Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776–2015

J. H. SNIDER

ABSTRACT

In the preamble to the US Declaration of Independence, Thomas Jefferson wrote that people have an "unalienable" right "to alter" their government. A total of 37 US states would eventually include in their state constitutions a similar provision promising the people the right at all times to alter or reform their government. Jefferson would later also argue that people should have a right to alter their constitution at periodic intervals. Eventually, 14 states, including New York, would adopt a constitutional provision implementing such a right. The distinctive democratic function of that right—except in states with the constitutional initiative—is that it allows the people to bypass the legislature's gatekeeping power over constitutional reform. This article explains the long-term structural forces leading to increased opposition to calling a state constitutional convention. Some of these forces signal democratic dysfunction and should be cause for alarm.

Thomas Jefferson famously argued on repeated occasions that a constitution should be designed for the living and thus amenable to periodic revision by the people regardless of a legislature's preferences. An early articulation of this idea came in a letter he wrote to James Madison on September 6, 1789, while in

J. H. Snider is the president of iSolon.org and editor of the State Constitutional Convention Clearinghouse (snider@concon.info).

W. Brook Graves, a state constitutional convention scholar from the mid-twentieth century, wrote, "The advocate of constitutional reform in an American state should be endowed with the patience of Job and the sense of time of a geologist." Thanks to my family and the board of iSolon.org for sticking with me.

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France, 2 years after the US Constitution was written: "The question whether one generation of men has a right to bind another, seems never to have been started [*sic*] either on this or our side of the water. Yet it is a question of such consequences as not only to merit decision, but place also, among the fundamental principles of every government. . . . No society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation" (Jefferson 1984, 959). He repeated this idea in a letter to Samuel Kercheval 27 years later. But unlike the first letter, which was not published until 1829, 40 years after it was written (Sloan 1993, 281), the second letter was published immediately and as a proposed agenda for a state constitutional convention: "Let us provide in our constitution for its revision at stated periods. . . . It is for the peace and good of mankind that a solemn opportunity of doing this every nineteen or twenty years should be provided by the constitution, so that it may be handed on with periodical repairs from generation to generation to the end of time" (Jefferson 1984, 1402).

New York's 1846 constitutional convention added such a provision to New York's constitution, and it has remained, with some modifications, in every subsequent version of the constitution. The constitution mandates that every 20 years New Yorkers be given the opportunity to vote on whether to convene a constitutional convention. It also mandates that if the people vote to convene a convention, they have the right to elect delegates to the convention and then vote up or down on its proposals.

This once-every-20-year popular referendum will next be on the ballot on November 7, 2017. New Yorkers have voted by popular referendum to convene constitutional conventions in 1821, 1845, 1866, 1886, 1914, 1936, and 1965 (Snider 2016). They have rejected calls to convene conventions in 1858, 1916, 1957, 1977, and 1997 (Snider 2016). Based on long-term structural forces, this article explains why voters in not only New York but also other states have become increasingly unlikely to approve future calls for a state constitutional convention. To the extent that these are undemocratic structural forces, including elites trying to entrench their power at the expense of democratic accountability, this should be a concern.

THE DECLINE OF STATE CONSTITUTIONAL CONVENTIONS

There is no literature on the decline of federal constitutional conventions because there has only been one such convention in American history. For state constitutional convention scholars interested in the contrast between America's federal and state constitutional convention experience, the striking fact that needs to be explained is why there have been so many state constitutional

conventions (e.g., Tarr and Williams 2004, 1075–76): approximately 236 according to the State Constitutional Convention Clearinghouse, which translates into an average of almost five per state (Snider 2015c).

Scholars interested in studying comparative state constitutional conventions have until recent decades not focused on explaining the decline of successful convention calls. Instead, they have focused on the formal institutional properties of conventions, the reasons why conventions were called (rather than not called), the politics of later stages in the long convention process (including convention delegate selection, convention deliberations, and ratification of convention proposals), and how the various mechanisms of constitutional amendment differ (Jameson 1887; Dodd 1910; Hoar 1917; Graves 1960; Martineau 1970; Sturm 1982).

The recent change of interest can partly be explained by the intensity of defeat becoming impossible to ignore. During the past 30 years, there have been 30 periodic referendums to call a state constitutional convention, without a single one passing. Rarely do more than a few years go by without another periodic call for a convention going down to defeat. The year 2010 marked the high point of such defeats, when four—the highest number of calls in US history—went down to defeat (Snider and Tarr 2010; Snider 2015b). In a mere 4 years from 2008 to 2012, a total of 10 went down to defeat—another historic high. After the burst of state constitutional conventions in the 1960s (13) and early 1970s (7), the recent decline seems especially dramatic (Snider 2015c).

From another perspective, every year there are actually 50 defeats, as no state legislature, despite having the power to do so, chooses to call a convention. The politics of these defeats is arguably as interesting as the politics of the defeats that come to a vote, force convention opposition into the open, and engender abundant media coverage.

The literature on convention call defeats suffers from narrow explanatory frameworks that fail to capture much of the defeats' underlying political and democratic logic (Benjamin 2001; Dinan 2010; Kogan 2010). The literature has focused on a narrow slice of time (e.g., since the beginning of the current wave of defeats), a narrow subset of states (e.g., often just one state), and proximate rather than more fundamental causes of defeat (e.g., how specific political actors explained their opposition). In doing so, it has relied on readily available information sources, such as media accounts and government documents, which may be convenient sources of externally validated information but are nevertheless often incomplete and misleading. And in framing the significance of the decline, it has emphasized the role of the constitutional convention as a tool for elected officials to "modernize" constitutions as opposed to a tool for the sovereign (the people) to bypass incumbent legislators' gatekeeping power over constitutional revision.

This article seeks to highlight explanatory variables appropriate for its more ambitious explanatory task combined with its normative assumption that the primary democratic function of the state constitutional convention is to provide a mechanism to bypass a legislature's gatekeeping power over constitutional revision. It is structured as follows: it provides evidence for a long-term decline in calling state constitutional conventions spanning more than 100 years, describes the important but hard-to-measure political difference between independent and dependent conventions, analyzes the functional attributes of the major types of independent constitutional amendment mechanisms, analyzes the three key structural forces that have contributed to the long-term decline in calling conventions, and suggests that it is important to strengthen countervailing forces.

THE GREAT CONSTITUTIONAL CONVENTION DROUGHT

The United States in general and New York in particular are currently witnessing the greatest drought in state constitutional conventions in their respective histories. States have convened at least 236 constitutional conventions to amend their constitutions since 1776, but not a single one in the past 25 years (1992–2017). The previous longest drought was 10 years (1802–12; Snider 2015c).[1]

To the extent that the literature on state constitutional conventions has noticed the current extraordinary drought, it has tended to view it as part of a long-term pattern of peaks and valleys (Adrian 1967, 315–20; Dinan 2000, 7–10; Tarr 2014, 12, 23–28, 30).[2] The masking of a long-term pattern of decline has been facilitated by a methodology of counting state constitutional conventions during various periods of time that has not normalized the count to make more relevant comparisons over time.[3]

For example, a constitutional convention when America only had 13 states should weigh more than it does today, when there are fifty states. Similarly, if one is focused on state constitutional convention politics, then conventions caused by external actors, notably Congress and the courts, should be excluded. Congress has mandated constitutional conventions when new states

1. As discussed below, the 1992 constitutional convention in Louisiana was essentially a special session of the Louisiana legislature. The last independent constitutional convention was in 1986, bringing the drought to 31 years.

2. General histories of constitutional conventions may implicitly use a peaks-and-valleys framework without explicitly using one (e.g., Sturm 1970). In the study of the US Constitution, a related literature focuses on periods of "ordinary lawmaking" and "constitutional lawmaking" and may speak of "constitutional moments" (e.g., Vile 1994, 76–79).

3. Compilers of unweighted constitutional convention data by historical period include Sturm (1970, 54; 1982, 83) and Kogan (2010, 888).

were created and when states sought reentry into the Union after the Civil War. Federal and state courts have required state constitutional conventions to reapportion state legislatures, albeit sometimes only indirectly as a last resort if a state legislature failed to do so. Some of these adjustments, notably the adjustments for new states and states seeking reentry, tend to mute the long-term decline. But the long-term pattern of decline nevertheless remains striking.

Table 1 and figure 1 show the number of constitutional conventions in 20-year segments from 1776 to 2015. The key number is the weighted number of optional conventions during each time period. It is calculated as the total number of conventions less those that were necessary preconditions of statehood, required for post–Civil War readmission to the Union, and mandated in the wake of the 1960s US Supreme Court one-person, one-vote decisions.[4] This is then weighted by the number of states in the Union during the relevant time period. For example, only 15 states constituted the United States in 1795, so the weighted number of optional conventions held between 1776 and 1795 is the number of optional conventions held (11) divided by 15/50, equaling 36.7. Once this weighting is done, the pattern of long-term decline becomes evident.

Figure 1 shows that not only have there been peaks and valleys in the convening of constitutional conventions in the United States, but they are also part of a long-term trend of decline, especially from the mid-nineteenth century on. Dividing American history into three 80-year segments, the pattern becomes more striking. We get weighted averages of 121.7 for 1776–1855, 98.8 for 1856–1935, and 36.5 for 1936–2015.

Table 2 shows that New York has convened nine constitutional conventions concerning its state constitution since 1777, but not a single one in the past 50 years (1967–2017).[5] The previous longest drought was 29 years (1938–67). New York's last convention call to be approved by the voters—in 1965—was placed on the ballot in the wake of a US Supreme Court and then New York State Court of Appeals ruling that the state's legislative apportionment violated both the US Constitution and the New York State Constitution. The court admonished the legislature to convene a constitutional convention to address the apportionment problem it had failed to address (Dullea 1997, 49–66).

Analyzing what exactly is in decline is a subtler question than portrayed with this readily available data because there is substantial variation in types

4. According to Alan Tarr, in six states court rulings on legislative reapportionment were "the principal factor leading to the calling of conventions." These six convention calls were Rhode Island in 1964, Connecticut and Tennessee in 1965, New Jersey in 1966, New York in 1967, and Hawaii in 1968 (Tarr 2014, 28). For an illustrative case, see *Butterworth v. Dempsey*, 237 F. Supp. 302 (1965).

5. This excludes New York's two state constitutional conventions concerning the US Constitution: to ratify the US Constitution in 1788 and to ratify the amendment repealing Prohibition in 1933.

Table 1. Weighted Conventions in 20- and 80-Year Intervals

	States		Conventions			
Years	Total	New	Total	Optional	Weighted 20 yr	Weighted 80 yr
1776–1795*	15	15	24	11	36.7	
1795–1815	18	3	7	4	11.1	
1816–1835	24	6	19	13	27.1	
1836–1855	31	7	36	29	46.8	
1776–1855						121.7
1856–1875†	37	6	62	45	60.8	
1876–1895	44	7	23	16	18.2	
1896–1915	48	4	15	11	11.5	
1916–1935	48	0	8	8	8.3	
1856–1935						98.8
1936–1955	48	0	12	12	12.5	
1956–1975‡	50	2	24	18	18.0	
1976–1995	50	0	6	6	6.0	
1995–2015	50	0	0	0	0.0	
1936–2015						36.5
Total		50	236	173		

*Connecticut and Rhode Island kept their colonial charters when they joined the Union, which is why the number of optional conventions increased from nine to 11 for 1776–95.

†Eleven states seceded from the Union and were forced to convene constitutional conventions to be readmitted, thus reducing the number of optional conventions by 11.

‡Federal courts mandated that six states convene constitutional conventions to reapportion their legislatures, thus reducing the number of optional conventions by six.

of constitutional conventions. An especially important distinction is between conventions dependent on the legislature and those independent of the legislature. In the normative framework of this article, independent conventions provide a more important democratic function than dependent ones. The focus is thus on explaining their decline rather than that of conventions more generally.[6]

INDEPENDENT VERSUS DEPENDENT CONSTITUTIONAL CONVENTIONS

Constitutional conventions can be classified as independent or dependent.[7] A dependent convention is an agent of the legislature; an independent conven-

6. Scholars who view a constitutional convention as primarily a vehicle to make comprehensive as opposed to piecemeal reform won't emphasize this distinction (e.g., Kogan 2010, 890).

7. This conceptualization of "independent" vs. "dependent" conventions is much broader than the usual distinction in the literature between "limited" and "unlimited" conventions (e.g., Sturm 1982, 81–83).

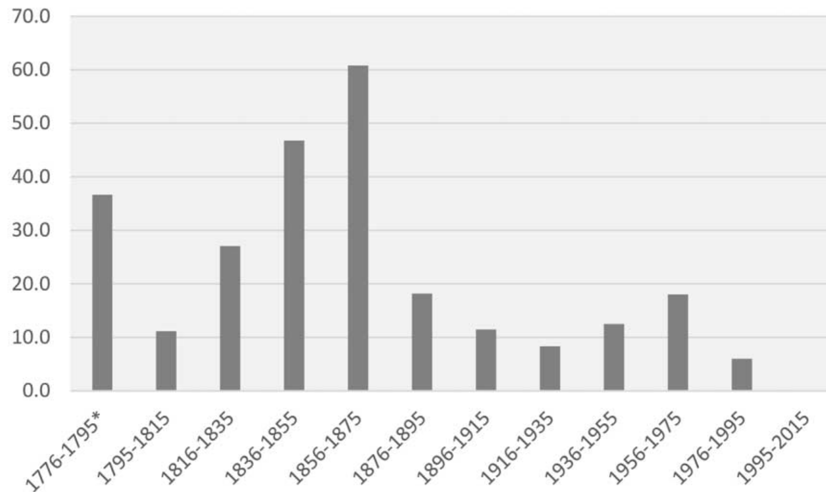

Figure 1. Weighted number of optional conventions in 20-year intervals

tion isn't. In reality, there are no purely independent conventions; all independent conventions are partially dependent.

Independence can be categorized along two dimensions of legislative control over a convention: control over the convention's agenda and control over its membership. When the legislature lacks such control, the convention is independent. When the legislature has such control, the convention is dependent. Table 3 classifies New York's conventions along these two dimensions. Each of the four resulting categories is illustrated with all the relevant cases from New York, as well as recent cases from other states. When legislative membership completely overlaps with constitutional convention membership, it is redundant for a legislature to limit a convention's agenda, which would explain why such overlapping cases don't appear to exist.

Such a table based on yes/no categories is intrinsically incomplete and arguably simplistic because of the many borderline cases, such as Hawaii's 1968 convention, when 51% of the delegates were incumbent state legislators (this dropped to 2% at its next convention in 1978; Pratt and Smith 2000, 105, 107). Nevertheless, it can be helpful as a starting point for explaining certain concepts.

During the twentieth century, conventions with controlled agendas, called "limited" conventions, became popular. For example, between 1971 and 1980, five of the nine (56%) conventions were limited.[8] During the nineteenth cen-

8. Three additional ones were unlimited by constitutional mandate: in Arkansas (1978–80) as a result of a court ruling, and in Hawaii (1978) and New Hampshire (1974) as a result of a mandatory periodic referendum. The unlimited ones in Illinois (1969–70) and Montana

Table 2. New York's History of Calling Constitutional Conventions

		Popular Vote to Call a Convention					
Year	Call?	Date	Yes (#)	No (#)	Yes (%)	No (%)	Convened?
1777*	No	N.A.	N.A.	N.A.	N.A.	N.A.	Yes
1801	No	N.A.	N.A.	N.A.	N.A.	N.A.	Yes
1821	Yes	Apr. 24	109,346	34,901	75.8	24.2	Yes
1845	Yes	Nov. 4	213,257	33,860	86.3	13.7	Yes
1858	Yes	Nov. 2	135,166	141,526	48.9	51.1	No
1866	Yes	Nov. 6	352,854	256,364	57.9	42.1	Yes
1886	Yes	Nov. 2	574,993	30,766	94.9	5.1	Yes
1914	Yes	Apr. 7	153,322	151,969	50.2	49.8	Yes
1936	Yes	Nov. 3	1,413,604	1,190,274	54.3	45.7	Yes
1957	Yes	Nov. 5	1,242,568	1,368,063	47.6	52.4	No
1965	Yes	Nov. 2	1,681,438	1,468,431	53.4	46.6	Yes
1977	Yes	Nov. 8	1,126,902	1,668,137	40.3	59.7	No
1997	Yes	Nov. 4	929,415	1,579,390	37.0	63.0	No
2017	Yes	Nov. 7	?	?	?	?	?

*New York's 1777 convention was convened during the Revolutionary War, when New York City and other parts of New York were occupied by the British.

tury, such agenda-controlled conventions were rare, with the designation "unlimited" used to designate a convention with an uncontrolled agenda. No state has ever convened a limited convention after installing a periodic convention referendum in its constitution. For example, New York added the periodic convention call to its constitution in 1846; its only limited convention was in 1801.

The extent to which limits on constitutional conventions are enforceable remains unsettled among the states. But by the late twentieth century a consensus developed that voter ratification of a convention-proposed amendment might cure transgressions in allowed amendment subjects.[9] This understanding would tend to reduce a legislature's incentive for calling a limited convention (Graves 1960, 34–35). For example, Rhode Island's legislature convened a limited convention in 1973, as it had previously done four times during the twentieth century (Snider 2014a). The delegates proposed and the voters ap-

(1971–72) added the mandatory periodic referendum to their state constitutions, and the one in North Dakota (1971–72) added the unlimited state constitutional convention via the popular initiative. The other unlimited one was in Arkansas (1969–70), where the Arkansas Supreme Court would later clarify that future conventions had to be unlimited. The limited ones were Louisiana (1973–74), Rhode Island (1973), Texas (1974), and Tennessee (1971 and 1977).

9. If an amendment is challenged in court prior to ratification, the situation becomes more complicated (Tarr and Williams 2004, 185–92).

Table 3. Legislature Control over a Convention's Agenda and Membership

	Membership Control	
Agenda Control	Dependent	Independent
Dependent	None*	NY (1801), TN (1977), AZ (1978)
Independent	NY (1777), TX (1974), LA (1992)	NY (1822, 1846, 1868, 1894, 1915, 1938, 1967), NH (1984), RI (1986)

Note.—Dates are based on the year in which a convention adjourned.
*The literature on state constitutional conventions has poor data on their status as limited conventions with completely overlapping legislative membership. It is possible that at least one such convention exists.

proved changes that went beyond the limits set by the legislature, including a proposal for a periodic constitutional convention referendum. The Rhode Island Supreme Court ruled that since the revisions were not challenged by the legislature and were approved by the voters, they were valid.[10] Since then, Rhode Island's legislature has called no limited conventions. Connecticut's limited convention of 1965 also went well beyond its legislative mandate, including, as in Rhode Island, adding a periodic convention referendum provision, but no litigation ensued (Sturm 1970, 67).

In 1975 the Arkansas legislature created a limited constitutional convention. After a lawsuit was filed, it was forced to convene an unlimited one in 1978.[11]

The most famous example of an unenforceable limited convention is the federal one in 1787, which went beyond its initial charge of amending the Articles of Confederation. As with Rhode Island in 1973, ratification of the convention's proposals by the sovereign—in that case the states—solved any defects in the scope of the agenda the convention pursued.

For the original 13 states, eight of the first constitutional conventions were sitting legislatures expressly authorized by a popular vote to draft a constitution.[12] Based largely on their experience with colonial charters, the colonists generally believed that constitutional law should be fundamentally different from statutory law and expressly authorized by the people (Wood 1969, chap. 8; Lutz 1980). Given that the colonies were in the midst of a war with Great Britain, convening a special body to draft a constitution was impractical. New Hamp-

10. *Malinou v. Powers*, 114 R.I. 399, 333 A.2d 420 (1975).

11. *Pryor v. Lowe*, 258 Ark. 188, 523 S.W.2d 199 (1975).

12. Rhode Island and Connecticut retained their colonial charters and would not draft new constitutions until the nineteenth century. Legislatures in three states, New Jersey, South Carolina, and Virginia, created constitutions without express authorization from the public. The legislatures in the remaining eight states received express authorization (Dodd 1910, 23–25).

shire's 1778 constitutional convention was the first public body elected solely for that purpose (Dodd 1910, 22–23). New York's 1776–77 constitutional convention met in a half dozen different places while fleeing the British (Lincoln 1906, 1:491–92).

More recently, the Texas legislature in 1974 and the Louisiana legislature in 1992 reconstituted themselves as conventions for purposes of constitutional revision. This type of convention membership may not be legally possible in states like New York with constitutions that stipulate that convention delegates must be elected specifically to serve in a convention.

Conventions whose membership overlaps with that of the legislature may more aptly be described as special sessions of the legislature than conventions. Labeling them conventions, however, may have procedural benefits for legislative leaders, such as smaller majorities required for constitutional amendments submitted to voters, double-dipping in salary as both a legislator and a delegate, and exemptions from ethical safeguards that apply to legislators but not to delegates (depending on how the legislature drafts the enabling act for the convention).

In any case, such conventions now lack democratic legitimacy. Beginning in the nineteenth century, it has become unusual for the public to elect incumbent legislators to more than 10% of a convention's seats. Recent exceptions include Louisiana's 1974 convention, with 24% of delegates being incumbent legislators, and Hawaii's 1968 convention, with 51% of delegates being incumbent legislators. During the twentieth century, some states, such as Montana and Michigan, explicitly banned legislators from running as convention delegates. In other states, questions remain whether the state constitution's ban on plural office holding (e.g., simultaneously holding more than one office in two or more branches of government that compose the state's system of checks and balances) applies to convention delegates. New York's last convention in 1967 had nine (4.8%) incumbent legislators, although another 10 served in the prior legislature and didn't either seek or win reelection (Owens 1997, 381).

THE CONTINUUM FROM DEPENDENT TO INDEPENDENT CONSTITUTIONAL CONVENTIONS

Placing conventions along an independent–dependent spectrum illuminates certain political considerations that are obscured by a simple independent/dependent categorization. Consider membership control. Even if legislators cannot directly serve as or appoint convention members, a legislature may be able to adopt rules giving it substantial control over selection and leadership, such as by creating delegate election rules and a convention budget and timeline that favor insiders to win as delegates and then emerge as convention leaders.

Many of these techniques are subtle, as are the techniques that have led to the entrenchment of legislative incumbents. Consider agenda control. Even if a legislature doesn't have direct control over a convention's agenda, it may be able to assert substantial indirect control, for example, by appointing a commission to suggest an agenda and not providing the resulting convention with enough resources and time to develop its own independent agenda. Similarly, a legislature may provide a convention with inadequate resources for staff so that it must use "free" staff provided by the legislative leadership, or appropriate a ridiculously low amount so that the convention must seek more funds (with success based on whether the legislature approves of its agenda).[13]

These concerns are mitigated in New York, where the convention-calling provision, as revised at its 1894 convention, specifies key delegate election rules and the pay of delegates.[14] For example, it specifies that delegates must be elected, the districts in which they will run based on preexisting senate districts (thus preventing convention-specific gerrymandering), the date for the delegate election, and the pay and travel reimbursements of the delegates (N.Y. Const., art. 19, sec. 2). However, even in New York many delegate election rules, such as who is eligible to get on the ballot and the voting rules by which at-large delegates are chosen, are left to the discretion of the legislature.

POPULAR CONVENING AND RATIFICATION REFERENDUMS

Independence can also be measured using two other criteria: the people's preconvention control over whether to convene a convention, and its postconvention control over approving the convention's recommendations. Table 4 classifies New York's conventions using these two criteria. New York conventions fill only two of the four categories. Recent examples from other states are used to complement the New York data.

Most states prior to 1829 didn't require ratification of convention proposals (Dodd 1910, 64). After 1829, it became the norm, but many exceptions remained, especially among southern states seeking to overturn Reconstruction-

13. A delegate to Rhode Island's 1986 constitutional convention alleged that the convention speaker "had been hand-picked and strung out on puppet strings by the then Speaker of the House, Matt Smith. Nothing moved during the convention without Matt Smith's authorization. He essentially controlled the entire process from beginning to end, including establishing the rules under which we operated." Written Testimony of Roberto Gonzalez, Esq., to the Constitutional Convention Bi-Partisan Commission, Providence, Rhode Island, August 19, 2014. See also Conley (2002, 189).

14. For a systematic review of the ways in which state constitutional provisions differ in the control they give legislatures over delegate selection and convention rules, see Snider (2015a).

Table 4. Popular Control over Convening a Convention and Ratifying Its Proposals

Popular Convening Control	Popular Control over Ratification: No	Popular Control over Ratification: Yes
No	NY (1777, 1801)	LA (1992), TX (1974)
Yes	VA (1902), La. (1913, 1921)	NY (1822, 1846, 1868, 1894, 1915, 1938, 1967), NH (1984), RI (1986)

Note.—Some new states entering the Union prior to 1857 lacked a popular referendum for convening a convention and/or ratifying its proposed constitution. In all cases, Congress had to ratify the proposed constitution before the state could enter the Union. Since the twentieth century, there appears to have been no case of a state where the people could vote on neither convening a convention nor ratifying its recommendations. Delaware remains the only one of the 50 American states where the state's constitution does not mandate popular ratification of constitutional amendments.

era constitutional provisions that facilitated black voting. Albert Sturm (1982, 57) found that 49 of the 145 approved state constitutions in US history were approved without popular ratification, including 23 (almost half) before 1800. Congress didn't mandate that new states include a ratification referendum for a new constitution—always proposed via a convention—until Minnesota entered the Union in 1857 (Dealey 1915, 44). As indicated in table 4, New York first held a popular vote to ratify a convention's proposals in 1822. New York's current constitution requires the approval of voters to ratify a convention's proposals.

THE MANDATORY PERIODIC STATE CONSTITUTIONAL CONVENTION REFERENDUM

Another criterion related to independence is the people's gatekeeping power over constitutional amendment, that is, their power to bypass the legislature when a proposed reform would not be in the legislature's institutional self-interest.[15] If the legislature calls an independent convention, it loses its gatekeeping power; by not calling one, it keeps its gatekeeping power.

The democratic principle justifying the periodic state constitutional convention referendum is the same as that justifying many other time-limited constitutional provisions, such as the constitutional requirement for periodic elections and periodic legislatures. Incumbent elected officials aren't allowed to postpone the date of their own next election, and the executive branch isn't allowed to postpone when the legislative branch can convene. This is because

15. For a definition of gatekeeping power, which is a specific type of agenda-setting power, see Crombez et al. (2006). For a history of this type of referendum, see Martineau (1970).

granting candidates and executive branch officials such powers would create a conflict of interest that would undermine popular sovereignty.

The institutionalization of this periodic principle often came slowly and after much blood, sweat, and tears. For example, one of the major complaints against the provincial governors in the American colonies prior to the Revolutionary War was that the governors often refused to convene the colonial legislatures on a regular basis, especially when the governor and legislature were in conflict. As a result, Revolutionary War–era state constitutions included requirements for periodic legislatures.

But using periodicity to prevent legislators from monopolizing the constitutional reform agenda either didn't occur to or was not a priority of the state constitution framers, who nevertheless made great intellectual strides in conceptualizing the democratic prerequisites of constitutional government, including a written constitution and the separation of the legislative from the constituent power (Wood 1969, pt. 3). Gradually, however, states recognized the democratic value of having an institutional mechanism that could bypass the legislature's gatekeeping power over constitutional reform. New Hampshire was the first, in 1792 (16 years after it joined the Union and 5 years after the Federal Constitutional Convention). New York was third, in 1846.

Today, 14 of the 50 US states have provisions for periodic convention calls. Eight of the 14 added this provision in the twentieth century. It is an institution, then, that first saw its appearance in the eighteenth century but didn't take off until the twentieth century, perhaps because through the early nineteenth century legislatures were willing to convene independent constitutional conventions even without such a procedural mechanism. During the twentieth century, the National Municipal League made a periodic convention call part of its influential Model State Constitution (National Muncipal League 1968), and the last six states to adopt such provisions did so during the last half of the twentieth century. Two were new states (Alaska and Hawaii). The others (Connecticut, Illinois, Montana, and Rhode Island) held constitutional conventions in the wake of the US Supreme Court's landmark legislative reapportionment rulings in the early 1960s. The other type of mechanism to bypass the legislature's gatekeeping power on constitutional revision, the popular constitutional initiative, is also largely a twentieth-century development. Of the 18 states with a constitutional initiative, only one (South Dakota in 1898) adopted it before the twentieth century.

The design and implementation of the provisions for periodic constitutional convention calls vary substantially (Snider 2015a). Some have proven not to be self-enforcing. For example, Oklahoma's constitution mandates that a convening referendum be placed on the ballot at least once every 20 years, but it hasn't been placed on the ballot since 1970. Iowa last approved a conven-

tion call in 1920, but the legislature refused to convene the convention (Shambaugh 1934, 281–82). Ambiguous majority vote requirements for calling a convention have provided legislatures in Maryland and Hawaii with an excuse for not convening a convention approved with an ordinary majority, defined as a majority of those voting on the referendum, but not a majority of those voting on any proposition at the election (Dinan 2010, 419–21; Snider 2012a, 2012b).

Some of the states using this procedure allow the legislature to hijack a convention by taking steps that ensure a dependent convention. In an extreme case, Connecticut's constitution doesn't specify that convention delegates have to be elected. It merely says that the legislature can select "the manner of selection of the membership," leaving open the possibility that the legislature could appoint the members. This provides convention opponents with a great argument: if a convention is going to be controlled by the legislature, why bother?

New York's convention-calling provision, as revised at its 1894 convention, leaves less room for legislative manipulation, but the legislature is still left with substantial control of the delegate election process, which convention opponents can exploit.

LEGISLATURE VERSUS POPULARLY INITIATED CONSTITUTIONAL CONVENTIONS

Since 1971, there has been a bifurcation between legislature-initiated and popularly initiated constitutional conventions. No state legislature has called for an independent convention, while the only calls for independent conventions have resulted from mandatory periodic convention provisions. A brief account of the calls for dependent conventions since then is revealing. There have been a total of six: Louisiana (1973), Rhode Island (1973), Texas (1974), Tennessee (1977), Arkansas (1978), and Louisiana (1992).

Two of these conventions, Texas (1974) and Louisiana (1992), were merely the state legislatures reconvening as constitutional conventions. The Louisiana "convention" was essentially a special session of the legislature convened during the summer of 1992 to modify a constitutional debt provision. The legislature met in convention primarily to bypass the supermajority requirement for legislatively initiated amendments.[16] As a convention, only a simple majority was needed to propose a constitutional amendment. Since the Louisiana Constitution doesn't require popular approval of a convention call, this tactic was permissible.

16. Rhode Island made extensive use of this procedural maneuver during the mid-twentieth century, meeting as a limited convention in 1944, 1951, 1955, 1958, and 1973.

Louisiana's 1973 convention came about largely as a result of what appeared to be a wholesale rejection by voters of legislature-initiated amendments. In 1970, voters rejected all 53 amendments on the ballot, and in 1972, they rejected 36 of 42. Although more independent than the 1992 convention, the 1973 convention was highly representative of those in power: of 105 delegates, the governor appointed 27, all of whom shared his general goals. In addition, 25 of the delegates were incumbent legislators, and another nine were former legislators. The convention's staff primarily came from the legislature.

The other three dependent conventions during that time, Rhode Island (1973), Tennessee (1977), and Arkansas (1978), were all convened as or intended to be limited conventions. But as previously noted, the Rhode Island convention didn't honor its original limits, and the Arkansas convention was mandated by its state supreme court to be unlimited.

Consequently, for more than 40 years the only opportunities for a US citizen to vote on convening an independent state constitutional convention have come in states that mandate periodic votes on holding a convention. Of the 14 states that have a periodic convention call requirement, eight of them, including New York, have a period of 20 years, one a period of 16 years, and five a period of 10 years.

OTHER MECHANISMS OF CONSTITUTIONAL CHANGE

There are other mechanisms to change a constitution in addition to a constitutional convention. Until the late eighteenth century, when America invented the amendable written constitution, constitutions tended to be associated with either long-held customs (in Britain) or law giving by a charismatic lawgiver (such as Solon in ancient Athens; Vile 1993).

As part of a government system based on checks and balances, the American colonists recognized that it was important to develop a type of written law higher than legislative law. This higher written law would be based on the wishes of the popular sovereign ("we the people") and passed via a formal change process. The constitutional convention was invented—and gradually evolved—to institutionalize these requirements. As Thomas Jefferson explained in the mid-1780s, "To render a form of government unalterable by ordinary acts of assembly, the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their governments" (1984, 250).

Nowadays, we take it for granted that American constitutions should be written down and include a formal system of future amendment. Within this framework, the various constitutionally specified mechanisms can be divided along two functional dimensions: legislature versus independent initiation,

and a narrow versus broad scope of constitutional change. As table 5 shows, this gives us four functional categories, in which can be placed the legislature-initiated amendment, the legislature-initiated constitutional convention, the popular initiative, and the periodic constitutional convention referendum.

The advantage of this classification is that it highlights important and common differences in the four major types of formal state constitutional amendment. The disadvantage is that it masks enormous variation within categories and a continuum of overlapping functionality across categories. There are also less formal mechanisms of constitutional change, including interpretations by the various branches of government, most notably the judiciary.[17] The constitutional commission is not part of this typology because it is appointed by elected officials and is subservient to and can only be used in conjunction with any of these four mechanisms of constitutional change.[18]

A detailed discussion of the comparative merits of these various constitutional change mechanisms is beyond the scope of this article. What is important for the argument here is a recognition that healthy constitutional reform mechanisms independent of the legislature serve an important democratic function. Legislature-dependent constitutional reform mechanisms also perform a valuable democratic function, but a function that should primarily be viewed as a complement to rather than substitute for independent mechanisms. Just as our system of government is based on various checks and balances among government branches, it requires an independent constitutional reform check on the legislature. Unfortunately, just as the functional lines between the legislative and executive powers are inherently ambiguous, overlapping, and contestable, so are the functional lines between independent and dependent constitutional reform mechanisms.

THE UNIQUE FUNCTION OF THE PERIODIC CONSTITUTIONAL CONVENTION REFERENDUM

The most fundamental control a legislature can have over a state constitutional convention is the ability to control the decision to call one. By not calling a convention, it can effectively prevent any constitutional changes not in its present institutional self-interest. Interests inimical to the legislature fit into two broad

17. For a discussion of constitutional amendment processes and their comparative merits, see Vile (1994) and Tarr and Williams (2004).

18. In Florida, the appointed constitutional commission can place constitutional amendments on the ballot directly. In the four-box categorization here, that procedure would arguably most closely fit in the box with the legislature-initiated constitutional convention. When a legislature can appoint or otherwise tightly control convention delegates, the line blurs between such a constitutional commission and convention.

Table 5. Modern Types of State Constitutional Change

	Initiation of Constitutional Change	
Scope of Change	Legislature	Independent of Legislature
Narrow	Legislature-initiated constitutional amendment	Popular constitutional initiative
Broad	Legislature-initiated constitutional convention	Periodic constitutional convention referendum

categories: restricting its powers (e.g., legislative redistricting, ethics, term limits, transparency, campaign finance, ballot access, and debt finance) and enhancing the relative power of other institutions designed to check its power (e.g., the executive branch, the judicial branch, the popular initiative, local government, and the constitutional convention).

An important qualification on legislative self-interest is the word "present." A legislature doesn't necessarily have a conflict of interest in limiting future legislatures. For example, if a legislative majority (and its interest group allies) is worried that it might one day become a minority (such as the slave states in 1787, when they were a declining majority), it will have an incentive to lock in those preferences while it still can.[19]

At the 1787 Federal Constitutional Convention, delegate George Mason eloquently argued for a constitutional convention provision (which became part of Art. V) as a mechanism for constitutional amendment independent of the legislature: "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" (Farrand 1911, 202–3). The specific mechanism he successfully advocated for was to give the states the ability to set the agenda. This solution was not available at the state level, where granting localities the ability to call a convention was neither possible (localities were generally subdivisions of the state rather than separate sovereign entities) nor desirable (sovereignty should lie with the people, not geographic units).

A state-level solution to the conflict-of-interest problem Mason identified was the periodic constitutional convention referendum, which New York included in its 1846 constitution. Richard Marvin, chair of the Future Amendments Committee at New York's 1846 constitutional convention, explained the committee's proposal: "[Article XIII, §2] was simply to bring the constitu-

19. An extraordinary case of this constitutional lock-in during the twentieth century was the malapportionment of state legislative districts (Dixon 1968).

tion in review by the people once in twenty years, without the intervention of any other body" (Croswell and Sutton 1846, 794).

An alternate mechanism to solve the legislature gatekeeping problem is the constitutional initiative, first implemented at the turn of the twentieth century and ultimately adopted in some form by 18 states, mostly in the West. Of the 14 states with the periodic constitutional convention referendum, eight, including New York, do not have any type of constitutional initiative. Thus, as a practical matter in these eight states, the periodic constitutional convention referendum is the only available mechanism to solve the legislative gatekeeping problem.

Which solution to the legislative gatekeeping problem is better depends on the type of legislative gatekeeping problem to be solved and the details of the particular constitutional convention or constitutional initiative process to be compared. One important consideration is that, like the legislature-initiated constitutional amendment, the constitutional initiative is relatively inexpensive and fast. But the constitutional initiative is typically more limited in what it can propose than a constitutional convention. In most states, a proposed initiative may only cover a single subject as opposed to a general revision. Some parts of a constitution may not be changed via a constitutional initiative. In Illinois, only the legislative article may be amended via the constitutional initiative. The number of amendments that can be introduced over a given period of time may also be restricted. In Mississippi, only five initiatives are allowed on the ballot during an election. In Massachusetts, the legislature can veto a constitutional initiative with a supermajority vote.[20]

Another difference between a constitutional initiative and a constitutional convention is the power of the proposers. With the initiative, the proposal is generally made on a take-it-or-leave-it basis. Signatures can be gathered to place a proposal on the ballot only after the proposal is finished. This gives the proposer more power because it only has to beat the status quo to be approved; it doesn't have to be optimal because it doesn't have to fend off amendments. It may have to fend off substitute initiatives, but these tend to be costlier and riskier, as each must get the requisite number of signatures to get on the ballot.[21]

The difference in proposing power is rooted in the drafting process. With the initiative, the proposal is drafted before the public part of the process starts, and the public can only vote on whether to support or oppose it.

20. For the variations and limitations on constitutional initiatives, see Matsusaka (2008, app. 1).

21. With the indirect initiative, the story is more complicated. But the indirect initiative doesn't solve the proposal power problem, as the legislature retains an institutional conflict of interest when making alternative proposals.

With the constitutional convention, people vote for delegates to debate and vote in public on a wide variety of proposals before the public is asked to vote on particular proposals. Most importantly, it is relatively easy for a delegate to propose an amendment to a proposal. Whereas getting enough signatures to get a substitute initiative on the ballot can cost millions of dollars and involve high risk, a substitute amendment can be placed on the agenda at a constitutional convention with little more than a hand raise. In addition, the proposing and debating of amendments takes place at public expense, as the public pays the delegates to deliberate over an extended time span. Whether all this debating and easy amending at public expense adds value to the proposing process depends largely on the quality of the delegate election process.

Interest groups generally view a constitutional initiative as more desirable. A constitutional convention is a slower process, as it requires three popular votes: for a convention, for convention delegates, and for convention proposals. This can add years of delay in comparison to the constitutional initiative. Interest groups, as we have seen, must also give up their proposal power, as they have no direct control over a convention's proposals. Finally, as this article explains, convention calls are likely to mobilize a broad coalition of highly motivated and powerful opponents with a nearly invincible track record of winning. This political logic is reflected in the fact that only twice in American history, and not since 1960, has a state with a constitutional initiative used it to call a convention.[22]

Since New York lacks the constitutional initiative, the people's only formal way to bypass the legislature's gatekeeping power over constitutional reform is the periodic constitutional convention referendum.

ANOTHER FUNCTION: COMPREHENSIVE REFORM

Advocates for constitutional conventions have often argued that they are primarily advantageous for comprehensive reform leading to "streamlining" or "modernizing" a constitution (Adrian 1967, 321–23; Tarr 1998, 23–28). This conceptualization appropriately generalizes the benefits of large-scale constitutional revision when limited/dependent and unlimited/independent conventions are bundled together as an object of study.

Given this background on the constitutional convention, we are ready to look at three long-term structural factors leading to its decline: (1) increased legislature opposition, (2) increased special interest group opposition, and (3) in-

22. For a literature review on using the initiative to convene a constitutional convention, see Snider (2015d).

creased public ignorance. These three factors may all be viewed as interdependent and self-reinforcing.

INCREASED LEGISLATURE OPPOSITION

The Growth of Constitutional Reform Substitutes

An independent constitutional convention can be used as a general-purpose institutional mechanism for constitutional amendment. From a legislature's perspective, some purposes may be good (those consistent with its institutional self-interest) and others bad (those adverse to its institutional self-interest). Historically, legislatures have faced great pressure to accept the good and bad as a single inextricable package. Increasingly, however, legislatures have devised ways to separate the good and bad. To the extent that there has been an arms race between the people and legislatures seeking gatekeeping control of the constitutional reform agenda, legislatures have generally been winning.

Since the US Declaration of Independence in 1776, state legislatures, including New York's, have developed substitute mechanisms of democratic reform that don't require losing agenda control. The most notable of these is the legislature-initiated constitutional amendment, which is more efficient than the constitutional convention for implementing relatively small constitutional changes that aren't in conflict with a legislature's institutional self-interest (Dinan 2006, 41–42).

Most of the first constitutions from the 13 original states, including New York, didn't specify a procedure for future constitutional changes. Merely specifying that, as in the Virginia Declaration of Rights, "the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish government" was thought adequate. When states wanted to revise their original charters or first constitutions, they convened a constitutional convention as a general-purpose tool. Thus, between 1776 and 1800, the United States, made up of 16 states, had 26 conventions (Snider 2015c) and only 18 individual constitutional amendments (Tarr 1998, 60).[23]

New York's constitution had no provision for future amendment until 1822. When the legislature wanted to reform its colonial charter in 1776 and then its constitution in 1801, it convened a constitutional convention as one of its plenary powers as a representative of the people. The 1822 constitution provided for legislatively initiated amendments. No provision was included for a convention. By then, perhaps it was considered self-evident that a legislature could call for a convention whenever it wanted regardless of what the con-

23. Two of the 16 states, Connecticut and Rhode Island, did not change their colonial charters during this period and thus did not convene conventions.

stitution said. Even between 1822 and 1846, New York's legislature passed only eight constitutional amendments, all of which were approved by the voters (Galie 1996, 95).

During the twentieth century, states began to lift some of the restrictions on legislatively initiated constitutional amendments, allowing more subjects to be included in a single amendment and more frequent amendments (Sturm 1982, 95–96). Majority thresholds for legislatively initiated constitutional amendments were also lowered, making them more competitive with the majority thresholds for convening conventions.

The development of the constitutional commission, a government-appointed body whose proposals can be submitted to the legislature for approval and revision, preserves the legislature's gatekeeping control while facilitating large-scale constitutional amendment. The combination of the constitutional commission and the legislatively initiated amendment allows for extensive public deliberation about large-scale constitutional revisions—previously cited as a primary advantage of a convention—without loss of legislative gatekeeping control.[24]

The Growth of Career-Oriented Legislators

Legislatures, as Albert Sturm writes, "have been the natural enemies of unlimited constitutional conventions" (1970, 88). But the degree of their enmity may have increased as their incentive for entrenching themselves has increased.

Early congressional and state legislators at both the rank-and-file and leadership levels had high turnover. They tended to be citizen legislators rather than careerist legislators, that is, they worked as representatives for brief periods, earned their livings outside of government, and didn't see serving in elected office as a career. Accordingly, incumbent legislators had relatively little incentive compared to today's legislators to entrench their power. Future president Abraham Lincoln's one term in Congress from 1846 to 1848, after which he returned to his law practice, was not unusual. As the Congressional Research Service reports, "The rate of Representatives not seeking re-election dropped dramatically beginning in the mid-19th century. Prior to the Civil War, it was common for 40% of Representatives or more to not seek re-election, and prior to 1887 no Congress saw fewer than 25% of Representatives not seek re-election. During the 20th and 21st centuries, the rate at which Members have not sought re-election has remained roughly constant, at an average of 11%" (Glassman and Wilhelm 2015, 5). Many studies have observed the growing

24. Some states don't allow comprehensive revisions by legislatively initiated amendment. For example, Alabama's supreme court has ruled that since Alabama's constitution provides for a convention, the legislature cannot bypass a convention with a legislatively initiated constitutional revision. *State v. Manley*, 441 So.2d 864 (1983).

tendency toward careerism among state legislators. As Peverill Squire summarized, "High levels of turnover were commonplace across all state legislatures during the antebellum era" (2012, 231). In New York's legislature from 1777 to 1870, 60% of legislators in an average legislative session were first termers. In the 1845–48 legislative session, it was 89% (Gunn 1980, 277–78). Beginning in the late nineteenth century, legislative turnover dramatically declined, with the proportion of state senate first termers dropping from 67.3% in the 1870s to 10.2% in the 1980s (Stonecash 1998, 81). From 2005 to 2013, 96.5% of New York State Legislature incumbents were reelected (Citizens Union 2014, 12).

Legislators with short-term legislative careers would have less incentive to jealously guard their legislative prerogatives over constitutional reform. It is no coincidence that the golden age of independent constitutional conventions, from roughly 1840 to 1857, corresponded with low legislative entrenchment. This period saw New York (1846) institute the periodic convention call, followed within 11 years by the most concentrated wave of such provisions in US history: Michigan (1850), Maryland (1851), Ohio (1851), and Iowa (1857).

INCREASED SPECIAL INTEREST GROUP OPPOSITION

In his book *The Logic of Collective Action*, Mancur Olson provided a theory to explain why not all interest groups are equally well represented (Olson 1971). Olson observed that it was hard to form groups and that, paradoxically, the larger the group, the harder it was to effectively organize and exert influence. The problem stems from the incentive of interest group members to free ride. Potential group members get the benefits of interest group representation whether or not they join, so they have an incentive to let others bear the cost of group membership. This incentive increases as group size increases.

Nowadays, we tend to explain the undemocratic tendencies of group formation and effectiveness in terms of concentrated benefits and diffuse costs. If 10 people benefit from a $10 million tax break that 100 million people have to pay for, each of those 10 people gets a $1 million benefit, but it only costs 10 cents a person to provide that tax break. Consequently, it isn't worth it for those 100 million to organize in opposition to the subsidy. Their best strategy is to hope that do-gooders will take on the burden of representing their interests.

Now comes the more relevant part: a dynamic theory that explains the long-term impact of such group formation tendencies. In a second book, *The Rise and Decline of Nations*, Olson argued that group formation tendencies have caused the increasing calcification of government (Olson 1982). As governments grow, more special interest groups form, wanting to preserve their spe-

cial privileges and making it increasingly hard for governments to experiment and solve problems.

Jonathan Rauch labels this phenomenon "demosclerosis." As applied to constitutions, we get what could be called "constitutional sclerosis," the inability to adjust constitutions to solve important democratic problems. Just as it is much easier for legislators to increase than decrease the budget for a particular program, it is easier for legislators to add to constitutions—often in an effort to protect current majorities from future majorities—than to eliminate obsolete and unpopular provisions. Charlotte Irvine and Edward Kresky (1962, 4) have described state constitutions as a "safety vault" in which private interests "deposit laws favorable to their own health and welfare."

Individual members of a legislature may live in as much terror of cutting a constitution as cutting a program's budget, but in a convention the logic of special interest politics appears to be mitigated, thus short-circuiting constitutional sclerosis.[25] Preliminary evidence for this is the propensity of modern conventions to cut the length of constitutions. States that have had a successful convention since 1950 have relatively short constitutions compared to those that have not, with a "successful" convention defined as one whose recommendations were ratified by voters. The median length of constitutions in the 14 states that have had a successful convention since 1950 is 17,574 words. The median length of a constitution in the other 36 states is 33,261 words, 89.3% longer (Council of State Governments 2014, 10).[26] The constitution of New Hampshire, which has had more conventions (17) than any other state, is 13,060 words long. The US Constitution, including amendments, is 7,575 words.[27]

In short, both legislatively initiated statutory politics and legislatively initiated constitutional politics become increasingly dominated by the politics of special interest gridlock. For the same reason there is a rise and decline of nations, there is a rise and decline of constitutions—a shift from representing the interests of the living to representing those of the dead, what Louis Seidman calls "an intergenerational power grab" (2013, 41).

25. The logic of this mitigation derives from the fact that convention delegates don't have to worry about reelection and special interest group reelection influence; instead, they have to worry about getting their proposals ratified and how their on-the-record deliberations will be viewed by future historians and courts (see Elster 2013, 210, 229).

26. The five unsuccessful states were New York, Maryland, Arkansas, Texas, and New Mexico, which tended to provide the voters with a single take-it-or-leave-it option rather than a set of options with controversial and noncontroversial proposals separated.

27. A rigorous study on the relationship between constitutional conventions and constitutional length would have to control for confounding variables such as the difficulty in amending a state constitution, the availability of other modes of amendment, and different attitudes in different time periods about the desirability of constitutions.

INCREASED PUBLIC IGNORANCE AND ITS CONSEQUENCES

Increased Public Ignorance

As the public's ignorance increases, so does its vulnerability to information manipulation by the power elite.

Americans are remarkably ignorant about their state constitutions and constitutional convention history. A poll taken by the US Advisory Commission on Intergovernmental Relations in 1988, a year after America's federal constitutional bicentennial, revealed that only 48% of Americans even knew they have a state constitution, let alone its contents. The figure for the northeastern section of the country, including New York, was significantly lower: 38% (Advisory Commission 1988, 33).

Knowledge of state constitutional conventions is probably even weaker. A negligible fraction of Americans have experienced a convention in their adult lifetimes. In New York, the last one was 50 years ago.

Students are not taught about state constitutional conventions in school: not in high school, not in college, not even in PhD programs in American government. Introductory American government high school and college courses teach students about the Federal Constitutional Convention of 1787. But as scholars have argued, that's a misleading stand-in for understanding state conventions (e.g., Tarr 1998, chap. 1).

There are reasons to believe that Americans' ignorance of their state constitutional history may have become more prevalent. First, given the current drought of state conventions, both average citizens and local political elites—journalists, good-government activists, and political scientists—have an unprecedented lack of direct experience with the institution.

Second, if a unit of government, such as states, declines in power and loyalty relative to the federal government, there is less reason to study it. Since the Civil War, Americans' loyalty to their state has weakened relative to the federal government (Fritz 2010, 856).

The Consequences of Increased Ignorance

Understanding this ignorance is important for explaining the politics of convening state constitutional conventions. Political scientists know that political campaigns differ based on voters' level of knowledge. For a high-salience issue, such as an abortion referendum or a presidential election, voters are unlikely to be swayed by last-minute advertising because they already have well-formed opinions. For a low-salience issue, such as whether to convene a convention, last-minute advertising has greater impact.

Usually, when voters don't have a well-informed view about a particular issue, they can rely on partisan cues as an information shortcut. But convening

a constitutional convention tends to be opposed by legislators of both political parties, so state party organizations steer away from taking a stand. In such an information environment, better-organized and well-financed interest group information campaigns can be especially persuasive. Compounding the problem, in order to win on a low-information ballot item, it isn't necessary to win the argument. It is only necessary to sow confusion, for when voters are confused, they are more likely to prefer the status quo and vote no (Magleby 1984, 142). A bias toward failure also tends to become self-reinforcing. Repeated failure inculcates a culture of defeatism, where advocates for a convention sit on the sidelines believing their odds of success hopeless.

Table 6 looks at money spent pro and con on ballot advocacy campaigns on whether to convene a state constitutional convention. The campaign finance laws mandating such disclosures tend to be of recent origin, have many loopholes, and are poorly enforced (see, e.g., Achorn 2004; Snider and Clay 2014b). At best, they provide a good indication—after the election is over—of how much each side spends on paid advertising.[28]

Table 6 suggests that campaigns against rather than for convention referenda tend to be better financed. A striking result is the lack of reported expenditures in most of the states where data were gathered. This may result from the fact that those opposing a convention don't spend money to do so unless public opinion polls or other trustworthy indicators suggest that the public might support a convention. Even when they have a reasonable chance of winning and are ahead in the polls, "yes" campaigns are unable to match the expenditures of "no" campaigns. In New York (1997), Rhode Island (2004), Connecticut (2008), and Rhode Island (2014), "yes" campaigns were ahead in published polls until a final blitz by the "no" campaigns shifted public opinion.[29]

It is important to note that "yes" and "no" dollars aren't equally efficient. From extensive study of constitutional initiatives, we know that "no" dollars tend to be much more efficient than "yes" dollars, partly because voters are risk averse when it comes to constitutional reform (Bowler et al. 1998, 129).

Although the arguments used by mobilized "no" campaigns tend to vary in their particulars, certain themes are common. A favorite ambiguous but fear-inducing sound bite is that a convention would open up a "Pandora's Box" (Galie 1997). More detailed arguments are that a convention will be outra-

28. The National Institute on Money in State Politics, the leading provider of campaign finance information for ballot advocacy, has been collecting information on constitutional convention ballot advocacy since 2008. It reported contributions for Illinois (2008) and Connecticut (2008) but none for Hawaii (2008), Iowa (2010), Maryland (2010), Montana (2010), Ohio (2012), New Hampshire (2012), and Alaska (2012). At the time of this writing, data were not yet available for Rhode Island (2014), so data were compiled directly from the Rhode Island State Board of Elections (Snider 2014c).

29. For New York in 1997, see Benjamin (2001).

Table 6. Ballot Advocacy Campaign Disclosures, 2008–14

State	Year	For ($)	Against ($)	For (%)	Against (%)
Connecticut	2008	17,597	846,669	2.0	98.0
Illinois	2008	147,765	1,694,168	8.0	92.0
Rhode Island	2014	39,701	141,800	21.9	78.1

geously costly, redundant with the legislature, and corrupted by the legislature, special interests, and the ignorant masses. The "no" campaigns will heavily publicize the names of unpopular individuals and organizations supporting a convention.

Arguments are often inconsistent, indicating they are rationalizations of undisclosed interests. Liberals may argue that a convention will help conservatives, while conservatives argue that it will help liberals. Some may argue that a convention will result in too much reform, while others argue that it will result in too little reform to be worth the effort and money. Some may argue that a convention will result in majoritarian reforms that harm minorities, while others argue that it will result in minority ("special interest") reforms that harm the majority. Often the same individual or organization will make opposing arguments. When arguments are compared across referendum campaigns in different states and over different referendums within the same state, predictions about the likely impact of a convention may appear even more arbitrary and inconsistent.[30]

Table 7 shows the top 10 campaign contributors for the "yes" and "no" campaigns in three states. Individual contributors dominate the "yes" campaigns. Organizations, especially heavily regulated industries such as government employee unions, dominate the "no" campaigns. Newspaper and academic accounts of the campaigns in New York (1997) and Rhode Island (2004) provide similar results (Benjamin 2001; Dinan 2010; Snider and Clay 2014a).

During the late nineteenth and early twentieth centuries, heavily regulated industries such as railroads strongly opposed conventions just as they did the popular initiative (Goebel 2002). Similarly, heavily regulated industries such as insurance helped finance the 2008 "no" campaign in Illinois. Since the 1970s, government unions have been the leading group opposed to convening independent conventions. With big labor joining big business and legislatures in

30. A compendium of op-eds, editorials, letters to the editor, ads, and other advocacy-related documents making the various arguments can be found, broken down by state, at http://concon.info.

Table 7. Top 10 Organizations Favoring and Opposing a Constitutional Convention

Rank	Organization Favoring	Amount ($)	Organization Opposing	Amount ($)
		Illinois		
1	Citizens for Fair Assessment & Taxes	50,000	Illinois Federation of Teachers	325,000
2	Andrea Raila	25,000	National Education Association/NEA	200,000
3	Supporters of Jack D Franks	20,250	Illinois Coalition for Jobs Growth	167,500
4	Mike Rohrbeck	20,000	Illinois Education Association	125,000
5	Citizens for James M. Houlihan	10,000	Exelon Corp.	100,000
6	Andre Howard	5,000	State Automobile Mutual Insurance Co.	125,000
7	Andrea Raila & Associates	4,000	Allstate Insurance	50,000
8	David Gassman	4,000	Illinois Trial Lawyers Association	50,000
9	Richard Ney	2,500	Health Care Service Corp.	50,000
10	James Findlay	2,000	Illinois AFL-CIO	40,068
Top 10		142,750		1,232,568
Total		147,765		1,694,168
		Connecticut		
1	Rick Coirdano	10,010	National Education Association/NEA	325,000
2	John J. Woodcock	2,542	Connecticut Education Association	315,000
3	Heinrich Enslin	500	Connecticut Federation of Teachers	105,000
4	Jacqueline Juhasz	500	Love Makes a Family	21,549
5	Barbara Lachance	500	Uconn American Assoc. of University Professors	20,000

6	Barkhamsted Republican Town Committee	400	AFSCME Council 4	20,000
7	Christopher Healy	250	Planned Parenthood of Southern New England	10,000
8	Thomas VRBA	200	Connecticut AFL-CIO	6,115
9	Wesley Gallaway	200	Connecticut Employees Union Independent	5,000
10	Salvatore Gabriele	200	Connecticut State Council of Service Employees	5,000
Top 10		15,302		832,664
Total		17,597		846,669
	Rhode Island			
1	John Hazen White*	15,000	R.I. AFSCME AFL-CIO	25,000
2	Alan Hassenfeld	12,500	National Education Association	20,000
3	Aram Garabedian	6,000	R.I. Hospital United Nurses & Allied Professionals	15,500
4	Matthew Schweich	2,201	R.I. Federation of Teachers & Health Professionals	15,000
5	Angus Davis	2,000	R.I. American Civil Liberties Union	15,000
6	Timothy Murphy	2,000	New England Laborers Management Trust	10,000
7	None	N.A.	R.I. Association for Justice	10,000
8	None	N.A.	R.I. International Brotherhood of Teamsters	10,000
9	None	N.A.	R.I. Service Employees International Union	6,300
10	None	N.A.	United Food & Commercial Workers Defense Fund	5,000
Top 10		39,701		131,800
Total		39,701		141,800

*White also provided an in-kind contribution of a billboard with an estimated value of $23,000. The “yes” campaign had a similar billboard on the same highway but no reported expenditure for it.

either active or passive opposition to convening a convention, convening one has seemingly become politically untenable. Some business groups have supported conventions, but their support has been relatively minor in terms of both dollar contributions and organizational support. Business groups that took a position on the 1997 convention vote in New York tended to support a convention, but ad campaigns about the convention were still overwhelmingly negative (Benjamin 2001).

The laws regarding campaign finance referendum disclosure have notable loopholes. Consider the government unions, which, fearing that a constitutional convention could threaten tens of billions of dollars of pension benefits, are likely to be the primary financial backer of the upcoming "no" campaign in New York, just as they have been in other states with similar referendums.

New York exempts from campaign finance disclosure intraorganizational communications, which favors large organizations. For example, by spring 2016, New York's statewide government workers' union, NYSUT, which represents more than 600,000 members and 1,200 local unions, primarily public school staff (NYSUT stands for "New York State United Teachers"), had already begun mobilizing its members and organizing a coalition opposed to a yes vote on the convention referendum. *NYSUT United*, the newsletter sent to all NYSUT members, had already published more than a half dozen articles opposing a yes vote. For example, it reported that at NYSUT's 2016 policy-making conference NYSUT executive vice president Andy Pallotta told delegates, "NYSUT's position is clear: A convention poses great danger to retirement security, collective bargaining rights and access to a quality public education" (NYSUT Communications 2016b). It also reported that delegates responded "loud and clear in their opposition to a 2017 Constitutional Convention for New York State and called for NYSUT to wage a vigorous public relations campaign to convince the public to vote it down" (NYSUT Communications 2016a).

The law exempts campaign finance disclosures during the last 19 days before a referendum election, when government union–financed ad campaigns against constitutional convention referendums have historically gone into high gear. Disclosure is not required until after the election, when it can no longer influence the outcome.

The law also exempts indirect campaign finance expenditures such as contributions to 501(c)(3) nonprofit organizations. An example of such potentially influential expenditures are contributions to public interest groups that help those groups pursue their core missions independent of any interest they might have in a constitutional convention. Such groups would presumably think twice about alienating a potential donor on an issue vitally important to the donor. The consequence with regard to an upcoming convention referendum

could be the recipient suppressing support, increasing opposition, or even flipping support to opposition.

In 2012, New York's United Federation of Teachers and NYSUT collectively gave over $2 million to influential groups with large membership bases, some of which have taken positions on constitutional convention referendums (Garland 2013). Such groups in recent years have included Planned Parenthood, Empire State Pride Agenda, and the National Association for the Advancement of Colored People. Such groups also include leading New York good-government groups. Some of the money comes indirectly via government union–funded groups such as the Working Families Party and the Public Policy Education Fund of New York (Bragg 2016). Good-government groups have historically been a widely used press source for statements about conventions (see, e.g., Mahoney 2015).

The League of Women Voters is especially noteworthy for its reliance in recent decades on the goodwill of New York's public school unions. Central to the organization's long-term health is its youth program, including its "Students Inside Albany" conference (League of Women Voters 2015b). Public schools throughout New York State help advertise the program and let teachers write the evaluations needed for student attendance. Prominently displayed on both the front and back sides of the League flyer distributed to the schools is the endorsement of the leading statewide public school unions in New York: the Civil Service Employees Association (school support personnel) and NYSUT (League of Women Voters 2016). Local League chapters are instructed to contact NYSUT if they have trouble getting into the schools.[31] As of 2014, the League had 3,655 members across New York State, down from 5,992 in 2004 (League of Women Voters 2014, 21).[32]

Prior to the 1980s, state chapters of the League had often been leading supporters of independent state constitutional conventions. Since then, no state chapter has supported one. As late as 1970, the leading mid-twentieth-century convention historian, Albert Sturm, could write, "Of the numerous citizens' groups that have supported constitutional revision, the most active in most jurisdictions have been the Leagues of Women Voters. They have initiated campaigns for convention calls, worked for the adoption of reforms proposed by conventions and otherwise sought to promote state constitutional modernization. In several states they initiated litigation that resulted in conventions ordered by the courts" (1970, 63).

31. The specific instructions are as follows: "Call the state office and we will find a local contact in the schools for you with help from one of our student program sponsors, New York State United Teachers (NYSUT)" (League of Women Voters 2015a).

32. Robert Putnam (2000, 438) describes the decline of the League in earlier decades.

Randi Weingarten, the president of the American Federation of Teachers, the largest union among NYSUT members, has publicly said, "Why would you put your money with someone who wants to destroy you?" She influences how $1 trillion in public-teacher pensions is spent and insists that Wall Street firms seeking to manage those funds support her union's positions. The *Wall Street Journal* reported that at least some financial managers "stopped making donations to advocacy groups targeted by Ms. Weingarten" (Mullins 2016). One of the groups on her black list was New York's Manhattan Institute for Policy Research, one of New York's two largest think tanks.

The you-scratch-my-back-I'll-scratch-yours logic of coalition politics is also important. According to one survey, 80% of lobbyists agree that "coalitions are the way to be effective in politics" (Berry 1997, 187). If convening a convention doesn't further an organization's core interests and the organization is part of a coalition with highly valued partners who strongly oppose convening a convention, then it is Politics 101 to exchange mutual support on core interests with those partners. Such reciprocal transactions are the essence of interest group coalition politics, just as they are for machine party politics and legislator logrolls.[33]

A vivid illustration of such back-scratching coalition politics may have occurred during the last few days before the November 4, 2014, referendum in Rhode Island. On November 1, 2014, the Saturday before the election, Rhode Island citizens received a classy mailer headlined, "This election day, protect women's reproductive rights, reject question 3." It continued, "A Constitutional Convention could send women back to the 1950s."

But there was a glaring flaw in the mailer's argument: Rhode Island public opinion overwhelmingly favored a woman's right to choose. According to survey results Planned Parenthood distributed to legislators and the press on June 5, 2014, 93% of Rhode Islanders supported this right.[34] That favorable public opinion was the centerpiece of Planned Parenthood's legislative advocacy. By implication, if Planned Parenthood's own data were accurate, the coalition op-

33. As Jonathan Rauch argues, "A core machine function is to protect loyal insiders who 'take one for the team.'" (2015, 11).

34. The press release read in part, "Today Planned Parenthood of Southern New England (PPSNE) held a press conference to discuss the findings of a recent poll to gauge Rhode Islander's [*sic*] views on issues related to women's reproductive health services. Rhode Island voters overwhelmingly believe (93 percent important) it is important for women in Rhode Island to have access to all of the reproductive health care options available to them, including abortion. . . . 'The idea that Rhode Islanders hold more conservative beliefs about these services and values than voters do elsewhere is simply untrue,' said Susan Yolen, Vice President of Public Policy and Advocacy of Planned Parenthood of Southern New England." Available at http://www.plannedparenthood.org/about-us/newsroom/local-press-releases/planned-parenthood-of-southern-new-england-releases-reproductive-health-services-public-opinion-poll.

posing the convention was worried that 7% of Rhode Islanders would capture the convention and that the other 93% of Rhode Islanders would be misled on this high-salience, easily understood issue into voting during ratification against their own interests.

There was no media coverage of this last-minute and misleading mailer. By this point in the election, the media were exclusively focused on more high-profile races, including the race for governor. The "yes" campaign neither sent out any mailers of its own nor responded to this mailer, a reflection of its relative lack of money and organization.

A plausible political explanation for the mailer is that Planned Parenthood was a coalition partner with the government unions that primarily financed the "no" campaign and also contributed to Planned Parenthood. For example, the two cofounders of the "no" coalition—who were quickly replaced by professional staff with no listed affiliation—were government affairs staffers for a teachers' union and Planned Parenthood. The Planned Parenthood staffer was a former National Education Association state political director. Unlike the public employee unions that mobilized their members on this issue, Planned Parenthood did not, suggesting that its high-profile role was partly a front for and favor to its union allies (Snider 2014b).

Between October 14 and 17, 2014, Brown University's Taubman Center conducted a poll finding that 42.3% of voters were in favor of a constitutional convention in Rhode Island, 26.8% opposed, and 30.9% undecided. The final tally on November 4, 2014, was 55.1% opposed and 44.9% in favor (Taubman Center 2014). The last-minute mailer contributed to the "no" campaign's victory.[35]

Paradoxically, the public's growing predisposition to distrust democratic institutions has been a bonanza for "no" campaigns, which have focused their campaigns on linking distrust of familiar democratic institutions to an unfamiliar one: the state constitutional convention.

Various public opinion indicators suggest that Americans are highly distrustful of their democratic institutions and elected leaders and that this distrust has been increasing in recent decades. The longest-studied indicator is trust in the federal government. Since 1958, there has been a general downward descent in this trust indicator, dropping from 73% in 1958 to 24% in 2014 (Pew Research Center 2014). Currently, 80% of Americans think that members of Congress "are primarily interested in serving special interest groups" (Montopoli 2011). Amazing for its logical inconsistency, a large majority of Americans (64%) across both Democrats and Republicans now believe that

35. For a more general discussion of the various factors that contributed to the outcome, see Snider (2014c).

"on the issues that matter to them in politics today, their side has been losing more often than it's been winning." Only 25% believe that their side has been winning more often than losing (Doherty et al. 2015, 103–4).

"No" campaigns have been effective in linking this distrust of democracy with distrust of the constitutional convention process. Rather than present the convention process as a vital manifestation of the democratic process and one of the marvelous contributions of America to the development of democracy worldwide (Wood 1969, chap. 8), "no" campaigns present it as, at best, a very high risk version of ordinary politics. For example, the last-minute Planned Parenthood mailer was effective partly because the 93% of Rhode Island voters who approved a woman's right to choose didn't know they were part of an overwhelming majority and mistrusted their fellow citizens to do what they believed was right.

CONCLUSION

In the preamble to the US Declaration of Independence, Jefferson wrote that people have an "unalienable" right "to alter" their government. A total of 37 US states would eventually include in their state constitutions a similar aspirational right of people at all times to alter or reform their government (Martineau 1970, 421). New York does not have that aspirational right, but it has something far more important: a practical mechanism to implement that right in the face of a legislature's opposition.

Despite that mechanism, the political forces seeking to ensure that the interests of dead majorities retain control over New York's constitution remain formidable. The great misfortune of the periodic constitutional convention referendum is that its greatest democratic strength—institutionalizing the people's inalienable right to reform their government in the face of legislative opposition—is also its greatest political handicap, for in taking agenda control from the legislature it creates a powerful and implacable foe. For the legislature and its allies, a constitutional convention is truly a "Pandora's Box."

The framers of the US Constitution in 1787 were afraid of legislative tyranny, partly because the first round of state constitutions after the US Declaration of Independence gave too much power to legislatures. They believed that legislative elections were inadequate to protect the sovereign people, so they set up a system of strong checks and balances as an auxiliary precaution against a legislature's abuse of its lawmaking powers. A corollary to this theory of government by checks and balances is that it is harmful to the long-term health of a democracy for a legislature to have exclusive gatekeeping control over constitutional reform because, for a subset of important issues, it has an inherent conflict of interest with the sovereign people.

In New York, a state constitutional convention is the only way to bypass the legislature's gatekeeping power over constitutional change. But it is also a flawed institution, which means that the public must weigh difficult trade-offs when deciding whether to call one. Winston Churchill once famously said that "democracy is the worst form of Government, except for all those other forms that have been tried from time to time." Perhaps the same could be said of democracy's most powerful mechanism for reforming itself: the state constitutional convention.

New York was once a widely copied pioneer in the development of not only the state constitution in general but also the state constitutional convention in particular. In 1821, it was one of the first half dozen states to implement a popular referendum to call a convention and then ratify its recommendations. In 1846, it was the third state to include in its constitution a periodic convention referendum, the first state to include the referendum on a 20-year interval, and the first to include provisions for both a periodic referendum and a legislatively initiated constitutional amendment. In 1894, it was the first state to include a self-executing convention provision (Martineau 1970, 425–26). If New York ever convenes another convention, one of its top priorities should be to reinvigorate this vital democratic institution that lies at the heart of its constitutional tradition.

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