democratic reform issues is well known to be very difficult. Thus, compelling reasons, such as combating gerrymandering, must be found to capture the public's attention. Those who seek to create a more democratic political system in Maryland should now begin the process of educating the public about the issues at stake in this once-in-a-generation opportunity.

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Source: Snider, J.H., Maryland's Ballot Surprise, *Baltimore Sun*, January 8, 2010.

The road to term limits in Maryland: A constitutional convention is the state's best chance for reform

by J.H. Snider | September 22, 2010 | Baltimore Sun

Could this be the year when the anti-incumbent mood in Maryland results in legislative term limits? If so, there is only one way it could happen: via the statewide ballot item on Nov. 2 to convene a state constitutional convention (con-con).

A common refrain by con-con opponents is that if a constitutional change is popular, the legislature will make it, so a con-con is unnecessary. But this overlooks why the American system of government is based on checks and balances. Political scientists have long recognized that elections aren't always enough to get legislators to respond to public opinion.

Consider legislative term limits. They are wildly popular, but legislators frequently refuse to pass them. When they are placed on the ballot, they usually receive majority support even when opponents vastly outspend supporters and when the proposed term limits are so strict that many term limits supporters oppose them.

State legislators have such a blatant conflict of interest in passing term limits for themselves that the only way they have been passed – with only one exception – is in states with the ballot initiative, which allows citizens to bypass their elected legislators. Of the 21 states that have passed legislative term limits, only Louisiana lacks the initiative – and unsurprisingly, Louisiana has the weakest term limits law in the U.S. Maryland doesn't have the initiative. But it does have the constitutional convention, a similar checks-and-balances mechanism to bypass the General Assembly when legislators have a conflict of interest with voters. Six other states with the con-con, unlike Maryland, also have the initiative.

Maryland's constitution mandates that every 20 years a referendum be placed on the ballot asking voters whether they want to convene a state constitutional convention.

If November's referendum passes, voters will be asked to elect a con-con of the same size and geographic distribution as the Maryland General Assembly. In Michigan, con-con members cannot be incumbent officeholders. Maryland doesn't have that rule, but the last time Marylanders elected con-con delegates, fewer than 10 percent were incumbents. The con-con meets briefly and passes no legislation, only ballot referendums subject to voter approval.

A state con-con should be viewed as the voters' best opportunity to pass democratic reforms – such as term limits, independent redistricting, accessible ballots and legislative transparency – when incumbent legislators have a blatant conflict of interest with voters and seek to create barriers to political competition. A con-con need not be limited to conflict-of-interest issues, but that's where it can contribute most to the democratic process.

Term limits are certainly no panacea. Indeed, like democracy, they are awful – but better than the alternatives. A 2009 study by Columbia University professors Jeffrey R. Lax and Justin H. Phillips found that state legislatures without term limits had a larger democratic deficit, measured in terms of legislators' responsiveness to majority opinion, than those with them.

Although foreign to the General Assembly, Marylanders have lots of experience with term limits. The governor and many county executives have them. In the legislative branch, many school boards and county councils also have them. Their absence from the General Assembly is telling. For example, during the 2006 general election for the 47 seats in Maryland's state Senate, the average difference between first- and second-place finishers was a whopping 54.8 percentage points, including 15 uncontested seats. Only two incumbents lost, and only two seats changed political party. No office with term limits has similar uncompetitive electoral statistics.

A state con-con is also no panacea. Like any democratic process, it can be abused. But it is nevertheless the best mechanism available in Maryland for voters to combat the countless little ways incumbent legislators can erect undemocratic barriers to political competition.

Since a con-con challenges their power, incumbents from both political parties and the special interests that benefit from the status quo have in modern times opposed them. The last con-con to convene in Maryland was more than 40 years ago and was in response to a U.S. Supreme Court ruling that the General Assembly had for decades willfully violated the law of one person, one vote. The current anti-incumbent mood may create similar impetus.

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Source: Snider, J.H., The road to term limits in Maryland: A constitutional convention is the state's best chance for reform, *Baltimore Sun*, September 22, 2010.

A Historic Year for State Con-Cons

by J.H. Snider and G. Alan Tarr | October 12, 2010 | Huffington Post

2010 marks a historic year for state constitutional conventions (con-cons). On November 2, 2010, four states (Maryland, Michigan, Montana, and Iowa) have referendums on the ballot asking voters whether they want to convene a state con-con. Never before in U.S. history have so many such referendums been on the ballot at one time.

The constitutions in these four states mandate that such ballot questions be put before the voters periodically, so that they can decide whether to revise their constitutions. Fourteen states give their citizens this opportunity, and this is exactly what Thomas Jefferson wanted. "The earth belongs to the living," he said, and so each generation should have the opportunity to choose its own political institutions.

The large number of con-cons this year results from a historical coincidence. When Montana revised its constution in 1972 as a result of a con-con, it included an automatic con-con referendum provision with a 20-year cycle beginning in 1990. The result is that every 20 years three of the four states have the referendum on the ballot on the same date. The fourth state, Michigan, has a con-con scheduled for every 16 years, leading to an 80 year cycle when its referendum coincides with the other three . The next time four con-con referendums are expected to be on the ballot at the same time is in 2090.

The last three decades have been the worst period in U.S. history for state con-cons. There have been 233 in U.S. history, including five in Maryland, but only three since 1980 and only one convened as a result of a referendum mandated by a state constitution. As a result, the vast majority of living Americans, including reporters, haven't witnessed a con-con in their adult life. This popular ignorance has made it easy for misinformation about con-cons to spread, especially during the last few days before a con-con election when there is virtually no accountability for what is said. Based on the historical record, the following rebuts some of that misinformation.

1. State constitutions don't matter.

It's true that state constitutions are very long and, for the average person, unloved and rarely read. But state and local governments affect citizens every day, and it is the state constitution that creates, structures, and limits those governments. The Maryland Constitution, for example, guarantees the rights of victims of crime, limits governors to two terms of office, requires a balanced state budget, limits state indebtedness, and requires the establishment of "a thorough and efficient System of Free Public Schools." More negatively, the less important a passage may be to the average person, the more important it may be to a special interest group who fought with blood, sweat, and tears to get a legislature to codify one of its privileges not just in law but in constitutional law — the hardest type of law to change and the type of change only the most powerful special interests are likely to win. State constitutions indeed do matter.

2. State legislatures can be trusted to propose needed constitutional changes.

For most constitutional revision, the legislature is indeed the appropriate institution to take the lead in either proposing amendments or calling for a constitutional convention. But on issues such as term limits, campaign finance, redistricting, legislative transparency, and ballot access, elected officials from both political parties may have an inherent conflict of interest with voters. America's constitutional system establishes checks & balances because elections alone do not guarantee that legislators will always place their constituents' interests ahead of their own interests. Constitutional provisions to automatically place state con-con items on the ballot, including provisions to elect con-con members independently of the legislature, are necessary to ensure that state constitutions reflect the public's views.

3. A constitutional convention would open up a Pandora's Box.

Like the original con-con that created the U.S. Constitution in 1787, most con-cons have been efficient and effective democratic institutions. The last con-con in Maryland proposed a number of worthwhile constitutional reforms, and although voters rejected the complete package of constitutional changes it proposed, they have in the ensuing years adopted piecemeal a number of its better proposals.

Admittedly, the democratic process is often messy and unpredictable. Like most state legislatures, con-cons will generate their fair share of harebrained and undemocratic proposals, but none can become law unless adopted by a majority of the delegates and a majority of the electorate. States have held 233 con-cons, and none have produced the horrors that opponents fear, because they are democratically accountable. State voters decide whether to have a con-con, elect the delegates, and ratify or reject the con-con's proposals. Conventions face extensive press and public scrutiny, and courts can strike down any constitutional changes that violate the U.S. Constitution.

In Maryland, the misconception about a con-con's limitless, unaccountable power may result from the wording of its con-con ballot referendum, which reads: "Should a constitutional convention be called for the purpose of changing the Maryland Constitution?" A more accurate ballot description would have read: "Should a constitutional convention be called for the purpose of proposing changes to the Maryland Constitution that would then be submitted to the electorate for its approval or disapproval by majority vote?" In short, con-cons cannot approve constitutional changes; they can only place them on the ballot for voter approval.

4. A constitutional convention would just be politics as usual.

The politics of getting a con-con called suggests just the opposite. Entrenched interests, such as unions and business groups, oppose conventions because they trust state legislatures to protect their special privileges more than independently elected con-cons. So when these groups sense that a referendum to convene a con-con might pass, as in both Illinois and Connecticut in 2008 (in both states the yes vote was ahead in the polls

only a week before the election), they are willing to spend large amounts of money on PR campaigns to kill them. Since the yes advocates don't have any concentrated and thus powerful economic interests backing them, it is not unusual in close races for the "no" interests to outspend the "yes" interests by a factor of ten- or even a hundred-to-one for each vote they win. When combined with the fact that the vast majority of incumbent legislators from both political parties recognize that con-cons were designed to serve as a check on their power and thus oppose them, it can be a wonder why con-cons ever get any yes votes at all. The nature of the opposition they attract is itself proof that con-cons can make a real difference.

Con-cons can also be a good mechanism to update archaic constitutions. Most state constitutions designed in the 19th century, including Maryland's, weren't designed for the long term. Compared to the federal constitution, they tend to be much longer and filled with detail that doesn't differ much from ordinary legislation both in substance and in its propensity to become outdated. Such constitutions have often been patched and patched again with amendments (more than 5,000 across all state constitutions). But over time such patches tend to make constitutions incoherent and unreadable; they are no substitute for the type of careful review that a con-con can provide.

5. A con-con would deprive citizens of their rights.

The U.S. Constitution is the primary guardian of political and civil rights for minorities in the U.S., including such rights as freedom of the press, religion, and assembly; protection from unreasonable search and seizure; and one-person, one-vote. Nothing a con-con could propose could supersede the rights protected in the U.S. Constitution. Indeed, con-cons, often responding to U.S. Constitutional changes, have been a great force for expanding rights, including expanded white suffrage in the early 19th century, black suffrage in the late 19th century, and equal representation for urban citizens in the mid-20th century. Of course, rights not covered by the U.S. Constitution could be changed. But history suggests that con-cons, reflecting changing public sentiment, have done far more to enhance than diminish such rights.

6. A con-con cannot justify its cost to taxpayers.

Con-cons are either expensive or not depending on the size of a state's democratic deficit and whether they can reasonably be expected to significantly reduce it. A Gallup poll taken in 2009 found that the American public believes that, of every dollar spent, the federal government wastes fifty cents, state government 42 cents, and local government 37 cents. Presumably the cause of this waste is the government's democratic deficit. Democratic deficits also reflect injustice to individuals and mismanagement of private enterprise leading to monopoly and inefficiency. Anyone who questions the importance of democratic deficits in influencing the wealth of societies may want to compare the quality of democracy in poor and wealthy countries.

Using Maryland to illustrate the economics of con-cons, let's assume that a con-con would cost approximately $1 per person, or $6 million in total (Maryland has a

population of close to 6 million). The Maryland legislature currently spends $32 billion/year, and a referendum to convene a con-con only appears on the ballot once every twenty years. That means the cost of a con-con would be .00001 of the 20-year budget. Let's also assume that the public approved one or more of the con-con's proposed constitutional amendments, reducing the presumed 42% of government waste by only 1%. Ignoring any benefits from a reduction in injustice and private sector mismanagement, that would result in the public receiving a 500 to 1 return on its investment in the con-con. Of course, there are a lot of contestable assumptions here. The key point is that even if a con-con makes only a slight improvement in the quality of state democracy, the payback can dwarf the cost.

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On October 22, 2010 from 3:00 pm to 4:30 pm, The Maryland State Constitutional Convention Clearinghouse will be hosting an event at the National Press Club in Washington, DC entitled "Is State Con-Con Phobia Justified?" Leading state constitutional scholars will discuss the state constitutional convention referendums on the Nov. 2 ballots in Maryland, Michigan, Montana, and Iowa.

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Source: Snider, J.H., and Alan Tarr, A Historic Year for State Con-Cons, *Huffington Post*, October 12, 2010.

*G. Alan Tarr is the director of the Center for State Constitutional Studies at Rutgers University-Camden and co-editor of *State Constitutions for the Twenty-First Century: The Politics of State Constitutional Reform*.

Con-con promise comes due for O'Malley

by J.H. Snider | November 13, 2010 | Washington Post

In an Oct. 21 gubernatorial debate with Republican challenger Robert Ehrlich, Maryland Gov. Martin O'Malley was asked if he supported convening a constitutional convention — a "con-con" — in Maryland. He replied: "If that's what people want to do, then that's what we should do." O'Malley undoubtedly made that promise confident that the con-con referendum would fail (none has succeeded anywhere in the United States since 1984), allowing him to costlessly appease con-con supporters.

Now that the referendum has received 54 percent of the vote, the governor should be held accountable for that promise.

Even though more people voted for this referendum than against it, a con-con probably will not be called automatically, thwarting the will of the people. That's because a quirky rule written into Maryland's constitution essentially counts blank votes on this question as no votes.

This undemocratic rule exists because incumbent legislators from both parties hate con-cons, which serve as a check on their power. As George Mason, one of the delegates to the 1787 U.S. con-con, put it in arguing for a con-con mechanism for amending the Constitution: "It would be improper to require the consent of the [legislature], because they may abuse their power and refuse their consent on that very account."

The last Maryland con-con was convened after a 1964 U.S. Supreme Court ruling that the legislature had for decades knowingly violated the principle of one person, one vote. Over the years, residents had migrated from rural to urban areas, but legislative districts had remained unchanged. As a result, each rural legislator came to represent far fewer people than each urban one. Rural legislators had for decades refused to implement one person, one vote because it would have cost them seats in the General Assembly.

To reduce the chances of a con-con ever coming to pass, lawmakers have long pushed for the innocuous-sounding requirement that winning a majority of all voters taking part in an election, with non-votes treated as no votes, would be necessary merely to convene a con-con. Remarkably, of the 14 states with constitutionally mandated automatic con-con referendums, only two have such a majority election requirement (and in the second state, Hawaii, the language can be read either way).

Maryland legislators' dislike of the con-con referendum was also reflected in the language they employed for the 2010 referendum. The question — "Should a constitutional convention be called for the purpose of changing the Maryland Constitution?" — conveyed the impression that the participants of the con-con would have the power to alter the constitution themselves, rather than to merely propose amendments for voter approval. The ballot also made no mention of the fact that a non-

vote would be treated as a no vote. This was not only a misleading attempt to suppress the yes vote but possibly an illegal one.

It didn't have to be that way. In 1966, Maryland Gov. J. Millard Tawes responded to the Supreme Court's rebuke by asking the legislature for a con-con referendum. To get around the "majority of all voters" requirement, he asked the legislature to hold a separate, special election simultaneously with the regular election. The 1966 con-con only won 26 percent of the total election vote, but it only needed to win a majority of those weighing in on the question. It passed because of Tawes's commitment to one person, one vote.

If Tawes's method had been used in 2010, the con-con would have passed. Even using the legislators' self-serving supermajority requirement, it received 48.5 percent of the vote, almost twice as much as in 1966.

This doesn't have to be the end of it. Because yes voters outnumbered the no's, the legislature has not only the power but also the moral duty to convene a con-con without another referendum. O'Malley should follow Tawes's precedent in upholding the principle of one person, one vote, and fight hard for a convention. Otherwise, this will be the first broken campaign promise of his new administration.

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Source: Snider, J.H., Con-con promise comes due for O'Malley, *Washington Post*, November 14, 2010.

State ignores voters on constitutional convention

Majority voted in favor of con-con in 2010, yet it hasn't been convened.

by J.H. Snider | January 18, 2012 | Baltimore Sun

Many laws aren't enforced, including requirements that you pay payroll tax for baby sitters and clean your sidewalk after a snowstorm. But enforcing the Maryland Constitution, especially in regard to electoral rules, should not be a matter of discretion.

On Nov. 2, 2010, a statewide ballot referendum asked voters whether they wanted to convene a state constitutional convention (con-con). Under Maryland's constitution, this referendum is automatically placed on the ballot every 20 years. Of those voting on the question, 54.4 percent voted yes. However, the governor and General Assembly refused to convene the con-con.

In 1851, Maryland held its first con-con since the Revolutionary War. Since the mid-1830s, Maryland citizens had fought, sometimes under the banner of "reform or revolution," to convene a con-con. Rural and slaveholding counties represented a declining proportion of Maryland's population but controlled a majority of General Assembly seats. Fearing a con-con would lead to population-based reapportionment, the Assembly strongly opposed convening a con-con. Acutely aware of the Assembly's opposition, con-con delegates designed an amending process they believed wouldn't be dependent on the Assembly's goodwill.

From 1851 until 1930, the majority required to convene a con-con was interpreted and implemented to mean an ordinary majority. With an ordinary majority, the number of yes votes is compared with the number of no votes and, if larger, the proposition passes. This is the default type of majority in America when, as often occurs, majority language is ambiguous.

In 1930, the yes votes exceeded the no votes. But the rural delegates who controlled the Assembly feared a con-con would reduce their power via reapportionment. The Assembly hired a prominent constitutional lawyer who argued that the majority clause in Maryland's constitution was ambiguous and could be read to mean a majority of those voting on any item on the ballot. Under this definition of a majority, nonvotes could be counted as "no" votes, thus defeating the referendum.

Given that courts at that time were opposed to entering the "political thicket," the Assembly knew it merely had to provide a plausible-sounding constitutional interpretation. Perhaps because the few copies of Maryland's mid-19th century con-con debates were largely inaccessible in 1930 and because no printed record existed of the debates from Maryland's last con-con in 1867, the Assembly's counsel also could provide a remarkably selective and biased interpretation of the con-con debates without being held accountable.

In 1950, Maryland voters once again approved the con-con referendum. Once again, citing the earlier legal opinion, the Assembly refused to convene a con-con.

In the early 1960s, judicial attitudes about entering the "political thicket," especially in areas such as reapportionment where elected officials had a blatant conflict of interest with citizens, began to change. Consequently, democratic reform groups sued the state of Maryland, arguing it not only violated the U.S. Constitution's requirement of "one-person, one-vote" but also violated its constitution's majority requirement for convening a con-con. The con-con rules entered the lawsuit only as a vehicle to reapportion Maryland. Representing the state, Maryland's attorney general argued that no constitutional violations had been made and, in any case, such political issues did not belong in court. The lower courts chose to evade the con-con issue, with theU.S. Supreme Courtultimately ruling in 1964 that Maryland had violated the U.S. Constitution and would have to reapportion its legislative districts.

The 2010 con-con referendum results, then, do not mark the first time Maryland's incumbent politicians have refused to convene a con-con after a con-con referendum received an ordinary majority. However, this does mark the first time this has happened since the courts' new willingness to take on such political issues. (Despite the reform groups' request in the 1960s, no court has ever ruled on the legality of the Assembly's self-serving majority interpretation.)

The 150-year odyssey of Maryland's con-con provision is an amazing story of political corruption, special interest politics, media dysfunction and public ignorance. Marylanders owe a tremendous debt of gratitude to the courageous, tireless and visionary leaders who inserted this provision in Maryland's 1851 Constitution. Despite implacable opposition from Maryland's incumbent officeholders, the clause is now Marylanders' best hope for fixing Maryland's democratic deficits, including its inherently corrupt redistricting system and its legislators' defiance of popular sentiment on legislative term limits. This is why I'm suing the state to force it to convene the con-con a majority of Marylanders voted for on Nov. 2, 2010.

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Source: Snider, J.H., State ignores voters on constitutional convention, *Baltimore Sun*, January 19, 2012.

It will take a con-con to untangle Maryland's gerrymanders

by J.H. Snider | February 10, 2012 | Washington Post

The U.S. Constitution mandates that states redraw their political districts every decade, based on the latest population census data. Maryland's General Assembly is currently considering new districts for itself.

Maryland's redistricting process allows incumbent legislators to choose their own and their competitors' voters for the coming decade. The resulting anti-democratic districts are called gerrymanders, which have two basic flavors: partisan and pro-incumbent.

In a partisan gerrymander, districts are drawn to favor the dominant political party. For example, Maryland's recently approved congressional districts were drawn so that the Republican Party would be dominant in only 12.5 percent of the congressional seats despite routinely polling more than 40 percent of the vote.

In a pro-incumbent gerrymander, districts are drawn to favor sitting legislators. Maryland's proposed General Assembly districts have been drawn to give most members of both parties safe seats in the general election. Many will run unopposed or face only nominal opposition.

Of course, the incumbents who control redistricting routinely profess that the districts are drawn to enhance, rather than harm, democratic values. Although everyone knows these claims are a farce, it plays out this way decade after decade because incumbents benefit from the status quo and voters have no practical recourse for bringing about change.

One common recommendation to fix the problem is to create a bipartisan redistricting commission. But creating such a commission isn't politically viable in Maryland, where one party dominates the government and no ballot initiative exists.

Another often-heard idea is to empower judges to draw the districts. But judges lack the power of the purse or sword to enforce their rulings, often depend for their appointments and perks on the good will of incumbent legislators and know that they are popularly perceived to be the least democratic branch of government. Hence, except for the most egregious gerrymandering cases, they defer to the political branches. As U.S. District Court Judge Roger W. Titus wrote in a recent redistricting case, it "is clear that the plan adopted by the General Assembly of Maryland is, by any reasonable standard, a blatant political gerrymander." Nevertheless, he approved the plan.

My preferred solution is the redistricting jury. With a redistricting jury, judges don't choose a plan. Instead, they convene a jury to pick from among submitted plans based on democratic criteria such as compactness, contiguity and equal population. To enhance its democratic legitimacy, the jury is randomly selected and unusually large. Until recent technological advances, redistricting juries weren't practical. Drawing district maps used to require experts, cost hundreds of thousands of dollars and required months of work. Now a fifth-grader connected to the Internet can draw comparable maps with a few clicks

of a mouse. This means that a redistricting jury would be able to choose from among many high-quality submitted maps.

However, given the long-standing and inevitable opposition of Maryland's incumbent legislators to meaningful redistricting reform, the only politically plausible way to implement such reform is via a state constitutional convention. The good news is that Maryland's Constitution mandates that citizens be asked every 20 years whether they want to convene such a con-con. In 2010, when the question was last on the ballot, 54.4 percent of those voting on the question voted yes. Not a single member of the General Assembly publicly supported a yes vote. The bad news is that, relying on a self-serving and, I believe, illegal interpretation of Maryland's Constitution, the governor and General Assembly refused to convene the approved convention, despite their oath of office to uphold the Constitution.

With the need for redistricting and other democracy-enhancing reforms in mind, reformers should support pressuring and suing the governor and General Assembly to convene the con-con that Maryland voters approved.

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Source: Snider, J.H., It will take a con-con to untangle Maryland's gerrymanders, *Washington Post*, February 12, 2012

Here's why Maryland politicos must convene a constitutional convention

by J.H. Snider | March 12, 2012 | Washington Examiner

Maryland's Constitution stipulates that every elected official must take an oath of office to "support the Constitution." But for powerful elected officials, namely the governor and General Assembly members, Maryland's courts don't necessarily take such oaths seriously.

When an average citizen or low-level elected official breaks the law, it's a crime. But when the powerful break their oath of office, it can magically become a "political question."

Some scholars explain this double standard based on practical power politics. Since judges lack the power of the purse or sword to enforce their rulings and are often dependent for their appointments and perks on the goodwill of the governor and Assembly, they protect their careers by not poking the eye of the political branches.

Following precedent, this is arguably the underlying reason why Gov. Martin O'Malley and the Maryland General Assembly in Annapolis felt they could act with impunity when they violated Maryland's Constitution and their oath of office by failing to convene a state constitutional convention (con-con).

Maryland voters approved the convening of a meeting on November 2, 2010, by a 54.4 percent majority of those voting on the referendum.

Con-cons were designed by the framers to deal with issues where legislators have a blatant conflict of interest with the public. It was understood that if legislators were given exclusive power to propose constitutional change, then any changes that would restrict their power would probably never get passed.

The con-con was to be the safety valve for this democratic reform malady. As George Mason explained, "it would be improper to require the consent of the National Legislature, because they may abuse their power and refuse their consent on that very account."

Born of decades of bitter experience with an Assembly opposed to decennial reapportionment based on population, the framers of Maryland's 1851 Constitution expanded on this principle by requiring that a statewide con-con referendum be periodically placed on the ballot — currently five times a century — regardless of Assembly opposition.

The issue for the public now is not whether to support convening a con-con; it is whether to support one standard for upholding the law for average citizens and a lesser standard for the powerful.

Moreover, even if Maryland's officeholders weren't violating their oath of office, they would be violating their democratic duty to represent their constituents. As Article I of

Maryland's Constitution states, "All Government of right originates from the People…; and they have, at all times, the inalienable right to alter, reform or abolish their Form of Government."

A yes vote to convene a con-con merely requires that an election be held to elect delegates to a con-con, which may then propose constitutional reforms for ratification by popular referendum.

Maryland is the only U.S. state where the legislature, through a shamelessly self-serving and twisted interpretation of the framer's intent, claims a larger popular majority is required to convene a con-con than ratify its recommendations.

This amounts to a claim that the right of the people to put something on the agenda requires a greater majority than to pass it into law. Such a theory violates core democratic norms.

The Assembly knows that if a con-con fulfilled its constitutional function, the result would likely be popular democratic reforms, such as legislative redistricting, transparency and term limits, that aren't in its political self-interest.

But self-interest is no excuse to violate Maryland's Constitution, defy the people's will and hide behind the court's fear of retribution from the political branches.

The Assembly should fulfill its ministerial duty under Maryland's Constitution to convene the con-con the people approved.

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Source: Snider, J.H., Here's why Maryland politicos must convene a constitutional convention, *Washington Examiner*, March 12, 2012.

How to fix Maryland's D-minus in corruption

by J.H. Snider | March 30, 2012 | Washington Examiner

Last week the State Integrity Investigation, led by the Center for Public Integrity, released its political corruption scorecard for the 50 U.S. states. Maryland received a D-, placing it in the bottom fifth of states. Specific grades include F for Legislative Accountability, F for Public Access to Information; D-minus for Lobbying Disclosure, D-minus for Redistricting, and D for Ethics Enforcement.

Unfortunately, the Maryland General Assembly will take minimal or no action to improve these scores. Why fix a system from which one benefits? Why reduce barriers to political competition that might help political opponents?

Anticipating the possibility of such perverse incentives in a legislature, the framers of both the Federal and Maryland constitutions created a mechanism — the constitutional convention — to allow the people to pass democratic reforms without the need for legislative approval.

Unfortunately, the constitutional convention provision in the Federal constitution was inserted at the last minute and is hopelessly vague. The version inserted in Maryland's Constitution 64 years later (1851) was a considerable improvement. It included a provision that a referendum to convene one be placed periodically on the ballot (currently five times every century) without the need for Assembly approval.

Maryland's framers knew that incumbent legislators, concerned about preserving their own power, would strongly oppose independent conventions. To eliminate the Assembly's control, they devised the self-executing periodic referendum on a constitutional convention. Unfortunately, they didn't anticipate the extent to which future Assemblies would nevertheless be able and willing to twist the framers' intent and words to maintain control.

On Nov. 2, 2010, a majority (54.4 percent) of Marylanders voted in a statewide referendum to convene a state constitutional convention. But Maryland's Governor and Assembly members, violating both their oath of office and Maryland's Constitution, refused to convene one. This is why I am suing the state of Maryland.

This is the third time the Assembly has done this. The first two times, in 1930 and 1950, the primary goal of the Assembly was to avoid legislative reapportionment. The rural members who controlled the Assembly knew that reapportionment would shift power to the fast growing urban areas. Not until the U.S. Supreme Court ruled in 1964 that Maryland was violating the U.S. Constitution in this regard did the Assembly relent and convene a constitutional convention.

Since then, the democratic reform agenda has substantially changed. For example, only after the U.S. Supreme Court fixed the reapportionment problem did the problem of gerrymanders come to the fore.

Maryland's democratic reform problem is that the institutional mechanism that the framers created to solve legislatively intractable democratic problems, as highlighted by the State Integrity Investigation report, has itself become the subject of political corruption. States with the ballot initiative have a way to get around this problem. But in Maryland, the only option to bypass the Assembly's monopoly control of ballot propositions is the constitutional convention.

Sometimes a scandal erupts that is so embarrassing that the Assembly is forced to reform itself. But not all democratic problems, such as grotesque gerrymanders, are prone to vivid and timely scandal. Citizens shouldn't have to wait hundreds of years for the perfect scandal to appear serendipitously. And even when a problem is blessed with something close to a perfect scandal, the resulting reform is often more face-saving than substantive.

Maryland reformers who want to improve Maryland's score for democratic accountability must first address the root problem: the Assembly's unwillingness to convene constitutional conventions as specified in Maryland's Constitution. The so-called "con-con" is not a constitutional cobweb, but a vital part of Maryland's Constitution. That is why I'm suing Maryland to make sure one occurs.

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Source: Snider, J.H., How to fix Maryland's D-minus in corruption, *Washington Examiner*, March 30, 2012.

On gambling vote, what is meant by a 'majority'?

Legislature applies different interpretations according to its self-interest.

by J.H. Snider | September 23, 2012 | Baltimore Sun

What type of majority is necessary to approve Maryland's Nov. 6 ballot referendum to expand gambling? Maryland's Constitution says: "a majority of the qualified voters in the State" (Article XIX).

Those who have studied this clause, an amendment voters ratified in 2008, recognize its careless draftsmanship. Read literally, it means a majority of eligible voters in Maryland. This is not a crazy interpretation: dozens of laws with similar language have been interpreted this way since America's founding. However, Maryland's legislature wants to make it as easy as possible for voters to approve its proposed gambling referendum. Consequently, it interprets the clause as a majority of voters voting on the question.

Now consider another similar clause in Maryland's Constitution: the clause to convene a constitutional convention, which requires "a majority of voters at such election or elections" (Article XIV). Syntactically, it's identical to the gambling clause.

A majority clause is of the form: type of majority denominator, when, and where, with the when and where optional depending on context. The gambling clause specifies the denominator type and the where; the convention clause specifies the denominator type and the when.

Many jurisdictions and courts have interpreted a majority of voters at an election as a majority voting on the question. A particular election, such as a general election, may be specified simply to assure a well-attended election. However, Maryland's legislature has wanted to make it as hard as possible for voters to convene a constitutional convention, whose primary democratic function is to provide a mechanism for democratic reform when incumbent legislators have a strong conflict of interest with the public. (The most famous example of such an issue in the 20th century was legislative reapportionment; today it is legislative redistricting). Consequently, it interprets the clause as a majority voting, which means a majority voting on any proposition, even on a completely unrelated issue.

For example, in 2010, 54.4 percent of those voting on the question supported convening a convention. After the election, the legislature cited a glib legal analysis that the majority required was the much more difficult majority voting at a general election — a majority never achieved in Maryland's 226-year history.

Admittedly, Maryland's constitution has many poorly worded majority clauses interpreted by the legislature in self-serving ways. (Anyone who doubts the tendency of politicians and journalists to use imprecise language to describe majorities should do an Internet search on Maryland's gambling referendum.) But as a matter of both logic and fairness, the legislature shouldn't be able to have it both ways. If it insists that the

convention clause means a majority of those voting (despite the fact that the intent of the clause's framers and ratifiers was a majority voting on the question), then the gambling clause must mean a majority of eligible Maryland voters.

After the dispute over the majority required in the 2010 convention referendum, the legislature recognized the gambling referendum's inconvenient wording and has claimed that its original intent in 2008 was "a majority of the voters in Maryland voting on the question" by including that language in the 2012 enabling act to place the referendum on the ballot. But constitutionally required majorities cannot be rewritten by statute.

The legislature should not be allowed to interpret the same type of constitutional clause in different ways depending on its political self-interest. It must choose one consistent interpretation or the other. If it continues to refuse to do so, then the courts should end this self-serving political charade. Supporters and opponents of the Nov. 6 gambling referendum, take note.

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Source: Snider, J.H., On gambling vote, what is meant by a 'majority'?, *Baltimore Sun*, September 23, 2012.

Maryland manipulates "majority" vote

by J.H. Snider | November 5, 2012 | Maryland Reporter

Some vote counting scandals receive front page news coverage and shock the world; others remain invisible. Such is the difference between Florida's 2000 presidential election and Maryland's 2010 referendum to convene a state constitutional convention. Both involved vote counting practices more associated with petty dictatorships than advanced Western democracies.

The first article of Maryland's Declaration of Rights grants Marylanders the right to reform their government when the legislative branch prefers the status quo, as in its practice of pro-incumbent legislative gerrymanders. This right was implemented in Article XIV of Maryland's Constitution, which mandates that a referendum on whether to convene a constitutional convention automatically be placed on the ballot every twenty years, with the requisite majority to pass the ambiguously defined "majority of voters at such election or elections." The primary alternative way to bypass an intransigent legislature, the initiative, is not available in Maryland.

An ordinary majority

The 2010 referendum received a 54.4% ordinary majority (that is, a majority of those voting on it), which is the type of majority tallied on the referendum from 1851 (when the referendum was created) to 1930. Since 1930, Maryland's legislature has claimed the ambiguous text mandates an extraordinary majority, a majority of those voting on any proposition on the ballot. No court has ever ruled on the correct interpretation of the text.

(Editor's Note: Today's ballot Question 7 to expand gambling also requires "a majority of the qualified voters in the State," interpreted to mean a simple majority of those voting on it. But a lawsuit was filed Friday contending that at least the higher majority required for the constitutional convention should be applied. For a related op-ed by the author, see On gambling vote, what is meant by a 'majority'?)

Unfortunately, calculating such a majority denominator is not self-evident and has involved choosing among many possible proxy denominators. In 1930, Maryland's election administrator chose the vote for governor as the proxy. This proxy suited the legislature's goals of defeating the referendum and thus preventing a convention from reapportioning legislative districts based on population (something the rural controlled legislature wouldn't do until forced by a 1964 U.S. Supreme Court ruling).

Administrator changes method

In 2010, an administrator at Maryland's State Board of Elections changed the proxy to those hitting the submit button on the touchscreen voting machines, plus adjustments for absentee and completely blank ballots. This increased the size of the majority by 7,404 votes over the gubernatorial proxy. In contrast, if the Elections Board had chosen the common alternate proxy of the previous rather than current gubernatorial vote (when

referenda can be submitted at any election, the previous gubernatorial proxy allows for greater consistency), the referendum would have passed with a 50.2% majority (instead of losing with 48.3%).

The 2010 change violated core democratic principles because it was created not only by administrative fiat but also after the election and without public notice. Just think how the West reacts when a dictator seeking the mantel of democratic legitimacy conducts an election but waits until votes have already been cast and counted before deciding how to tally them.

A Public Information Act request to the elections board disclosed no relevant documents, except possible advice from Maryland's Attorney General kept secret under "attorney-client privilege."

Various practical and legal reasons explain why Maryland didn't previously use simple ballot counts to count voters voting at an election. For example, consider the federal government's mandate that an absentee ballot including only federal offices be sent to overseas military personnel (the U.S. Constitution may not grant the federal government authority to mandate that state and local propositions be included on absentee ballots). Since such ballots didn't include state referenda, it's obviously unfair to count such ballots as no votes. Yet that's what Maryland did.

What the legislature should do

Unlike the 1930 precedent, the 2010 change in majority denominator didn't change the election outcome. But it made the election appear substantially closer, a perception the legislature favored (not a single member of the legislature publicly supported a yes vote, which would have led to anti-incumbent redistricting reform in Maryland). It thus reduced the political pressure on the legislature to convene a constitutional convention, which was within its power to do.

More importantly, who knows what self-serving denominator the legislature will endorse next time? Consider that when the U.S. Supreme Court reviewed the Florida vote in 2000, presidential candidates Gore and Bush differed by less than 200 votes. Here the level of vote counting discretion was at least 37 times as much—and in a state a third Florida's size.

Such shenanigans shouldn't be allowed to reoccur. After a duly noticed public hearing, the legislature should codify in law how it wants to calculate the required majority. It should prevent Maryland's Attorney General from hiding secret laws by misusing the "attorney-client privilege." And it should make the vote counting process more transparent and accountable, especially when both political parties have a joint interest adverse to the public.

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Source: Snider, J.H., Maryland manipulates "majority" vote, *Maryland Reporter*, November 5, 2012

OVERVIEW OF CON-CON POLITICS ACROSS THE STATES
How the Public Reasons about State Constitutional Convention Referendums

by J.H. Snider | November 4, 2021 | Presentation at "State Constitutions and Governance in the U.S.," a conference held at the Utah Valley University Center for Constitutional Studies

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 18th 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 19th and early 20th 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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Source: State Constitutions and Governance in the U.S., a conference held at the Utah Valley University Center for Constitutional Studies, November 3-4, 2021.

Why the Need for "A Political Primer on the Periodic State Constitutional Convention Referendum"

by J.H. Snider | Fall 2016 | Law & Courts

At the 2016 Annual Meeting of the American Political Science Association, I produced a short course, "A Political Primer on the Periodic State Constitutional Convention Referendum." The short course consisted of two parts.

Part I included a two-hour compilation of TV documentaries and political ads. The TV documentaries included excerpts from past constitutional conventions, mostly U.S. state constitutional conventions held during the latter half of the 20th Century, plus a smattering of recent path-breaking constitutional conventions held in other countries. The unedited TV ads, mostly 30 seconds in length, were either for or against calling a state constitutional convention at an upcoming referendum. The TV documentaries generally described the past constitutional conventions in hagiographic terms. Most of the professionally produced TV ads were negative and characterized a future constitutional convention as a grave threat to the people's rights.

Part II consisted of four panels of experts, each panel approximately 30 minutes long. The first panel focused on New York, which on November 7, 2017 has the next referendum on whether to call a state constitutional convention. The panel included a history of New York's eleven state constitutional conventions since 1777 (J.H. Snider) and an argument why New York's upcoming referendum was of national interest (Sandy Levinson). The second panel reviewed the history of U.S. state constitutional conventions (John Dinan) and changing public opinion towards them (William Blake). The third panel examined the merits of alternative legislative bypass mechanisms, including Ireland's 2012 constitutional convention with randomly selected members (David Farrell), Florida's periodic constitutional revision commission (Carol Weissert), and the constitutional initiative (Craig Holman and John Dinan). The fourth panel focused on the politics and policy of New York's upcoming constitutional convention referendum, including an identification of the political actors (J.H. Snider) and arguments generally for (Richard Briffault) and against (Craig Holman).

The short course, which was recorded and posted online at the State Constitutional Constitution Clearinghouse and The New York Constitutional Convention Clearinghouse, is intended as a resource for local opinion leaders in states with upcoming state constitutional convention referendums. Between 2016 and 2034 at least one U.S. state every two years will have a referendum on whether to call a state constitutional convention: New York (2017), Hawaii (2018), Iowa (2020), Alaska (2022), Missouri (2022), New Hampshire (2022), Rhode Island (2024), Michigan (2026), Connecticut (2028), Hawaii (2028), Illinois (2028), Iowa (2030), Maryland (2030), Montana (2030), Alaska (2032), New Hampshire (2032), Ohio (2032), and Rhode Island (2034).

No periodic state constitutional convention referendum has passed since 1984—contributing to the longest draught in convening a state constitutional convention in U.S. history. After reviewing many debates leading to those defeats, I concluded that the debate discourse was often ill-informed, partly because of a lack of local experts on whom the press could rely for historical and comparative information about state constitutional conventions.

To rectify this problem, I have sought to provide easily accessible background information in a variety of different formats, including newspaper op-eds, an online information clearinghouse, scholarly articles, public history events, and this short course. My information clearinghouse on Rhode Island's November 4, 2014 state constitutional convention referendum, the most recent such referendum, is the most comprehensive online documentation of the politics of such a referendum ever compiled online. The results of my research will be published next year.[5]

Since only a tiny fraction of Americans has lived through a state constitutional convention in their adult lifetimes, and since Americans are not taught about state constitutional conventions (as opposed to the federal constitutional convention of 1787) during their formal schooling (even those such as myself who received a Ph.D. in American government), Americans approach these referendums starting with a huge knowledge deficit, making local opinion leaders that much more influential in public debates.

Too often local opinion elites and the public don't focus on the referendum until only weeks or days before the referendum, when the debate is dominated by lowest common denominator soundbites, including poorly informed opinion elites distracted by higher profile candidate races.

Such a lack of attention and expertise should not be con- (Continued on page 12) Why the Need for "A Political Primer on the Periodic State Constitutional Convention Referendum" J.H. Snider (snider@concon.info) Editor, The State Constitutional Convention Clearinghouse and New York State Constitutional Convention Clearinghouse 12 fused with lack of importance. As every school child learns, the preamble to the U.S. Declaration of Independence states that the American people have an "unalienable" right "to alter" their government. Thirty-seven of fifty U.S. States would eventually include similar rights language in their state constitutions; and all fifty state constitutions would include some type of mechanism to implement that right. Clearly, the right to alter one's constitution is one of the most fundamental, perhaps even the most fundamental, political rights Americans have. Implicit in that right is the right of the people to peaceably alter their constitution in the face of legislative opposition.

Fourteen states implement that right in part by granting the people the right at periodic intervals (ranging from ten to twenty years) to call a state constitutional convention via a

[5] Snider, J.H., "Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other U.S. States 1776-2015," The Journal of American Political Thought, forthcoming.

statewide referendum. This institution, like the constitutional initiative, dramatically reduces the legislature's gatekeeping power over constitutional amendment. Since legislatures have an institutional conflict of interest in proposing reforms that might weaken their own power, this institution serves a vital democratic function--albeit one that is rarely politically salient to the average voter.

Motivating voters to care about the direct provision of collective goods, such as education, transportation, or the environment, has proven hard. Harder still has been motivating them to care about indirect collective goods such as redistricting, campaign finance or other good government reforms that serve as the platform for providing direct collective goods. Hardest of all may be motivating them to care about infrequent and unfamiliar mechanisms for creating good government—arguably, the ultimate collective action problem.

The price of serving as a check on legislatures is that legislatures are this institution's intrinsic enemy. Powerful special interest groups with a track record of successfully influencing the legislature are also intrinsic enemies, as their ability to control a constitutional convention is a wildcard. Partly as a consequence of this intrinsic opposition and the collective goods nature of this institution for average voters, campaigns that oppose calling a state constitutional convention have tended to be much more sophisticated and better funded than campaigns that support them.

A state constitutional convention referendum has the ingredients of a collective action problem: concentrated benefits for opposing one and diffuse benefits for favoring one. Better educating the public about this institution via local opinion elites cannot eliminate this classic political problem, but it can mitigate it. The contributors to this law-courts newsletter all recognize the importance of better educating the public about the strengths and weaknesses of this and related legislative bypass institutions.

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Source: Snider, J.H., et al., The Politics of State Constitutional Reform, *Law & Courts*, Newsletter of the Law & Courts Section of the American Political Science Association, Vol. 26, No. 3, Fall 2016.