**J.H. Snider’s Speech at the
Global Forum for Modern Direct Democracy,**

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**Reforming the Process of Democratic Reform**

The United States has 51 constitutions, one for its federal government and one for each of its fifty states. I [cover](https://concon.info/) the fourteen states whose constitutions mandate a periodic referendum, ranging from once every ten to twenty years, on whether to call a constitutional convention. Given the non-U.S. audience in this room, the two recent convention processes approved in Chile may be more familiar to you than the convention process in these fourteen states. The most notable difference between these two sets of processes is arguably the U.S. use of an automatic, periodic popular referendum to launch the convention process.

Let me explain why I think the periodic constitutional convention referendum, abbreviated PCCR, is a very important democratic institution. But first, let me explain the rationale for direct democracy in constitution-making, so you can see how that rationale is linked to the rationale for PCCR.

Those who discuss direct democracy often don’t distinguish between direct democracy in ordinary and higher lawmaking. But there is a huge distinction between the two types of lawmaking. Whereas direct democracy is optional for ordinary lawmaking, it is essential for higher lawmaking because it gives higher lawmaking its democratic legitimacy. It has no similar legitimizing function for ordinary lawmaking.

Why is this?

To understand, we need some basic democratic theory regarding constitution-making, which I label “constituent power theory.” If you believe in democracy, then you believe that the people should be sovereign. When the sovereign people act in their constitution-making capacity, they are acting as the constituent power. When that constituent power creates a constitution, it creates constituted powers; that is, the entities that wield power under the constitution.

Now here’s the critical point: constituted powers, by definition, have a blatant conflict of interest if given control of their own powers. Thus, to the extent feasible, higher lawmaking should be controlled by the constituent power. This is where direct democracy becomes essential because direct democracy is used to partially overcome that conflict of interest by keeping the roles of constituent and constituted power as separate as possible. The more directly the people can initiate, propose, and ratify constitutional change, the less opportunity for constituted powers to abuse their power in higher lawmaking. No such check is required for ordinary lawmaking, where the people can delegate lawmaking to representatives because that delegation is subject to a constitution’s guardrails. It should be no surprise, therefore, that 49 of America’s 50 states require the people to directly ratify all proposed state constitutional change. And in the 50th they do so by mandating that a legislature must pass a proposed constitutional change twice with an intervening popular election for the legislators.

I became interested in the fourteen states with PCCR because, of all available U.S. mechanisms to maximize constituent power, PCCR does the most to grant the constituent power control over constitution-making—that is, at least in theory it does.

PCCR grants the constituent power three direct votes over the constitution-making process: first, whether to call a convention regardless of legislature opposition to such a call; second, who to elect as delegates to a called convention; and third, an up-or-down vote on each of the convention’s proposals. No other constitutionally specified constitutional amendment process in the U.S. grants the constituent power three such votes. The legislature-proposed system of constitutional changes, the most widely used constitutional amendment system among the fifty states, only grants the public one vote, the ratification vote. The popular constitutional initiative system, available in only 18 of the 50 U.S. states, only grants the constituent power two votes, the initiation and ratification votes.

PCCR’s popular vote at the constitutional initiation stage is vital because, at least in states without the popular constitutional initiative, it is the only way for the constituent power to bypass the legislature’s gatekeeping power over constitutional change. This helps explain why bipartisan majorities of legislators hate the institution and why the most powerful special interest groups, who, by definition, excel at influencing legislatures, also hate the institution.

At least one U.S. state has a PCCR every two years. In 2022, three U.S. states had such a referendum: Alaska, Missouri, and New Hampshire. In 2024, one state: Rhode Island, will have one. Also in 2024, one U.S. territory, the United States Virgin Islands, has enacted legislation to elect delegates to a constitutional convention called by a convention referendum in 2020.

For each of these referendums, I publish a state-specific website with comprehensive information both for and against calling the referendum. I also [publish op-eds](https://concon.info/about/) in major local newspapers explaining why the referendum is on the ballot and responding to attacks on the institution. My general orientation is to both defend the institution and seek reforms to improve it. Just like democratic reformers seek to improve the elections associated with ordinary lawmaking, I seek to improve elections associated with higher lawmaking. I’d call it meta democratic reform, or reform about democratic reform.

If you’re interested in a recent PCCR, I’d suggest you visit my [Alaska State Constitutional Convention Clearinghouse](https://alaska.concon.info/), available at [Alaska.concon.info](https://alaska.concon.info/). The Alaska PCCR is noteworthy because by many criteria it was, on a per capita basis, the most expensive referendum among the 140 referendums on the ballot in the U.S. last year. The no-side outspent the yes-side by 78 to 1, and the great majority of that spending was dark money. I discuss it in a [four-part series](https://thefulcrum.us/alaska-constitutional-convention-spending-spree) published last month in The Fulcrum, a trade publication for the U.S. democratic reform community.

This week I launched a [clearinghouse website](https://usvi.concon.info) for the United States Virgin Islands constitutional convention that voters approved of in Nov 2020 and whose enabling act the governor signed into law in January 2023. The popular election of delegates to the convention is scheduled for Nov. 2024. I critique that act in an [essay](https://www.zocalopublicsquare.org/2023/03/02/letter-from-virgin-islands-us-territory-constitution/ideas/essay/) published today by Zocalo Public Square, whose editor is one of the two co-producers of [this conference](https://www.democracy.community/stories/programme-2023). In that essay, I seek to defend the institution from the depredations of a legislature seeking to subvert its democratic purpose, which is to create an elected body independent of the legislature. Congress mandates such independent control for any U.S. territory seeking its own constitution. But while keeping the pretense of independent control, the Virgin Islands’ legislature enacted an enabling act that would give it effective control of the convention.

My essay also seeks reforms to improve the constitutional convention process, widely considered by law the gold standard in America for anything more than single-subject constitutional amendment. Imagine if elections for representatives responsible for ordinary lawmaking hadn’t improved during the last 200 years. We’d still have voice voting, a type of voting that enabled voter intimidation and vote-buying at scale. We’d still have party bosses rather than direct primaries to choose the candidates on general election ballots. And we’d still have completely secret money in elections. To be sure, many of the democratic reforms that have improved ordinary democratic elections have also improved “higher democratic elections.” But higher democratic elections need some special rules, such as that legislators shouldn’t be able to serve as convention delegates. Moreover, in too many cases, such as the lack of primaries, higher lawmaking elections feel like they are a hundred or more years out-of-date.

I recommend the following reforms to improve the convention process in the Virgin Islands as well as help bring higher democratic elections into the 21st Century:

1. Do not rush delegate elections so as to favor existing political elites.
2. Hold an open primary in multi-member districts to narrow down the field of delegates.
3. Use ranked-choice voting in multi-member districts for the general delegate election.
4. Ban government officials, including incumbent and retiring legislators, from running for delegate.
5. Ban delegates from running for another office until at least a year after the convention adjourns.
6. Pay all delegates equally rather than favoring government elites.
7. Allow candidates for delegate to submit their resumes and reasons for seeking office to the election’s office, which would compile that information for all candidates, post it online, mail it in a pamphlet to all voters, and link to it on all ballots.

If Congress approves the constitution proposed by the Virgin Islands, and the constitution is then submitted for Virgin Islander ratification, I recommend a narrowly tailored citizens’ assembly to help educate voters prior to their ratification vote. This would include:

1. Creating a “jury” of approximately 500 registered voters.
2. Assigning the head of the territory’s supreme court to randomly select, organize, and moderate the jury.
3. Letting the jurors listen to a debate between pro and con speakers chosen by convention delegates who respectively voted for and against the proposed constitutional changes.
4. Televising the debate for all to watch.
5. Immediately after the debate, asking the jurors to meet in round robin groups of ten to discuss among themselves the merits of the pro and con sides.
6. Asking the jurors to vote in plenary session on whether to support or oppose each proposed constitutional change.
7. And most important, on the ballot item asking voters whether they want to ratify a proposed constitutional change, placing a label, like a party label, reporting the percentage of jurors that voted yes or no, along with a link to the recorded debate before the jury.

In a book I am writing, I have a lot more thoughts about how to improve “higher democracy.” What I have proposed above is merely what I think the Virgin Islands should do to bring its constitutional convention process into the 21st Century.

In conclusion, consider that whenever there is a flaw in democracy, citizens can choose to either abandon democracy or seek more democracy—and that choice includes higher democracy as well as ordinary democracy. For good reason, the U.S. Congress mandates that U.S. territories seeking a constitution must use an independently elected constitutional convention to get one. If we genuinely believe in constitutional democracy, we should seek to improve the convention process rather than abandon or disparage it. Democratic reformers should step up to the plate for not only ordinary but higher democracy reform. Too often they have failed to do so.

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