

The Development of the Periodic State Constitutional Convention Referendum Since America’s Founding

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Abstract

Fourteen U.S. state constitutions mandate a periodic state constitutional convention referendum (PCCR), with the specified period between referendums ranging from ten to twenty years. PCCR grants the people three votes: 1) whether to call a constitutional convention, 2) if called, who to elect as convention delegates, and 3) whether to approve the constitutional changes proposed by the convention. These votes correspond to granting the people a type of constitutional “initiation,” “proposal,” and “ratification” power, with the grant of direct initiation power what separates PCCR from the constitutional convention. Through the prism of what this article labels Legislature Bypass Theory, a variant of Constituent Power Theory, this article discusses the development of PCCR since America’s founding, with a focus on its legal, intellectual, and political history.

Introduction

Among America's arsenal of constitutional change mechanisms,¹ the automatic periodic state constitutional convention referendum (PCCR) is arguably its most democratic. It grants the people acting in its constitution-making capacity (henceforth, the "constituent power") three direct votes over the constitutional change process: 1) whether to call a constitutional convention, 2) if called, who to elect as convention delegates, and 3) whether to approve the constitutional changes proposed by the convention. Among U.S. states, no other constitution-making process grants the constituent power the same cumulative degree of direct control over the initiation, proposal, and ratification stages of the process.

Historians have hailed America's late 18th-century invention of the constitutional convention as one of its greatest contributions to the development of democratic constitutionalism. In his presidential address to the American Historical Association, Andrew McLaughlin asserted: "If I were called upon to select a single fact or enterprise which more nearly than any other single thing embraced the significance of the American Revolution, I should select—not... the Declaration of Independence—I should choose the formation of the Massachusetts Constitution of 1780, and I should do so because that constitution rested upon the fully developed convention, the greatest institution of government which America has produced, the institution which answered, in itself, the problem of how men could make government of their own free will..." (McLaughlin 1915, 264–65).

In his *The Age of Democratic Revolution*, the great historian of democracy, R.R. Palmer wrote: "If it be asked what the American Revolution distinctively contributed to the world's stock of ideas, the answer might go something along these lines.... The problem throughout much of America and Europe, for half a century, was to 'constitute' new government.... America solved the problem by the device of the constitutional convention.... European thinkers... lacked the

idea of the people as a constituent power.” (Palmer and Armitage 2014, 159–61; see also Wood 1969, 306–43; Adams 2001, 73; Lenowitz 2015, 813).

Leading contemporary theorists of democratic constitutionalism consider this type of convention-based constitutional change mechanism superior to a legislature proposed and ratified one, especially for major constitutional change. For example, Columbia Professor Jon Elster concluded: “[T]o reduce the scope for institutional interest, constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures. Nor should the legislatures be given a central place in the process of ratification.” (2013, 211–12, see also 1995, 364). Similarly, University of Wellington Professor Joel Colon-Rios observed: “Constituent assemblies convened by referendum and comprised by elected deputies are now generally considered as the most democratic means of constitutional change.” (2020, 284; see also 2010, 240–43, 2012, 193–211; Thompson 2022; King 2019, 26–30, 33–34).

Among political scientists and law professors who study the history of U.S. state conventions, observations about their advantages over legislature-based constitutional change processes have been common (Garner 1907, 221, 239–40; Dodd 1910, 261–62; Dealey 1972, 258, 268, 275; Graves 1960, 32, 51; Sturm 1954, 118–19, 151, 1970, 71, 26; Purdy 2022, 222; Strickland 2022, 534–37). Law Professor Jonathan Marshfield has written the most substantial recent paean to the democracy-enhancing attributes of America’s state constitutional convention tradition (2023, 7, 29–30, 47; see also Pozen 2023). Law Professor Sanford Levinson has recently singled out the 14 U.S. states with PCCR as his “favorite state constitutions” (Levinson 2024, 46).

Even foes of the U.S. Federal Constitution’s Article V constitutional convention process have sometimes found a soft spot for the U.S. state convention process. This includes the two most prominent contemporary critics of Article V conventions, who argue that the state

convention model should be used as a model for national convention reform (Feingold and Prindiville 2022, chap. 9).²

After the breakup of the Soviet Union in 1989, independently elected constitutional conventions grew in popularity outside the U.S. (Widner 2007, 1522). The last convention called in the U.S. was in Nov. 3, 2020 in the U.S. Virgin Islands; delegate elections were held on Nov. 5, 2024.³

To the convention's duo of proposal and ratification powers for the constituent power, PCCR adds initiation power, as PCCR requires that the referendum on whether to call a convention be automatically placed on a statewide ballot at stated intervals regardless of whether the legislature wants to grant the constituent power the option to call a convention.

Currently, fourteen U.S. state constitutions include PCCR,⁴ with the specified period between referendums ranging from ten to twenty years. It is rare for more than two years to pass without a PCCR referendum on a U.S. state ballot; 36 have been on the ballot since 1986, when the last one convened.⁵ Prior to the advent of the constitutional initiative in the 20th Century (the first state implementing one was in 1902⁶), PCCR was the only available mechanism in any state to bypass the legislature's gatekeeping power over constitutional amendment. In the eight states with PCCR that lack the constitutional initiative, PCCR remains the only available mechanism to bypass the legislature's gatekeeping power over formal constitutional change. This article focuses on those eight states because they constitute the majority of current PCCR states and give PCCR arguably its most important democratic function: as a legislature bypass mechanism.

Reflecting PCCR's role as a legislature bypass mechanism for constitutional change, no state legislature has ever directly proposed PCCR for incorporation into its state constitution. Thirteen of the 14 states with PCCR incorporated PCCR in its constitution via a state

constitutional convention. The fourteenth state, Missouri, proposed PCCR via a constitutional initiative.

The literature on state constitutional conventions has been overwhelmingly focused on generic constitutional conventions, not what was treated as a minor, democratically unimportant variant: PCCR (Jameson 1887; Dodd 1910; Hoar 1917; C. L. W. 1968, 1006; Sturm 1982; Tarr 1998). This focus has become less intense in recent decades because no state legislature has called a genuinely independent constitutional convention since the 1970s and PCCR has come to seem the most likely method for convening another one. Most recent historical studies still focus on the generic convention rather than its PCCR variant (Dinan 2006, 2018; Zackin 2013; Woodward-Burns 2021b; Marshfield 2023). But there are exceptions (Martineau 1970; Liolos 2021), and the recent string of PCCR defeats has spawned a literature on contemporary PCCR politics (Dinan 2010; Snider 2017; Blake and Anson 2020; Lewis, Collens, and Cutler 2019).

In the substantial literature seeking to explain either Revolutionary Era American constitutionalism or the derivation of the Federal Constitution from its state precedents (Bailyn 1967; Wood 1969; Brown 2017), the existence of PCCR is a non-issue because PCCR did not exist prior to the end of the Revolutionary War in 1783 or the proposed Federal Constitution in 1787 and its ratification in 1789. The first PCCR state, New Hampshire, was not until 1792.

Even after PCCR was first institutionalized, no more than 10% of U.S. states had it until 1850. Of the fourteen states that today have PCCR, only six had it prior to the 20th Century (State Constitutional Convention Clearinghouse 2023)—and by then the scholarly tradition had already been established of focusing on the generic convention, not its PCCR variant.

Those who have studied PCCR have rarely focused on its unique democratic function and especially not its having a democratic function that has evolved over time (Dodd 1910; Martineau 1970; Sturm 1982; Dinan 2018, chapter 1). The recent explosion of studies on contemporary

PCCR politics trying to explain why the referendums fail also tend to both treat PCCR as a fixed rather than dynamic entity and not structure their analysis around PCCR's distinct contemporary democratic function (Dinan 2010; Lewis, Collens, and Cutler 2019; Blake and Anson 2020). However, some recent scholarship has treated PCCR, and especially its politics, more dynamically (Snider 2017; Dinan 2022b).

The constitutional theory most closely followed here is that of Colon-Rios, who focuses on the ability of the constituent power to initiate (also called “trigger” or “activate”) constitutional change via a constitutional convention (also called a “constituent assembly”). For example, he concludes that the constituent assembly “triggered at the initiative of the citizenry as opposed to that of the legislature” is “thus a democratically superior mechanism (2012, 161).” But he neither discusses subnational constitutions in the U.S. states nor PCCR (as opposed to the constitutional initiative) as the mechanism of initiating a constituent assembly (Colon-Rios 2012, 2020).

This article discusses PCCR's evolving democratic function in terms of democratic theory, constitutional structure, and constitutional convention politics. Part 1 develops a conceptual language, what it labels “Legislative Bypass Theory,” a variant of Constituent Power Theory, to describe PCCR's evolving and highly politicized democratic function. Part 2 describes the evolving constitutional context of PCCR, arguing that the democratic function of PCCR depends on competing constitutional change procedures available in a particular state constitution. Part 3 provides an intellectual history of PCCR, including the idea that PCCR grew organically from the basic logic of a democratic constituent power theory and America's early institutions to implement that theory, including popular sovereignty, written constitutions, independently elected constitutional conventions, and popular ratification of proposed constitutional changes. Part 4 explains PCCR's politics within a rational choice framework, highlighting the incentives of key types of political actors and how they've acted on them. Part 5

discusses the Machiavellian dynamics of the growing gap between PCCR's democratic function and its institutional implementation.

Part 1: PCCR's Democratic Function

For a given constitution with PCCR, we can divide theories of formal constitutional change mechanisms into two categories: the first focusing on constitutional change writ large across constitutions; the second on the comparative merits of specific constitutional change mechanisms within a constitution. The focus here is on the second type of analysis. But, as described in Part 2, the two categories have been inextricably linked in the intellectual history of PCCR.

Writ large theories often focus on how difficult it should be to change a constitution. In America, this debate most famously goes back to a late 18th Century debate between James Madison and Thomas Jefferson who disagreed about how hard it should be to change a constitution, with Jefferson arguing it should be easier (e.g., Dinan 2000; Elkins, Ginsburg, and Melton 2009, chap. 1; Bailey 2015). Since such theories focus on the ease of updating a constitution, I label them collectively as variations of "Modernization Theory." Because of Thomas Jefferson's influence on the development of PCCR, it is his variation that interests us here. Jefferson's basic idea is that a current majority, "the living generation," should be able to change a constitution in light of its current knowledge and interests; a past majority, "the dead hand of the past," should not be privileged over current majorities. Given that PCCR requires a periodic public vote on whether to change a constitution, it has been argued that it empowers the current generation to update its state constitution.

Comparative theories depend on the constitutional change options available in a given constitution and can be more complex to the extent that there are more options. Variables may

include deliberative quality, inclusiveness, cost, and the relative allocation of power between the constituent (also described as the “principal” or “master”) and constituted (also described as the “agent” or “servant”) powers. It is a variation of the last variable, the relative allocation of initiation power between the constituent and constituted powers, which is uniquely relevant for PCCR until the advent of the constitutional initiative in the early 20th Century. I label this theory “Legislature Bypass Theory” (“LBT”), which is a variation of Constituent Power Theory (“CPT”) (e.g., see Partlett 2017; Colon-Rios 2010, 204–5). The reason for labeling this comparative theory LBT rather than CPT is that there are many variations of CPT, including some versions of CPT that do not even require that the constituent power be democratic (e.g., a king or god can be the constituent power). Nevertheless, CPT serves as the intellectual foundation for LBT.

CPT makes the crucial distinction between constituent and constituted power. The constituent power makes a constitution. In a democracy, it is the popular sovereign, popularly known as the “people,” acting in its constitution-making role. The constituted powers are the government offices, such as the legislative, executive, and judicial branches, created by the resulting constitution.

As with any principal-agent relationship, the constituent and constituted powers have different interests. A major function of a well-designed written constitution is to prevent agency loss by ensuring that the constituted powers have the strongest possible incentives to act in the interests of the constituent power. Agency loss is the cost of an agent acting opportunistically or incompetently at its principal’s expense.

A primary way a written constitution prevents agency loss is to not only specify the powers of constituted powers but to prevent those powers from changing their own constitutional powers. Indeed, a principal would cease to be a principal if he gave final authority to an agent to control their contractual (e.g., constitutional) relationship (Partlett 2017, 957). A classic

application of this LBT-type logic, such as James Madison employed in Federalist #53, is that we do not allow legislatures to control the term of its members, as the English Parliament did in 1715 when it passed the Septennial Act, which endured for close to 200 years, extending the term of its members from three to seven years. Instead, such changes must be done through a special higher lawmaking procedure that provides a more direct role for the constituent power.

Despite exceptions (e.g., Elster 2013; Partlett 2017), Anglo-American constitutional theory focused on written constitutional change has generally downplayed or ignored CPT (Colon-Rios 2012, 8, 115). This is vividly illustrated by American constitutional scholars who, adopting a modernization conceptual framework, fail to make the crucial conceptual distinction between the desired or actual level of difficulty required for constituent versus constituted powers to make constitutional changes (e.g., Dixon 2011, 104–8).⁷

To be sure, the federal constitution follows state constitutions in providing CPT-like requirements; for example, any proposed constitutional change must be ratified by the constituent power. At the federal level, this is the state legislatures or popularly elected state ratifying conventions; at the state level, the people voting by referendum. But the democracy principle is generally stronger at the state level for constitutional change. For example, at the federal level, a $\frac{3}{4}$ supermajority is required versus only a majority for most states (Bulman-Pozen and Seifter 2021).

My version of CPT, LBT, focuses on the role of the legislative branch in the constitution-making process. It also focuses on three important components of the constituent power in the constitution-making process: initiation power, proposal power, and ratification power. These roles roughly correspond to the three public votes that define the PCCR process: the automatic vote whether to call a convention, the vote on whom to elect as convention delegates, and the vote whether to approve the amendments proposed by the convention.⁸ When a single entity has both

initiation and proposal power, it has agenda-setting power, more concisely known as gatekeeping power.

During America's Revolutionary War Era, the only type of initiation power generally available to the colonists was the Lockean right-of-revolution, which held that the people have an inalienable right of revolution when a government acted against the interests of its citizens (Locke 1988, secs. 149, 220–31, 240–43; see also Calabresi et al. 2018, 80–84; Vile 1992, 11, 24–25; Feingold and Prindiville 2022, 20). As we shall see, figuring out how to implement initiation power without revolution was one of America's great intellectual journeys that did not begin in earnest, at least in the written record, until the mid-19th Century.

The three different types of constituent power may be conceptualized hierarchically in terms of expanding the feasible set of constituent actions to enhance democratic accountability. See Figure 1. As each new type of constituent power is added to ratification power, the feasibility set expands. For example, if the constituent power wants to prevent legislative gerrymanders or pass legislative term limits, it may only be able to do this if it has initiation power; proposal and ratification power is unlikely to be enough (Reynolds v. Sims 1964). In contrast, if it wants to expand suffrage from propertied males to all males or reduce barriers to voter registration, this may be reasonably feasible if one political party in the legislature thinks the expanded suffrage or ease of voting would increase its vote share even if it is already in power (Keyssar 2009).

Of the three types of constituent power, initiation power is arguably the least politically salient for the average citizen. It is more causally remote and thus less intuitive than what is considered the most important decision for the constituent power: the final decision about whether a proposal becomes law. Like proposal power, it is usually implemented via an act of omission, which is usually less newsworthy and otherwise politically salient than an act of

commission. Yet it is hardly insignificant. As Eoin Daly has concisely formulated it, “the people can hardly ‘command’ a process that it does not itself initiate” (Daly 2019, 637).

The power of gatekeeping power is illustrated in the power of the speaker of the U.S. House of Representatives. Like other representatives, the speaker has only one of 435 votes in the House. The speaker’s primary power arguably rests on his or her gatekeeping power to determine what legislation will make it to the floor of the House for a vote.⁹

An example of an extremely undemocratic gatekeeping power that illustrates the potential significance of this type of power occurs in authoritarian countries such as Iran, Russia, Turkey, and Venezuela that have competitive general elections that function as mere democratic window dressing insofar as the authoritarian controls who competes against him in the general election.

A Functional Typology of the Major State Constitutional Change Mechanisms

A key feature that distinguishes PCCR from a mere constitutional convention process is the granting of the initiation power to the constituent power.

A key feature that distinguishes PCCR from legislature constitutional agenda-setting (“legislature referral”), the legislature-based constitutional change process available in all fifty states, is that with that process the constituent power gives up initiation and proposal powers. A key advantage of the legislature referral over constitutional convention change mechanism is its lower cost and potentially higher speed. It is expensive and time-consuming to hold special elections and create a special body to propose constitutional changes. These are fixed costs for a legislature in the sense that they have already been born after a legislature is elected. To make simple changes to a constitution, such as the Maryland Legislature’s 2022 proposed constitutional amendment to change the name of Maryland’s Appeals Court to Supreme Court (Hogan 2022), would be universally viewed as cost-prohibitive to do via a convention. Such cost considerations

are vital to understanding the historical growth of legislature power over constitutional change and the ensuing PCCR politics.

The problem with focusing narrowly on the cost of constitutional change is that such a focus may result in less democratic and effective processes. An analogy from ordinary as opposed to higher lawmaking may illustrate how democracy tends to be an expensive decision-making process. If the goal is to reduce decision-making costs in ordinary lawmaking, a single elected executive is the least expensive form of democratic government, as the high cost of convening legislatures and courts, including public participation and deliberation, could be saved. From this narrow cost perspective, a dictatorship would be an even more efficient system of decision-making, as the cost of elections could be eliminated altogether. This analogy illustrates that the cost of democratic decision-making—even for higher lawmaking—should be framed as a tradeoff between the cost and quality of democracy.

During the early 20th Century, another major constitutional amendment mechanism entered the mix: the constitutional initiative, which is both initiated and proposed by a private entity that gathers enough signatures to place a proposal on the ballot. Today, 18 U.S. states, including six PCCR states, have some type of constitutional initiative (“Direct Democracy in Your State” 2024).

Like PCCR, the constitutional initiative is a legislature bypass mechanism at the initiation and proposal stages. These stages are combined into a single agenda-setting “vote” based on collecting adequate constituent signatures to get a proposal on the ballot. And like legislature referral, it tends to cost taxpayers much less than the constitutional convention process.

However, the constitutional initiative does not necessarily eliminate costs. Instead, it shifts the bulk of them to the private sector from the public sector. This shift results in endemic collective action problems, as only well-organized or wealthy private entities can get items placed

on the ballot because it is expensive and difficult to do so; e.g., to collect adequate signatures in a short period of time and draft legally sound proposals. Politically sophisticated private actors also will not bother to place a proposal on the ballot unless they have adequate resources to defend it from opposition at the ratification stage.

A consequence of these collective action problems is that the private entities are granted extraordinary proposal power. That is, the constitutional initiative provides the private entity with take-it-or-leave-it proposal power, a power that helps justify its high cost of getting a proposal on the ballot and then later defending it. This proposal power is substantially weakened when a public body makes the proposal because each member of that body may only need to raise their hand (that is, pay a small marginal cost) to suggest changes to the proposal. A large literature exists criticizing the initiative in such terms, although only in relation to legislatures, not constitutional conventions (e.g., Magleby 2001, 184–88) except for incidental comparisons (Benjamin and Gais 1996, 72). These relationships are summarized in Table 1, with the PCCR entry highlighted.

The scholarly literature has traditionally treated the term “constitutional convention” as a categorical yes/no variable rather than a discrete variable with different degrees. Treating initiation, proposal, and ratification power as variables with a value of 1 or 0, we could rank all U.S. state “constitutional convention” provisions along a simple three-point constitutional democracy scale.¹⁰ A convention would receive one point if it must be elected independently of the legislature, two points if the constituent power must ratify its proposals for them to become law, and three points if the constituent power can initiate the convention process without the legislature’s approval. If a convention call would only appear on the ballot as a result of discretionary action by the legislature, no initiation power point would be given. If a convention

need not be selected independently of the legislature (either randomly or elected), it would not be defined as a convention but something else such as a constitutional commission.¹¹

I suggest labeling a one-point convention provision “weakly democratic,” a two-point one “average democratic,” and a three point one “strongly democratic.” A one-point convention would be viewed as mere window dressing for legislature referral and should ideally not be categorized as a real convention except in a disparaging PR sense.

This categorization of conventions would delegitimize pseudo conventions, such as the convention proposed by Louisiana’s governor in 2024, with its plan to reconvene the Louisiana Legislature as a convention (O’Donoghue 2024).

A telling observation is that private entities who want to bypass a legislature with a constitutional change proposal that can be implemented via a constitutional initiative will prefer a constitutional initiative without a follow-up constitutional convention. For example, four U.S. states explicitly allow the constitutional initiative to be used to call a convention, but no private entity has exercised this power. The same result has occurred in the three South American countries that explicitly allow the constitutional initiative to be used to call a convention (Colon-Rios 2012, 165).

Why is this? Private entities do not want to give up proposal power to the typically hundred or more elected constitutional convention delegates who probably would not propose exactly the type of constitutional amendment that they seek. Moreover, however expensive it might be to qualify a constitutional initiative for the ballot, it would likely be orders of magnitude more expensive and probably fruitless for the same well-heeled private entity to try to control a convention.

Compared to the initiative, PCCR is also unappealing to many private actors because of the delay it causes. The PCCR period in most states is every 20 years, and the shortest period in

any PCCR state is 10 years. The relatively long PCCR period is also just the beginning of delays because the constitutional convention process typically takes years to pass through all its stages after being launched. Thus, even if cost and total control over proposal power were not concerns, most private entities lack decades-long patience to get their pet legislature bypass proposal before the voters via PCCR.

To be sure, the constitutional initiative may have significant advantages over the constitutional convention other than its faster speed and lower direct government cost. For reasons discussed above, the selective incentives available to initiative supporters tend to be missing from convention supporters, who suffer from gross collective action problems (Denzau 1985, 198), reflected in the maxim that “everybody’s business is nobody’s business.” When a PCCR referendum appears on the ballot, unlike an initiative, it has no built-in supporters, as nobody had to invest any resources to place it there. One indicator of a collective action problem is that convention, unlike initiative, supporters have rarely had the resources to litigate on their own behalf even when a government has blatantly abused its power in controlling or killing a convention (see Part 5 below). Another indicator is that the sums spent supporting narrow initiatives or referendums, such as expansions of casino gaming, dwarf the sums spent supporting PCCR.¹²

An important qualification to the above discussion is that when a constitution only allows one constitutional amendment mechanism—a common occurrence during the early decades of the United States and when states are forming—comparative considerations are irrelevant to practical reformers in terms of choosing which constitutional amendment mechanisms to use.

It is also important to qualify the above discussion by observing that most arguments for or against constitutional change, including via PCCR, are atheoretical in the sense of the theory described above. Of course, this is also true for proposed reforms via ordinary lawmaking. Most

advocates for approving a PCCR seek to pass specific constitutional reforms that a legislature has failed to pass. But their arguments focus on the merits of the specific reforms they want, not a grand democratic theory that makes PCCR the ideal mechanism for proposing a certain class of reforms. Consider that the centerpiece of the PCCR yes campaign in Alaska in 2022 was that a constitutional convention could protect the Permanent Fund, something that was popular with Alaska voters but the legislature had failed to do. Alaska government oil revenue is placed in the Permanent Fund and a large fraction of it is distributed annually to every Alaskan via a check. In recent years, the Legislature had siphoned an increasing fraction of that fund to pay for government services. Many convention advocates thought a convention proposed amendment could best protect those distributions (Snider 2023b).

This type of non-LBT argument is most commonly used by convention opponents who may invest heavily in campaigns arguing that a convention would endanger popular rights. For example, if a woman's right to choose is popular in a given state, a no campaign might focus much of its campaign resources arguing that a convention could endanger that right (Snider 2017, 286, 2022c). For issues that do not poll as well, such as certain labor and gun rights, the same type of non-LBT argument might be used, except directed at a much more narrowly tailored audience.

Another reason for this narrow framing may be that the mainstream media, especially that which takes an editorial line opposed to a convention, typically employs a double standard for abstract vs. concrete convention arguments. For convention supporters, it often emphasizes concrete reasons; for convention opponents, abstract ones such as that a convention could open a "Pandora's Box" and be dominated by "special interests" (e.g., Maguire 2022). This double standard may reflect that the press expects a different burden of proof for those advocating for change as opposed to the status quo. The press appears to believe that, given a convention's cost

and risk, reporting a concrete convention agenda is most helpful to their audiences. But the two framings need not be mutually exclusive, as a concrete agenda can be used to illustrate a convention's LBT function.

The Gold Standard of Constitutional Change Mechanisms

Like the democratic theorists, political scientists, and historians cited above, the framers of America's state constitutional tradition have often viewed the constitutional convention as the gold standard of democratic constitutional change mechanisms. This is authoritatively reflected in their actions designing constitutions. Here I'll focus on the constitutions in the 14 PCCR states.

One indicator of the high regard is the relative majority required of a legislature versus a constitutional convention to propose a constitutional change for popular ratification. Eleven of the 14 PCCR states make it harder to propose a constitutional change via the legislature than a convention while the remaining three require the same simple majority. To pass a constitutional proposal during a single session, nine of the PCCR states require a legislative supermajority ranging from 3/5 to 3/4, whereas all PCCR states mandate nothing larger than a single simple majority for convention delegates. Two of the remaining five states require two legislative simple majorities spread over two legislative sessions with an election in between (State Constitutional Convention Clearinghouse 2023). Perhaps the simplest explanation for these systematically different majorities is that convention delegates who created them felt that legislators were closer to a constituted power whereas they were closer to the constituent power; that is, a convention was viewed as having less agency loss for the constituent power than a legislature. In less theoretical terms, conventions worried that legislatures would be less democratically accountable than themselves, such as a political party with a small and temporary majority in a legislature, attempting to entrench its priorities via constitutional change (Marshfield 2019, 115–16). Regardless of the merits of such theoretical arguments, convention delegates appear to have acted

on them by making it more difficult for legislatures than conventions to propose constitutional changes. In contrast, when given the opportunity, legislatures have tried to make it easier for themselves to propose constitutional change and harder for conventions. One of the major trends of post-Civil War change in American constitutional change mechanisms is the success of legislatures in reducing their barriers to constitutional change (Sturm 1982, 95–96; Dinan 2006, 41–44, 56).

Another indicator is the Congressional mandate that all U.S. territories seeking their own constitution may only do so by convening an independently elected convention. A U.S. territorial legislature will not be allowed to propose constitutional changes itself because it would have a blatant conflict of interest in proposing its own powers (Cooley 1972, 30; Woodward-Burns 2021a).

Another indicator is that some states in early American history lacked any provision for constitutional change. To remedy this problem, the courts ruled that legislatures had an inherent power to propose constitutional changes—but only via an independently elected convention, not via legislature referral. For example, after the Revolution, eleven of the thirteen colonies adopted a constitution as opposed to keeping their colonial charter. Of these eleven, only two included an explicit amendment clause; the others assumed the legislature had an inherent right to call a convention (Fritz 2007, 316; for a related point, see Hoar 1917, 151, 228). Today, all fifty states allow for legislature referral, so this judicial favoritism toward conventions no longer has practical relevance. But for all other types of constitutional change, including the constitutional initiative in states that lack it, it remains relevant.

Another indicator is the limitations on the constitutional initiative as opposed to the constitutional convention. Both PCCR and the constitutional initiative grant the constituent power the initiative power. But in five of the six PCCR states (83%) that grant this power, the initiative

is limited to a single subject (State Constitutional Convention Clearinghouse 2023). A reasonable explanation for this difference in power between the two legislature bypass mechanisms is the general understanding that PCCR is a more democratically rigorous constitutional change mechanism than the constitutional initiative.

Another indicator is the widespread legacy distinction in state constitutions, including nine of the 14 PCCR states (64%), between legislative amendment and revision. Amendment refers to relatively small and revision to relatively large constitutional changes. In most PCCR states, this distinction has no practical legal significance; it is just to clarify that the constitutional convention change rules apply to both small and large changes. In five PCCR states, the legislature is more limited than a convention in what it can propose. Consider Alaska. The constitution specifically states that conventions cannot be limited by the legislature:

“Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention” (Article XIII, §4). Alaska’s Supreme Court later ruled that an amendment may not be so sweeping as to be a revision of the constitution (*Bess v. Ulmer*, 985 P.2d 979, 1999).

Colantuono reports that, of all U.S. states, more than 50% require a convention to propose revisions (1987, 1479). As Schlam summarizes the literature, ‘The weight of authority is that where a constitution specifically provides two means of alteration, reading the language of the legislative amendment provision with that of the convention provision will often imply that a complete revision by the legislature is prohibited’ (1993, 354; see also Sturm 1970, 26).

In addition to a single subject limitation, legislature and initiative proposed constitutional changes may be constitutionally limited in other ways that a convention proposed one is not. For example, they may be limited by financial impact, by number of amendments allowed per legislative session, or by subject matter such as taxation (Tarr and Williams 2007, 3:183).

To understand the amendment/revision distinction, it helps to place it in the context of debates at conventions arguing for adding legislature referral to the convention as a legal constitutional change mechanism. The most common argument was that for relatively small changes the convention process was too expensive and slow to be practical, so the convention process should be reserved for major changes; that is, where the high cost of a more rigorous democratic procedure could be justified (Jameson 1887, 562; Oberholtzer 1912, 138; Frothingham 1916, 49; Sturm 1954, 118–19; Schlam 1993, 354; Marshfield 2019, 114–15). In the words of the leading early 20th Century state convention historian: “[T]he convention was more extensively used at first, but its cumbersomeness for small changes soon caused the states which employed it to adopt in addition or as a substitute the method of initiating proposed amendments in the legislature [W]here only a few changes are desired, the convention is an expensive and cumbersome instrument....” (Dodd 1910, 120, 259). An early example was New York in 1801, which wastefully convened a full-fledged convention to revise one clause of its constitution that its legislature would have been willing to revise (Dodd 1910, 120).

New Hampshire provides arguably the best case study on the history of the cost argument because of its comparatively good records of constitutional convention debates, its many opportunities to debate the issue at its many conventions spread out over a hundred years before finally winning a majority of delegates for legislature referral in 1964, and its holding out against legislature referral when most other states had adopted it early in their histories and did not second guess that adoption at subsequent conventions. The primary reason New Hampshire convention delegates used to justify introducing a legislature referral mechanism in 1964 and earlier was that, for most needed constitutional changes, it was a more cost-effective and thus practical mechanism (New Hampshire 1889, 188, 122–23, 1903, 632, 637, 1918, 205, 211, 1930,

74–75, 1938, 194–96, 1964, 110, 113; Millimet et al. 1964, 25). Other arguments included increased speed and flexibility to modernize the constitution.

An important caveat is that being low cost does not mean best because higher quality does not necessarily mean affordable. Just as the Toyota Lexus is widely viewed as better than a Toyota Corolla, it does not mean that a Toyota Lexus is the best choice of car for all car buyers because of its higher cost. Today, when it is no longer the only or default constitutional change mechanism, the higher cost of conventions may best be justified when not only the constituted and constituent powers have a conflict of interest, but also the constitutional initiative is an unavailable or inadequate substitute. In the case of New Hampshire, advocates of legislature referral nevertheless supported PCCR in part because of the legislature’s conflict of interest in addressing issues concerning its own power (New Hampshire 1964, 111; Millimet et al. 1964, 25).

A quirky indicator in one PCCR state is the precedence given to convention versus legislature proposed amendments. In Hawaii, if both types of amendment are ratified by the public, the convention proposed one is given legal precedence (Tarr and Williams 2007, 3:190, 200)

Among non-PCCR states, New Mexico has a noteworthy constitutional provision favoring conventions over legislature referral. Article XIX, Section 5 states that the provision authorizing legislature referral “shall not be changed, altered or abrogated in any manner except through a general convention called to revise this Constitution as herein provided.”

Backhanded praise for constitutional conventions is engaged in by government officials who seek to subvert them while recognizing their PR value. For example, when the U.S. Virgin Islands in 1971-1972 (Snider 2023d) and Washington, DC in 2016 (Woodward-Burns 2021a) held what should have been labeled constitutional commissions to propose their first

constitutions, their elected officials misleadingly labeled them “constitutional conventions” to help garner popular and congressional approval.

This sense of the convention as a better democratic process than legislature referral has been almost completely missing in contemporary popular debates about holding a state convention (Snider 2023e). Even as late as the 1980s, Janice May, a leading state constitutional scholar, could write “The state constitutional convention is the most revered of the state institutions for constitutional change” (1987, 155).¹³ As reflected in the perfect record of convention defeats since that statement was made, such sentiments have not dominated recent popular debates over whether to call a convention. But it is striking that U.S. state constitutional scholars, in contrast to the rich contemporary literature attacking Article V (national) conventions (e.g., Feingold and Prindiville 2022; Super 2021), have not joined the popular chorus attacking conventions.

Part 2: PCCR’s Legal History

A critical assumption of much PCCR literature is that understanding the structure of a constitution in which PCCR is embedded does not materially impact PCCR’s democratic function and, consequently, its politics. That is, if the constitutional text of a PCCR provision does not change, neither does its democratic function. But if the function of a PCCR provision depends on its legal, including constitutional, environment, then its function may evolve despite little or no change in its text.

Not only has the democratic function of PCCR not been static; it has tended to narrow over time as it has faced increased competition from competing constitutional change mechanisms, including initially from legislature referral and later from constitutional commissions and constitutional initiatives.

The first two states to adopt PCCR were New Hampshire in 1792 and Indiana in 1816. Their state constitutions are both notable for not having a provision for legislature referral. If the legislature wanted to amend the constitution, it had to do so via an independently elected constitutional convention, where it would lose direct control over constitutional change proposals. This constitutional environment persisted in New Hampshire until 1964, when New Hampshire's constitution was amended to include an option for legislature proposed constitutional change. In Indiana, it persisted until 1851, when, at a convention not called via PCCR, Indiana both cut its PCCR provision from its constitution and added a notoriously difficult-to-use legislature-based constitutional change mechanism. The result entrenched the Democratic Party's preferences during its brief control of both the 1851 convention and the state legislature.

In New Hampshire's constitution, the period was every seven years and in Indiana every twelve years. Between 1791 and 1964, New Hampshire had 30 convention referendums, six more than required under the seven-year periodic requirement. Between 1816 and 1851, Indiana had five convention referendums, three more than required under the 12-year requirement.

Contrast this with the track record for all fourteen PCCR states since 1984, when Rhode Island called a convention that then convened. Since then, not a single state legislature has endorsed calling for a convention when PCCR was subsequently automatically placed on the ballot 36 times. Nor, since then, has a single state legislature approved calling an independently elected constitutional convention outside the PCCR process. In contrast, when legislatures in New Hampshire and Indiana had no choice but to convene a convention to pass their preferred constitutional provisions, PCCR had a much less important function as a mechanism to bypass a legislature.

The third state to include PCCR via a state constitutional convention was New York in 1846. New York marks the beginning of the modern or competitive era for PCCR because New

York was the first PCCR state to include in its constitution both a provision for PCCR and legislature referral. Today, all 14 PCCR states face competition from legislature referral.

However, competition after 1846 was still limited, partly because of the tradition or constitutional requirement that constitutional changes proposed by the legislature be limited to a single or limited number of subjects. This restriction was largely whittled away with the advent of the extra-constitutional constitutional commission in the late 19th century. The first modern constitutional commission along these lines was implemented in New York in 1872 (Williams 1996). New Jersey would follow in 1873 with a constitutional commission that proposed 28 constitutional changes that would be approved by the legislature and then ratified by the voters (Williams 1996). Now the legislature could research large scale constitutional change via a commission whose members it could control and which only had the power to propose changes for the legislature's consideration.

By the end of the 19th Century, all the other states to implement PCCR during the 19th century--Maryland, Michigan, Ohio, and Iowa--had combined PCCR with legislature referral. Virginia, Jefferson's home state, would also adopt PCCR at a remarkably democratic convention in 1868. But it would drop it at a weak convention in 1902 that was called separately from its automatic PCCR provision and, contrary to its own enabling act, failed to subject the convention's proposed constitution, including its PCCR deletion, to popular ratification (J. J. Dinan 2005, 12–19). The primary purpose of that convention was to implement Jim Crow laws and prohibit blacks from voting. After the end of the Jim Crow Era, Southern states returned to the American norm of mandating popular ratification of convention proposals.¹⁴

Another way a constitution included no competition from legislature controlled constitutional proposals was when a state constitution lacked any formal change procedure. In

this case, state courts would only allow a legislature to call a convention, which is how Ohio (1851) and Iowa (1857) got a convention and via that PCCR.

The seventh of the current 14 states with PCCR was Oklahoma in 1907. Oklahoma marks the first state that would have a constitutional initiative in competition with PCCR. This paper does not focus on the six PCCR states that eventually incorporated the Constitutional Initiative largely because the competition from the constitutional initiative means PCCR has a narrower, albeit still important and unique, democratic function in those states.

Oklahoma's history deserves special note because of its status as the premiere pseudo PCCR state. Oklahoma's Constitution mandates that the PCCR period is every twenty years, but the last time the legislature placed a PCCR referendum on the ballot was in 1970. No one has litigated the legislature's subsequent refusal to place the PCCR on the ballot. As we will see in Part V, other states are arguably pseudo PCCR states but not as blatantly as in Oklahoma.

To the above discussion about a legislature's incentive to initiate a constitutional convention process, there are significant qualifications:

1) The qualitative difference between a statehood and subsequent constitutional convention. As noted above, Congress mandates that U.S. territories seeking to become a state or replace their organic act with a constitution must convene an independently elected constitutional convention followed by popular (as well as Congressional) ratification. A legislature proposed constitution is not allowed. From the standpoint of a legislature's incentives, this is like a constitution with PCCR that lacks a legislature referral mechanism for constitutional change. But a convention is not merely the price of statehood; it also offers an opportunity for the legislature to dramatically increase its power, as the control of fundamental law is taken from Congress and given to the state, which, if the legislature has its way, means primarily the legislature. Seventy-seven, approximately a third of America's widely categorized "state conventions," have been

statehood conventions (Dinan 2022b, 304). This includes the many states, especially prior to the 20th Century, that held multiple conventions before the public would ratify a proposed statehood constitution. The last two statehood conventions in the U.S. were in the 1950s, when Hawaii and Alaska both attained statehood and acquired PCCR via their statehood convention. U.S. territories have continued to hold conventions as the price of replacing a congressionally controlled organic act with a territorially controlled constitution. The last U.S. territory to do so was the U.S. Virgin Islands on Nov. 5, 2024 (Snider 2024a).

2) The recurring statehood-like political incentives. After the Civil War, Congress required Southern states that wanted to reenter the Union to call constitutional conventions to revise their state constitutions so as to abolish slavery and other unacceptable provisions.

3) The states with no constitutional change mechanism in their early constitutions. As we have seen, courts would only allow these states to change their constitutions via an independently elected convention; neither legislature referral nor constitutional initiative would be allowed. Thus, legislatures in these states that wanted to change their constitution could only do it via convention.

4) Court pressure. The last large wave of state conventions came in the mid-1960s and early 1970s in the wake of the U.S. Supreme Court's *Baker v. Carr* line of reapportionment cases beginning in 1962. At the time, state legislatures were dominated by rural legislators who had disproportionate representation in state legislatures and consistently refused to apportion districts based on equal population, even if not doing so violated their state's constitution. Various state and federal courts then threatened to call conventions or have a court reapportion districts if the legislatures failed to come up with a reasonable plan based on one-person, one-vote. In Connecticut, for example, a court forced a state convention (Norman-Eady and Sullivan 2008).¹⁵ which then incorporated PCCR in its constitution. For Rhode Island, New York, and Maryland,

the court merely suggested a convention as one way for the state to solve its legislative malapportionment problem (Dinan 2022b, 315–16).

5) When a convention requires a lower threshold than legislature referral for proposing constitutional change or passing a certain type of statutory budget item. For example, if a constitution requires a 2/3 supermajority vote of the legislature but only a simple majority vote of the public followed by a simple majority vote of convention delegates, a political party with only a bare majority of seats in a state legislature might view a convention as presenting a lesser hurdle and be willing to give up some control over the change process to secure that advantage. Based on this rationale, several legislators in Alaska supported a convention when the question was on the ballot in 2022 (Hughes 2022). Similar pro-convention incentives occur, especially when a legislature believes it can limit a convention's agenda, when a state legislature cannot place a constitutional proposal on the ballot without first approving it twice and with an intervening popular election between its two votes. During the 20th Century, this type of incentive helped motivate Rhode Island's legislature to repeatedly call limited conventions. However, after the courts ruled against the legislature's power to call a limited convention, the legislature lost its incentive to call conventions.¹⁶ No state allows the legislature to limit a convention called via PCCR, so this type of incentive plays less of a role in such states,

6) The trend since the Civil War in making legislature referral easier to implement in comparison to conventions. Specifically, legislatures have been successful in reducing the majorities and delays required for them to propose constitutional changes (Tarr 1998; Dinan 2006). Meanwhile, as discussed in Part V, legislatures and other constituted powers have succeeded in rigging the convention process to make it harder to implement successfully, which make it a less practical option for legislators and others who might otherwise have endorsed the process. Such changes have mostly been implemented without formal constitutional amendment.

Part 3: PCCR's Intellectual History

American concepts and normative values concerning the implementation of democratic constituent power have greatly evolved over time. Prior to the American Revolution, fundamental law was primarily conceived in unwritten terms. For example, England and its American colonies had an unwritten national constitution largely based on tradition (Loughlin 2013).

Even during this unwritten era, theories of constituent power tended to increasingly restrict constituted power. For Thomas Hobbes, the constituent power launched a government and then was essentially never heard from again (Hobbes 2017). For John Locke, the constituent power launched a government and could play a role again if revolution, a type of constituent power, were necessary due to a government's gross misbehavior (Locke 1988). For Jean Jacques Rousseau, the government had to be responsive on an ongoing basis to a vaguely defined "general will," which rulers could largely define as they wanted. Rousseau also advocated for periodic assemblies with jurisdiction over both statutory and constitutional law, but this idea of his had less influence (Rousseau 1997).

Central to American state constitutional history has been Americans incrementally and incompletely figuring out what type of institutions were necessary to effectively implement democratic constituent power. Many historians of American political thought have observed similar patterns more broadly (Wood 1969; Peterson 1992, 45).

Perhaps America's first great breakthrough—one that would reverberate around the world (Palmer and Armitage 2014, 159–61)—was to systematically conceptualize and codify constituent power in terms of a written rather than unwritten fundamental law. This implied that higher and lower lawmaking would be different and that this difference would be embodied in a written constitution. The written constitution would be passed by a higher lawmaking process that, compared to ordinary lawmaking, had an enhanced role for the constituent power. In other

words, this written constitution would constrain constituted powers; in colloquial terms, it was often described as protecting the “people” against the “government” usurping its rights.

But the advent of written constitutions was just a first step in America’s bumpy centuries-long journey seeking to implement enhanced constituent power—a journey often taken with minimal help from any towering democratic theorists.

Between the U.S. Declaration of Independence in 1776 and the U.S. constitutional convention of 1787, U.S. states invented higher democracy in the form of constitutional conventions. Specifically, the U.S. became arguably the first representative democracy to formally institute constituent power at the proposal and ratification stages of written constitution making. At the state level, this was done via a convention whose delegates would be elected separately from a legislature and whose proposed constitutional changes would be ratified by the people acting as the constituent power (Palmer and Armitage 2014, 159–61).

Driving this change were new concepts about how to implement constituent power. But the new concepts were centered on granting the constituent power proposal and ratification power, not initiation power (Adams 2001, 61–63; Kruman 1997, 31–33, 1997, 25). Initiation power was not ignored, but it was primarily conceptualized in Lockean revolutionary and natural rights terms rather than peaceful and formal legal terms. This would be reflected in the 1776 U.S. Declaration of Independence and the Virginia Declaration of Rights, which were drafted in Lockean-style revolutionary circumstances.¹⁷ Today, 49 American state constitutions have similar language in their declaration of rights (Calabresi et al. 2018, 90–93)

An early exception was the U.S. Constitution, proposed by a constitutional convention in 1787 and ratified in 1789. That constitution granted states, then perceived as the sovereign entity and thus the constituent power, the right to initiate a U.S. convention. As convention delegate George Mason explained the rationale for that provision: “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 1967, 203).

At the state level, in contrast, the people, not the state, is sovereign for purposes of constitutional change. This meant the federal model of state-based constituent initiation power was not an apt model for the states to follow, although New Hampshire, with its tradition of independent and powerful town meetings, has notable similarities, which in its case arguably also created the most effective self-executing convention mechanism among the PCCR states. Another difference with the federal model is the high threshold for activating initiation power—two-thirds of the states—compared to state constitutional conventions (and later, the constitutional initiative) that are predominantly initiated by a majority, not supermajority. By violating the one-person, one-vote democratic principle that all state convention delegate elections have had to follow since the 1960s, the small states empowered by the Federal Constitution are given disproportionated power. And since those small states predominantly vote Republican, it gives the federal process a partisan cast missing from the state one (see generally Cornwell 1975; Scalia 1999, 19–20; Feingold and Prindiville 2022, 109).¹⁸

During the first few years after America issued its Declaration of Independence, most states recognized that it would be undemocratic for a state legislature to merely draft a constitution as it does ordinary law. If it could do that, then written statutory and constitutional law would be functionally identical. One early solution was to have one session of the legislature propose a change, another one to ratify the change, and an intervening popular election granting the public the option to choose representatives who would not ratify (Kruman 1997, 20–25). Delaware is the only U.S. state or territory that retains this system.

In late 1770s Massachusetts, local towns, often inspired by the so-called “Berkshire Constitutionalists,” challenged the idea of a direct role for the legislature in both proposing and

ratifying constitutional changes (Douglass 2011, chap. 11; Lenowitz 2015). They contended that the legislature should not be trusted with such powers; instead, the constituent power should elect delegates to a new type of public body independent of the legislature, a constitutional convention, which would propose constitutional changes that the constituent power would then vote up or down.¹⁹

For example, in 1776, the town of Concord wrote to the state legislature:

Resolved 2 That the Supreme Legislative... are by no means a Body proper to form and Establish a Constitution...Because a Constitution alterable by the Supreme Legislative is no Security at all to the Subject against any Encroachment of the Governing part on any, or on all of their Rights and privileges. (Handlin and Handlin 1966, 152–53).

In 1778, the town of Boston similarly wrote:

[T]he General Court... being improper for this business: A Convention for this, and this alone, whose Existence is known No Longer than the Constitution is forming, can have no Prepossessions in their own Favor, while it is hard for the General Court, upon a Matter of this Kind, to divest themselves of the Idea of their being Members; and the probability that they may continue such, may induce them to the Government with peculiar Reference to themselves.... (Handlin and Handlin 1966, 308–9)

Beginning in 1776 and repeatedly during the following years, the Reverend Thomas Allen, the leader of the Berkshire Constitutionalists, made arguably the most eloquent argument for popular ratification of convention proposals:

[W]e have always been persuaded that the people are the fountain of power. That since the Dissolution of the power of Great Britain over these Colonies they have fallen into a state of Nature. That the first step to be taken by a people in such a state...is the formation of a fundamental Constitution as the Basis and ground work of Legislation. That the Approbation of the Majority of the people of this fundamental Constitution is absolutely necessary to give Life and being to it. That then and not 'till then is the foundation laid for Legislation. (Handlin and Handlin 1966, 90; see also Lenowitz 2015).

By the 1830s, such legislature bypass mechanisms would become the norm for U.S. territories drafting statehood constitutions and for existing states making major constitutional changes.²⁰

At least several communities in Massachusetts also proposed that the new constitution include a provision for periodic constitutional revision. But this proposal was not included in the resulting 1780 constitution.

On June 1, 1778, after reviewing the constitution proposed by the Massachusetts constitutional convention, the Town of Beverly rejected it and proposed improvements. One of them concerned PCCR-based future constitutional change:

[W]e cannot dismiss it without observing the want of an article which we think any constitution that is confirmed and ratified by the people ought to contain. We mean one, by which it shall be provided, that on a certain day in the year 1798 or such time as may be judged best, a Convention chosen by the people at large, distinct from the General Court, shall be held, to determine on such amendment, alteration, addition, or easement, as

should be found just; such innovations to have the sanction of the people; and that, after other twenty years, the constitution shall again be taken up in the same manner, and so on successively. This, if any human method can, might in time perfect a constitution and secure it inviolate. (Handlin and Handlin 1966, 295)

On June 5, 1780, the Town of Bellingham requested that the convention propose the following specific language to improve Article X concerning future constitutional change:

And at the End of Every ten Years afterwards there shall be begun and held a Convention at the same Place on the last Wednesday in September the members to be chosen in the same maner (sic) and by the same Rules and for the same Purpose and with the Powers as the Convention aforesaid is to have in the Year. 1790. (Handlin and Handlin 1966, 748)

Instead of a PCCR provision, the Massachusetts convention proposed a one-time mandatory constitutional convention referendum fifteen years later, in 1795, when voters rejected calling another convention.

In 1784, neighboring and closely allied New Hampshire largely copied the Massachusetts constitution. Its constitution included a one-time provision to call a constitutional convention seven years later, in 1791. It was the first and only one of two future mandatory conventions in U.S. history.²¹ The resulting convention in 1792 proposed and the voters ratified the first PCCR in U.S. history. The seven-year period, beginning in 1792, would now be perpetual, not a one-time event, and it would only offer the people the option to call a convention; it would not mandate one. No records of the convention debates exist, including any discussion of this provision. Lack of historical interest in this democratic breakthrough may partly be explained by

it taking place five years after the Federal convention--after which most American constitutional scholars and textbooks at all grade levels stop taking an interest in America's state convention history.

With PCCR, America became the first country to invent a legal rather than revolutionary expression of direct constituent power at the initiation stage of written constitution making.²²

The intellectual history of constituent power leading up to PCCR as a mechanism to institutionalize initiation power is hard to trace. Some scholars going back to the early 20th Century have credited Rousseau as the originator of the idea (Dunning 1909, 404; Colón-Ríos 2020, chap. 2). But Rousseau's notion of initiation power is very different from modern notions. Rousseau did not make a clear distinction between ordinary and higher lawmaking, as his periodic assemblies were designed to implement both lawmaking functions. His assemblies were more like direct (town meeting) than representative (convention) democracy. And he was concerned with making his assemblies independent of the king, who at the time Rousseau wrote often had the power to both convene and prorogue assemblies; today, it is the legislature in relation to a convention convening, not the king in relation to the legislature convening, that is the greatest threat to the exercise of constituent initiation power.

Other prominent early advocates of the periodic higher lawmaking idea—but primarily to counter the dead hand of the past rather than implement constituent initiation power—included enlightenment era thinkers Algernon Sidney (1996, 358), Marquis de Condorcet (Baker and Condorcet 1976), Thomas Paine (2009, 277–78), and Jefferson (1984, 959).

In some important respects, the notion of PCCR is an obvious extension of the checks and balances concept behind periodic legislative assemblies. When America was an English colony, colonial assemblies could be called into session or prorogued at the will of king-appointed governors. Thus, if a governor did not like what an assembly was doing, such as making trouble

for the king, he could prevent an assembly from meeting. To prevent state legislatures from becoming excessively dependent on governors, new U.S. states included in their constitutions a provision that legislatures automatically convene at stated periods, like what Rousseau had recommended and England's Triennial Act accomplished for its parliament in the mid-17th Century. PCCR can be viewed as an extension of that idea from ordinary to higher lawmaking but at much longer periods (from ten to twenty years vs. from one to four years) and with only an option, not a mandate, to convene independently of the will of a competing branch of government.

Jefferson is the American thinker usually linked to the birth and rationalization of PCCR (Fritz 1993, 973; e.g., Dinan 2000; Tarr and Williams 2006, 1:199; Elkins, Ginsburg, and Melton 2009, 13). But there are problems with this attribution. Although PCCR advocates often used Jefferson's name and published letters to justify PCCR (*Mohawk Courier* 1843; *Elmira Gazette* 1843; Medary 1849, 175), both when seeking to place PCCR in a constitution and later to approve PCCR referendums, that does not prove that his theory has been an accurate and narrowly tailored explanation for PCCR's democratic function. In recent decades, PCCR opponents have usually dismissed Jeffersonian arguments for calling a PCCR not in Madisonian terms that privilege past majorities but because competing constitutional change mechanisms can be used to modernize a constitution, thus providing the same Jeffersonian benefit at less cost and risk. Regardless of the merits of their other arguments attacking PCCR, these opponents have correctly identified flaws in using Jefferson to explain PCCR's contemporary democratic function.

In 1787, Jefferson wrote a letter to James Madison arguing that the people should have an opportunity to periodically revise their constitutions.

The question whether one generation of men has a right to bind another, seems never to have been started 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. . . . [N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. . . . Every constitution then, & every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, & not of right. (Thomas Jefferson 1984, 959)

In 1816, Jeffersonian wrote a letter to Samuel Kercheval developing his argument in its fullest and most quoted version.

Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead.... [L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.,,, [I]t 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, if anything human can so long endure. (Thomas Jefferson 1984, 1395, 1402)

After Jefferson died in 1826 and his letters were published in 1829, PCCR advocates widely used these quotes. They also often endorsed Jefferson's stated 20-year period, still the most widely used period for PCCR states, with eight of fourteen currently using that period.

In his *Notes on the State of Virginia*, Jefferson clearly expressed some LBT type ideas, including fear of "elective despotism" and the need for independently elected constitutional conventions and popular ratifications of their proposals (Thomas Jefferson 1984, 245,250). But by the time he wrote those passages, Massachusetts and New Hampshire had already implemented independently elected conventions with popular ratification of their proposals. And even earlier, as we have seen, town leaders in Massachusetts had expressed high profile distrust of their state legislature being allowed to both propose and ratify constitutional changes.

Regardless of Jefferson's early advocacy for formal constituent proposal and ratification power via a constitutional convention, he did not clearly articulate the idea that a legislature should not be entrusted with monopoly initiation power over constitutional change. As for initiation power, Jefferson only clearly endorsed the Lockean revolutionary theory—as in his U.S. Declaration of Independence—not a formal and peaceful legal mechanism.

When Jefferson writes about periodic constitutional revision, he makes no explicit reference to initiation power; that is, his language is highly metaphorical and ambiguous. One possible explanation for Jefferson's ambiguity could be his practical political sensibility, especially after he sought national political power, which included not needlessly antagonizing state legislatures. State legislatures were especially powerful when Jefferson wrote his letters, as the federal government was comparatively weak. It was one thing for Jefferson to take on the

powerful as a youth; it was quite another after he had already risen high up the political ladder and had to pick his enemies more carefully if he wanted to stay on his power rung and move higher up.

Another explanation could be that Jefferson did not care about practical details concerning the implementation of constituent initiation power, just as he endorsed freeing slaves but did not propose and promote a specific plan for doing so. But again, it was also arguably less controversial to endorse the vague idea of freeing slaves as opposed to a concrete plan to free them.

Regardless of Jefferson's actual intentions, it is easy to read his language as supporting Modernization Theory rather than CPT, as contemporary PCCR opponents have done when PCCR is on the ballot in their state (Snider 2023e) and as scholars usually do when analyzing those passages (e.g., Bailey 2015; Elkins, Ginsburg, and Melton 2009, chap. 2).

Remarkably, there was no early American democratic theorist or politician of national stature who articulated a clear vision for PCCR. Instead, as with many of America's democratic constitutional breakthroughs, PCCR grew organically as practical people worked out the logic of constituent power and reacted to specific problems associated with their own constitution making. For example, PCCR pioneer New Hampshire is not associated with any great thinker who articulated PCCR's democratic function. As noted previously, the key voices appear to have been relatively obscure townsfolk near the Massachusetts/New Hampshire border in the late 1770s.

The French thinker Emmanuel Sieyès was credited with coining the terms "constituent" and "constituted" power in 1789 and thus became closely associated with future iterations of Constituent Power Theory (Sieyès 2003).²³ But compared to modern theories of constituent power, Sieyès gave relatively little legal and institutionalized power to the constituent. For example, he endorsed France's National Assembly both proposing and ratifying constitutional

changes, after which France soon devolved into a dictatorship. Sieyes influence in Europe was great. But American states had already tried Sieyes-style constitutionalism before Sieyes theorized about it. And by the time Sieyes wrote, some American states had already moved beyond Sieyes by implementing a legislature bypass mechanism for both constitutional proposal and ratification. In the latter half of the 19th Century, Sieyes' stunted conceptualization of constituent power was revived by Southern secessionist states during the Civil War and then in Southern states during the Jim Crow Era after Reconstruction. But he would never be associated with the development of either PCCR or the formal constitutional initiative, except highly indirectly as a logical extension of his argument that the constituent and constituted powers had different interests.

The most vivid early articulation of LBT in relation to PCCR appears in the public record in New York in the early 1840s leading up to New York incorporating PCCR in its 1846 state constitution. Perhaps New Hampshire in 1792 or Indiana in 1816 had well-reasoned discussions about why they incorporated PCCR in their constitutions. If so, we may never know because records of the convention debates were not kept and local newspaper records were paltry prior to the invention of the penny press in the early 19th Century.

Constitutional convention Delegate Michael Hoffman led the campaign for PCCR in New York State. This is a small sample from one of his many speeches advocating for PCCR:

[H]ow is the Constitution to be amended? There are but two methods. The one, in the manner prescribed by the Constitution, through the agency of the Legislature. The other, by the people through their delegates in convention assembled. I am aware that many who agree with us in the necessity of constitutional reform, think that it should be done by the former method. And such at first was my own opinion; but am convinced on

reflection, that it cannot, or rather will not, be done in this manner. That the legislature could do it, if it chose, there is no doubt—but will it? On this point, I am very skeptical. Reasoning from the past to the future, I must say I have no confidence in the legislature.... (Kettell 1846)

Other prominent and eloquent advocates for PCCR in New York in the mid-1840s included convention delegate Arphaxed Loomis, arguably New York's first prominent proponent of PCCR, and magazine editor John Bigelow (Kettell 1846), who through his national magazine and remarkable eloquence helped spread the idea to other states in the 1840s.

With the development of the constitutional initiative, first implemented at the state level in 1902, we also get abundant references to LBT. As Washington's Supreme Court stated, direct democracy resulted from the "profound conviction that the Legislature had ceased to be responsive to the popular will."²⁴ It is noteworthy that the literature on the initiative as a legislature bypass mechanism has during the last century rarely compared its merits to PCCR (e.g., Matsusaka 2020; Schmidt 1991, chap. 1).²⁵ This is remarkable because advocates of the constitutional initiative during the Progressive Era and later recognized that the legislature bypass features of the convention process made it well suited for implementing the constitutional initiative. But they do not appear to have systematically codified their thoughts in major publications about the relative merits of the two different legislature bypass mechanisms.

As argued earlier, the constitutional initiative is more effective than PCCR in solving collective action problems associated with the institutionalization of constituent initiation power. But many framers in the 20th Century continued to treat the convention as the gold standard for constitutional change mechanisms, which helps explain why eight of the current fourteen states

with PCCR adopted it in the 20th Century—long after the constitutional initiative had been invented.

Part 4: PCCR's Political History

Legislature Bypass Theory is a type of rational choice theory, as it asserts that constituent and constituted powers have a conflict of interest in constitution making and by implication that constituted powers would want to take as much control of the constitution making process as feasible. But the detailed logic of that conflict of interest as it relates to elite political actors who aren't government officials but have interests aligned with them and each other is typically unexplored. Specifically, to understand the politics of PCCR, one must understand the power-driven reasons why not only incumbent legislators but political elites more generally prefer that a legislature rather than convention have initiation and proposal power over constitutional change.

Since seeking power for oneself is not an acceptable public reason for pursuing one form of constitutional change mechanism over another, we should be skeptical of scholarly and other accounts of PCCR politics (e.g., Dinan 2010, 410–23) that use newspaper, political advertising, and other self-reports to explain political actors' opposition to PCCR. Consequently, a rational choice methodology may be more insightful in explaining elite political actors' behavior than their own self-righteous explanations.

Another implication of rational choice theory is that when agents (elites) and principals (the public) have asymmetric information that favors the agents, the agents have strong incentives to engage in opportunistic behavior. Specifically, when elites' power-driven dislike of PCCR is placed in an environment of remarkable public ignorance of PCCR's democratic function and history, we should expect Machiavellian politics, which nicely summarizes contemporary PCCR politics and is the focus of Part 5.

Elite Opposition

A rational choice perspective provides a theoretical framework to understand the scope and intensity of political elites' demonstrated opposition to PCCR in recent decades. Here we will explore the incentives of five important categories of political actors who oppose PCCR: 1) incumbent legislators, 2) major political parties, 3) apex special interest groups, 4) secondary interest groups dependent on alliances with 1), 2), and 3) above, and 5) pro-court groups that prefer to exercise power via the courts rather than either a legislature or constitutional convention. The categories are not mutually exclusive; for example, there may be substantial overlap between categories 4) and 5), as groups geared to court protections will likely also seek alliances with as many powerful political actors as possible.

Incumbent Legislators: According to LBT, we would expect constituted powers, especially legislatures, to be opposed to calling a convention because a convention is designed to take constitutional agenda setting power away from them. In 1970, the then leading state constitutional convention scholar, Albert Strum, observed that legislatures have been the “natural enemies” of conventions (1970, 88; see also Martineau 1970; Benjamin and Gais 1996; Snider 2017; Dinan 2022a), and that observation remains as valid today as then. If anything, the continued shift from parttime, short-term, and amateur legislators to full-time, long-term, career-oriented legislator has made legislator incentives for entrenching their power even stronger than when Sturm wrote (Snider 2017, 275–77). Although it is not uncommon for a few incumbent legislators to support PCCR, no legislative leadership has actively supported calling a state convention during the last 20-year cycle of PCCR from 2004 to 2022.

Major Political Parties. The dominant factor leading contemporary state political parties to oppose or not actively support constitutional conventions appears to be the veto power of incumbent state legislators and other government office holders over the parties to which they

belong. When political parties have sought to entrench their preferences in a constitution, they have chosen to do so in recent decades via legislature referral rather than convention. No major state political party has actively supported calling a state convention during the last 20-year cycle of PCCR from 2004 to 2022. This pattern even holds for contemporary state political parties that are the minority party in a legislature, although individual legislators who support a convention are most likely to be in the minority party. When political parties, like incumbent legislators, have sought to use conventions to entrench their preferences, they have usually done so when the legislature lacks constitutional change proposal power, as discussed in Part 2.

Apex Special Interest Groups. Apex special interest groups, by definition, excel at influencing the legislature and sometimes in ways that a majority of informed voters would not accept if given veto power over the matter. Apex special interest groups typically are associated with the base of a major political party; for example, large businesses for the Republican Party and large labor unions for the Democratic Party. One reason these groups oppose conventions is that they have invested heavily in exploiting the legislative process, including cultivating legislative relationships. A convention threatens to devalue those investments.

The number of apex interest groups seems to have grown as government has grown and taken on more functions (Rauch 1995). Many formerly weak groups with respect to legislatures have grown powerful and thus opposed to state conventions (Snider 2017). For example, prior to the Industrial Revolution and the growth of big business in the 19th Century, business organizations tended not to oppose conventions. Similarly, at the turn of the 20th Century, America had no government unions and the unions that did exist tended to be relatively weak and thus supportive of conventions to counter their weakness in Gilded Era legislatures controlled by big business. Now that unions have great influence over legislatures, they have joined big business in opposing conventions. An example is Alaska in 2022, where big oil companies, local

chambers of commerce, and government unions all opposed a convention vote, although the lion's share of opposition money came from government unions, not business entities (Snider 2023a).

Some of the earlier apex special interest groups, such as railroads and mining companies, have been greatly weakened since the turn of the 20th Century. But the interests of those currently at the apex, regardless of their partisan leanings, remain as strongly opposed to calling state conventions as ever before. This can be confirmed by the complete absence of apex special interest groups organizing and funding PCCR yes campaigns, whereas they have been the key funders and initial organizers of no campaigns (Snider 2017, 2023e).

Secondary Interest Groups: Even the most powerful political actors depend on allies to be politically effective. This is even truer for the relatively weak, who devote substantial resources to cultivating powerful allies, often by engaging in mutual backscratching. A key observation is that there are few, if any, interest groups in U.S. states that make calling a constitutional convention central to their mission. Contrast this with incumbent legislators and apex interest groups, who have consistently demonstrated their strong opposition to calling conventions. For secondary interest groups, this makes convention support an issue tradeable for mutual advantage. This is an especially easy trade if they are confident that a yes campaign will lose regardless of what they do. For most political actors, this mutual backscratching may merely mean not speaking out publicly even if one supports a convention. But for some political actors, it can also mean vigorously opposing a convention in public primarily as a favor to one's political allies who are less politically popular and prefer to exercise influence in the shadows.

This type of mutual backscratching may be seen in the close alliance across many PCCR states between Planned Parenthood and the National Education Association, including routine support for each other's top priorities. The NEA was relatively unpopular compared to Planned

Parenthood in some PCCR states so preferred to have Planned Parenthood take a higher profile role. For example, in Rhode Island in 2014, the local chapters of the NEA and Planned Parenthood were the two key early organizers of the no campaign. Central to Planned Parenthood's lobbying campaign with the legislature was that a woman's right-to-choose was so popular in Rhode Island that it would be foolish for the legislature to pass a law banning it. But then, why would voters ratify a constitutional change limiting a woman's right-to-choose, a very high-salience issue where it is not possible to fool people into voting against their own interests? Any proposed constitutional change including limiting a woman's right to choose would have been a poison pill in Rhode Island. Moreover, statutory law in Rhode Island is less democratic than constitutional law in the sense that Rhode Island voters lack ratification power over statutory law; the legislature has the power to not only propose but pass statutory law. In contrast, a convention only has the power to propose law; the public, not the legislature, chooses whether it becomes law. Nevertheless, the weekend before the election on whether to call a convention, the no campaign delivered a campaign postcard via mail to Rhode Island Independents and Democrats. The postcard, which said it was endorsed by Planned Parenthood, argued that a convention could endanger a woman's right to choose (Snider 2017, 286, see also 2022c). In contrast, in states with PCCR, such as Missouri, where a woman's right to choose is unpopular and might genuinely be endangered by a convention, Planned Parenthood, like the NEA, operates with a lower public profile.

However, it is an important qualification that secondary interest groups were the backbone of convention support during most of the 20th Century (Zackin 2013). It has only been during the 21st Century and late 20th Century that secondary groups as a category either turned decisively against calling conventions or kept their mouths shut. This is a major historical change. Among the factors that may have contributed to it are the increasing opposition to conventions by highly

valued coalition partners, including the political actors discussed above . To this may be added the growing sense based on a track record of convention referendum defeats that seeking a yes vote on a convention referendum is a quixotic effort and thus a waste of resources (Snider 2017, 2023e).

Pro-Court Groups: Some groups, especially those protecting minority rights, prefer to exercise influence via the judicial branch of government rather than a legislature or constitutional convention. Thus, they are also natural enemies of conventions. Local chapters of the American Civil Liberties Union (ACLU) may be the most vivid example. The ACLU has generally been most effective using the courts rather than legislative bodies to pursue its mission of protecting minorities, especially unpopular minorities such as felons (Zackin 2008, 381–83). In states where its mission is most popular, the ACLU has been among the most visible opponents of calling a convention.

However, the ACLU also acts like a secondary interest group, as it cultivates political allies among incumbent legislators, apex special interest groups, and other secondary interest groups. Rhode Island’s local ACLU chapter accepted indirect money (ads for its annual meeting program, which do not need to be publicly reported) from the NEA, the convention’s leading opponent, shortly before taking on the role of a highly visible convention opponent. But since the ACLU’s mission makes it a natural enemy of the convention process, this type of mutual backscratching may be less important for it than other secondary interest groups. On the other hand, when the ACLU publicly opposes conventions to a general audience, it uses the majoritarian style talking points of its interest group allies rather than the minority rights framing that would better reflect its mission but that it and its coalition allies fear would be unpopular and thus politically counterproductive.

It is important to note that the incentives of the above described political actors, with the exception of the pro-court faction, differ with respect to constitutional conventions and initiatives. Should they have a popular issue on a take-it-or-leave-it-basis that they feel the legislature isn't addressing—that is, a proposal that they believe the public will view as better than the status quo—they may use the initiative because of the control it gives them over the process, especially its agenda and thus possible outcomes. As previously noted, with a convention they lose this control and with that risk not only losing but having to pay a fortune merely to defend the status quo they would have otherwise preferred to shift in their favor.

PCCR Supporters' Collective Action Problems

Democracy is notorious for suffering from collective action problems (Olson 1968), but potential PCCR supporters may suffer from even greater collective problems than classic democratic collective action problems. To overcome collective action problems, the public largely depends on elite competition, where the elites, whether competing political parties or interest groups, find it in their self-interest to bear the cost of educating the public on different sides of an issue (Zaller 1992). The severe nature of the PCCR collective action problem is largely due to the shared interest of the most powerful political elites, as described above, in opposing genuinely independent conventions.

A consequence is that PCCR yes campaigns in recent decades have been overwhelmingly organized and funded by individuals, who typically raise only a tiny fraction of the money raised by no campaigns (Snider 2017, 2023e) and lack access to the highest quality professional political talent.

Another consequence has to do with press coverage. Press coverage tends to be based on “objectivity” norms based on reporting the competing views of political elites. Political reporters typically cultivate these elites as news sources and believe they have attained journalistic

objectivity when they present the views of competing elites, such as a Democrat vs Republican, liberal vs. conservative, or business vs. labor. But this reporting norm fails to effectively educate the public about a referendum to call a convention because the sources share an animus toward the convention process. This animus is reflected in the elites' shared interest in pointing the press to yes advocates for change who are extremists and support unpopular causes in the self-filling hope that such unpopular causes will become the face of the yes campaign thanks to the credibility and free publicity the press have bestowed upon them via the elite's prodding. The political information system currently associated with PCCR is analogous to that associated with one-party political regimes, such as existed in the American South during the first half the 20th Century (Key and Heard 1949). In such regimes, opposition viewpoints rarely get a fair hearing.

Opposition (no) campaigns have also been able to take advantage of institutional knowledge in a way supporting (yes) campaigns have not. For example, the National Education Association has run dozens of no-campaigns during the last few decades and can share best practices with its state affiliates. During the mid-20th Century, the nonprofit National Municipal League, formed in 1894 as a good government group, played a similar role for yes-campaigns, sometimes in cooperation with local chapters of the League of Women Voters, which were then influential and often highly supportive of state constitutional conventions. But no comparable institutional resource currently exists for yes-campaigns.

The governor's declining role as an advocate for conventions deserves special note. Governors, although a constituted power, do not have the same conflict of interest as legislatures because they are from a competing branch of government. Throughout U.S. history, calling a convention despite legislature opposition has often depended on the support of a governor (Dinan 2010, 432–33). During recent decades, most governors have not taken a public position on a referendum whether to call a convention. And, when they occasionally have expressed support

publicly, have usually only half-heartedly done so, as the governors did in Hawaii in 2007, Michigan in 2010, and Alaska in 2022. An exception was an independently elected Lt. Governor in Illinois in 2008 who advocated for government ethics, campaign finance, and direct democracy reforms (Jaeger 2008). In short, vigorous gubernatorial support for calling an independent convention has become rare. This decline may be attributed to diverse factors. Governors have limited political capital and may not want to squander it, especially with fellow partisans in the legislature, on something now viewed as a hopeless cause. Governors also need to work with legislatures and powerful interest groups to get their agenda passed and get reelected; to the extent those political actors have become either increasingly powerful or desirous of entrenching their power (Snider 2017), they may view poking them in the eye as increasingly problematic.

Perverse Framing Incentives for PCCR Supporters

A puzzling feature of PCCR politics is the persistent use of a Modernization Theory by PCCR supporters, which has created an opening for PCCR opponents to argue that constitutional change can be proposed with less cost and risk via the legislature. One type of explanation for this puzzling tendency is historical. One historical factor, as we saw in Part 3, was that during its early history PCCR was primarily a modernization vehicle because legislatures couldn't directly propose constitutional changes.

Another important historical factor may be that the only widely revered American political authority who could be used to sanction PCCR was Thomas Jefferson. This was especially so during the 1840s, when the modern form of PCCR as a legislature bypass institution was launched along with the first major wave of PCCR states. By the 1840s, the Democratic Party was the party of Jefferson and Jackson, and for political actors who lived in a Democratic leaning state and wanted to win public support for a reform, claiming Jefferson's endorsement was an effective political strategy. This rhetorical strategy also characterized the pioneering

PCCR advocates in New York State during the early and mid-1840s, when they won PCCR in a state whose constitution already had a legislature-referral process for constitutional change. In their arguments, the PCCR advocates often led with Jefferson, including quoting from his letter to Kercheval cited above. Jefferson's letters, first published in 1829, had by the early 1840s become a bible for many of New York's Democratic Party leaders. However, after the initial Jeffersonian rhetoric to win over an audience, PCCR advocates might argue in great detail why the legislature couldn't be trusted to propose needed constitutional changes.

New York State's pioneering use of Jefferson's authority to support PCCR was successfully mimicked by later PCCR supporters in other states. As the Michigan State volume in the Oxford Commentaries on the State Constitutions explains Michigan's adoption of PCCR in 1850: "The new constitution included a novel provision borrowed from the ideas of Thomas Jefferson (Fino 2011, 14)."

Today, Jeffersonian Modernization Theory is still used by PCCR supporters, even if citing Jefferson's name may be less common. The yes campaign for Hawaii's 2008 PCCR campaign was arguably led by Hawaii's Lt. Governor Duke Aiona, who framed the yes campaign in Jeffersonian terms without explicitly mentioning Jefferson's name; for example: "The founders of our state recognized the importance of maintaining a living, evolving constitution when they incorporated a provision that calls for a constitutional convention every 10 years" (Aiona 2007). Hawaii's Governor also supported a yes vote and encouraged the press to go to the Lt. Governor's website (Lingle 2008). Alaska's 2012 PCCR included an Election Pamphlet mailed to every Alaskan voter by Alaska's Division of Elections, which published one pro statement and one con statement. The pro statement began with a direct reference to Jefferson and then followed with a catalog of reforms a convention could propose. Here is the opening: "The times they are a

changing,’ said Bob Dylan. Thomas Jefferson agreed that change requires periodic review of a constitution” (State of Alaska Division of Elections 2012, 61).

What is most puzzling is the persistent use of Modernization Theory by PCCR supporters when PCCR opponents can now so easily rebut it by arguing that a legislature is a less costly and risky mechanism of constitutional change than a constitutional convention. Jefferson’s name may now be downplayed, but his arguments remain popular. As for his name, it carries much less cachet than in the 1840s and may now even be a negative, as it has become associated with highly unpopular activities such as Jefferson’s long-term and hidden sexual relationship with one of his female slaves who was thirty years his junior and, as a slave, his property, not a mistress (Britni 2017).

One possible solution to this apparent puzzle is to focus on the strategic incentives of yes campaign leaders. The most respected leaders who the press and others identify as spokespeople for yes campaigns tend to be relatively long-term political players who seek to maintain goodwill with as many other political actors as possible. Picking a fight with political actors whose support they might want in the future may not be a good career decision for them. They may also decide it is not smart PCCR politics to alert powerful political actors as to why calling a convention is not in their political self-interest. As an analogy, many good government reformers who lobby legislators believe it is politically ineffective to promote their reforms as contrary to legislators’ self-interest. Instead, they often argue that their reforms will lead the public to trust the legislature more and, by implication, enhance legislators’ power.

Much modernization language should be read as elite code for LBT. But the average voter does not decipher this message. To be sure, PCCR supporters have also provided LBT type arguments, if sometimes only implicitly through their choice of proposed constitutional changes that a legislature will not pass.

Cost and Risk Recast With An LBT Framing

The cost and risk arguments promoted by PCCR opponents have different implications depending on whether one is using a Modernization Theory or LBT framing. From the perspective of LBT, the higher cost of a convention over a legislature for proposing amendments is an investment, not merely an additional cost, because it also includes unique benefits: the desirable constitutional changes made possible by bypassing the legislature.

The risk argument focuses on the unlimited agenda allowed for convention proposals, excluding any proposal that might conflict with federal law, which trumps state constitutional law. However, most state constitutions with PCCR grant legislatures substantially the same type of proposal power, albeit sometimes only by proposing a bundle of discrete amendments and relying on court enforcement of limited subject rules that tend to be deferential to legislatures. From the perspective of Modernization Theory, there is no advantage to taking a risk on an unknown convention as opposed to a known legislature for proposing constitutional changes.²⁶ But from the perspective of LBT, the democratic function of a convention is that a legislature cannot control its agenda; an agenda unlimited by a legislature is thus PCCR's prime feature, not a bug.

The campaign against calling a convention in New York in 2017 illustrates the cost and risk arguments. On costs, one flyer said: "A convention could cost taxpayers \$50-\$100 million. That's a lot of money, especially when our Constitution can be amended through the legislative process without spending a dime—like it has more than 200 times."²⁷ Similarly, a letter-to-the-editor template said: "If we believe changes are necessary, there are less costly and more effective ways to accomplish them than a convention. Specifically, the New York State Constitution can be amended through the state Legislature...."²⁸ On risks, another flyer said: "Opening the state

constitution is like opening Pandora's Box. You can't predict what changes delegates will make.”²⁹

New Hampshire's constitutional convention history vividly illustrates the distortions that can result when potential costs and risks are promoted without reference to benefits. New Hampshire has been a relatively small state by population compared to most PCCR states. In theory, it should also have had the highest convention cost structure insofar as its conventions have routinely elected 400 or more delegates—more than twice as many other state conventions. With the second oldest constitution in the world, it has also used conventions for the relatively minor task of making amendments rather than major revisions. Yet it held ten constitutional conventions during the 20th Century, largely because a convention was the only available legal mechanism to amend its constitution. Many other conventions were held during the 19th Century for new states that lived in poverty by contemporary standards and had tiny populations. Under the Northwest Ordinance of 1787, territories were allowed to enter the Union with as few as 60,000 residents, such as Indiana in 1816. Despite this poverty compared to the present, there was nary a whisper about such costs because territorial legislatures were eager to obtain statehood and saw conventions as strengthening rather than checking their power.

As for the risk of holding a New Hampshire convention, that seemed of relatively minor importance in decision making about holding a convention—as evidenced by the many conventions New Hampshire held prior to 1964.

Part 5: PCCR's Evolving Gap Between Its Function and Implementation

The history of democracy is rife with examples of leaders professing their love of democratic principles while in practice subverting their implementation (Morgan 1989). An extreme illustration of this perverse tendency is that some authoritarian countries have

constitutions that are among the most generous in granting political and civil rights to their people. Similarly, populism has often been characterized as a vague commitment to popular rule without committing to implement the concrete policies to ensure such rule (Müller 2017).

As for institutionalizing democratic initiation power, the incentive for PCCR's supporters is to decrease the gap between PCCR's democratic function and its institutional implementation whereas for PCCR's opponents it is to increase the gap. As the gap is increased, the legislature's legitimacy as the preferred source of constituent agenda-setting power is also increased, thus creating a negative feedback loop. This perverse incentive by PCCR opponents is a critical consideration in explaining PCCR politics in states with PCCR.

Insofar as the elites who control the levers of power are in the anti-PCCR camp and can successfully undermine the constitutional convention as an institution, we would expect a growing gap between the convention's democratic function and its institutional capacity. This institutional backsliding would run contrary to Americans' general expectation or at least hope that the gap between democratic promise and reality tends to narrow over time, as in the implementation of the U.S. Declaration of Independence's promise that "all men are created equal," where blacks, Native Americans, and poor whites were initially excluded but then gradually enfranchised. If this account is accurate, America's history of democracy may be categorized as running on two tracks in PCCR states: more democratic for ordinary/representative lawmaking and less democratic for higher/constitutional democracy. I suggest dubbing elites who seek to undermine democratic higher lawmaking in the name of the people as "higher lawmaking populists" to distinguish them from "ordinary lawmaking populists," as the former populists may react with horror at the latter populists and not recognize how much they have in common.

PCCR is prone to this democratic slippage because it has a number of problems:

1) The vagueness of PCCR provisions, which leaves an opening for legislative opportunism. At constitutional conventions where PCCR is proposed, the future amendment article tends to be a relatively low priority. For example, it is focused on near the end of a convention when delegates are anxious to end the convention and do not want to think through difficult implementation issues. This most famously happened at the U.S. national convention in 1787, where Article V concerning future conventions was drafted in a rushed, slapdash manner a few days before the convention adjourned. As a result, crucial implementation details were left unaddressed (Feingold and Prindiville 2022). State convention procedures have tended to be drafted with substantially more but still inadequate care. This muddle has left an opening for legislatures to abuse their power by not fixing problems easily within their power to fix. As an analogy, Congress has had more than 230 years to fix the ambiguities of Article V's convention process but has chosen not to because those ambiguities enhance its power by preventing the effective use of a Congressional bypass mechanism for higher lawmaking.

2) The American public does not understand PCCR's democratic function. Due partly to frequent elections and abundant media coverage, the public has an intuitive feel for how ordinary lawmaking and representative government should and does work, including its sad tradeoffs; it lacks that same intuition for higher lawmaking related processes. Accordingly, elite scaremongering may be an especially effective political strategy in higher lawmaking politics. This may have been less of a problem in the 19th and early 20th centuries, when calling state constitutional conventions was relatively common so people could reason from more direct experience. Nowadays, not only have very few people lived through state conventions, but schools and other government funded institutions rarely teach their history—and when they do, tend to teach reverence for it, thus enhancing the legitimacy (and power) of contemporary government institutions.

3) As a democratic institution, PCCR is not prone to crises, the prerequisite for much helpful democratic reform. Most institutions associated with ordinary representative democracy have suffered crises during the past century and faced great popular pressure, albeit often only briefly, to reform themselves to better implement their democratic function. Lacking analogous crises, similar pressure to democratize the convention process has not materialized. The enemies of PCCR can then use these unfixed deficiencies to denigrate and demobilize support for PCCR. Fortunately, some reforms of ordinary election processes carry over to higher election processes, but in material ways this is often not the case.

4) PCCR involves a high stakes process—a constitutional process. As scholars have documented, people tend to react with fear to constitutional changes and other high stakes changes whose outcome they feel is uncertain (Zink and Dawes 2016). This reinforces elite incentives for scaremongering. The resulting fear of PCCR-based constitutional change bolsters the constitutional status quo even when the public greatly mistrusts current government institutions.

5) Democratic institutions tend to naturally weaken over time if not updated. If the world changes but not constitutional change mechanisms, the mechanisms become increasingly deficient simply because they haven't kept up with the times. The growing deficiencies can then be used by political elites as a self-fulfilling prophecy to weaken and discredit the convention process.

Tactics for Subverting PCCR

Consider some PCCR implementation problems directly or indirectly involving state legislatures.

As we have seen, Oklahoma hasn't placed a PCCR amendment on its statewide ballot since 1970 despite its constitution mandating that it be placed on the ballot if the question hasn't

been placed on the ballot for twenty years. But most state legislatures and their interest groups allies subvert PCCR in more subtle ways. Their techniques to do so can vary substantially from state to state, but their consistent attempts to subvert PCCR by whatever tools available to them seems to be a constant.

Legislatures may do nothing to fix constitutional convention procedures that have become illegal or misleading. For example, Alaska's statehood Constitution was ratified in 1956 before the U.S. Supreme Court's line of reapportionment cases in the 1960s that mandated that political districts have equal population. The problem was fixed for all future Alaskan elections except Alaska's convention provision, which made the now illegal 1955 delegate election process the fallback process if the legislature could not agree how to enable a delegate election to a convention (Snider 2022a). Since 1930, Maryland's legislature has insisted that the majority for a convention call be a majority voting at an election rather than on the question (despite the constitutional wording of the majority required being highly ambiguous) but has refused to notify voters on the ballot that their blank answers to that referendum question will be tallied as a no vote (Snider 2012b). In New York and Missouri, the state constitution mandates the use of at-large convention delegate districts before the federal government began to frown on such districts because they discriminate against minorities. Convention proponents would likely sue to prevent a called convention based on such districts (Tarr and Williams 2007, 3:196).

Legislatures may exempt delegate elections from general election reforms they have proposed and helped pass. For example, in many PCCR states, ordinary but not higher (constitutional convention) elections incorporated the primary as part of the election process during the early 20th Century. The resulting anachronistic PCCR delegate election process may give elites working in the shadows excessive control of the nomination process. In the general election for delegates, most delegates will win with a plurality rather than majority because there

is no primary to narrow the field of candidates and many candidates are likely to run for delegate because no seat has an entrenched incumbent.

Legislatures may have excessive control over convention finances and can use that control to exert undue control over a convention, such as forcing it to speedily convene, which gives established elites an edge in delegate leadership elections. Or they may create strong incentives for a convention to rely on the legislature's staff for support, which gives the legislature significant control over the information convention delegates see and the drafting of their proposals. For example, to exert control over America's last PCCR-based state convention, which convened in 1986, Rhode Island's legislature limited the convention's budget so as to make it repeatedly come back to it for more funds (Conley 2002, 189). And in a series of five state conventions in the U.S. territory of the Virgin Islands from 1964 to 2012, the latter being the last on U.S. soil, the territorial legislature enabled delegate election processes that gave it and its allies undue control of who got elected. The techniques included a rushed election, multi-member districts to limit fair representation at the convention, and a welcome mat for government officeholders to run for delegate. The first two of the so-called "constitutional conventions" explicitly gave the legislature veto power over the convention's proposals. USVI's ongoing convention process suffers from many of the same corrupt processes, although with some novel twists (Snider 2024b).

Legislatures may have had too much control over whether a called convention ever convenes and will look for any excuse, such as a disagreement between the House and Senate in passing an enabling act for a convention delegate election, to delay or even not call a convened convention. In Iowa, the legislature did not convene an unquestionably called convention when its House and Senate did not agree on wording to enable a delegate election (Snider 2020). In New

York, it took the legislature eight years and a change in governor to convene a called convention (Galie 1990, 16).

Even the slightest procedural defect may be used to disqualify approved convention calls, even though courts are generally highly cautious about overturning elections. For example, the Alaska Supreme Court overturned a yes vote for a convention because the Lt. Governor added a prefatory clause to the constitutionally mandated ballot language (Snider 2022b). Similarly, at the last minute and out of the blue, votes may be found to overturn a call for a convention after a seemingly comprehensive tally has indicated that a convention was called. In Iowa, this happened on the last day before the canvassing board issued its final election results, when it found enough missing votes from one county to overturn the yes majority (Snider 2020).

Ambiguities in the wording of required majorities for referendums to call conventions have been systematically used to reverse yes votes on convention calls whereas similar ambiguous wording on non-convention referendum proposals that the legislature or powerful special interest have favored were not similarly challenged and reversed. For example, Maryland and Hawaii state governments only determined AFTER an election that a successful majority to call a convention would have to include a majority of those voting at an election rather than on the question. The actual language in the constitution was ambiguous, a widespread attribute of referendum majority language, especially prior to the 20th Century (Snider 2012b, 2012a, 2018). Michigan PCCR had a similar ambiguity problem, which was later formally solved via a constitutional initiative. Neither Maryland nor Hawaii can solve the problem via a constitutional initiative because they lack that institution.

Campaign finance rules regarding the disclosure of no campaign contributions have been systematically ignored or not enforced in a timely way by state agencies. For example, in both Rhode Island and Hawaii the state government agency responsible for campaign finance

disclosure failed to require timely disclosures or material penalties for the no campaigns' failures to provide legally mandated information (Snider 2023a, 2019; Snider and Clay 2014a, 2014c). Alternatively, needed rules have neither been discussed nor implemented by the legislature. For example, in Alaska, no attempt has been made by the legislature to disclose dark convention campaign finance money, which has been the bulk of the anti-convention money (Snider 2023c).

Mechanisms for the state to inform voters about the function of conventions and what issues they might address may be systematically biased against calling a convention. For example, in both Alaska and Rhode Island the official election pamphlets produced by the state government and sent to citizens failed to explain why PCCR existed in their state constitutions and suggested that there was nothing a legislature could not propose at less cost and risk than a convention (Snider and Clay 2014b; Snider 2022b). In Illinois, a judge ruled that the convention referendum ballot language was unconstitutional because the legislature had mandated the insertion of false and biased information on the printed ballot, including noting the 3:1 ratio by which the previous convention referendum in 1988 had lost. The judge decided it was too late to reprint the ballots so he ruled that election workers would hand out a correction notice on the day of election. But the law wasn't uniformly enforced and a large fraction of precincts failed to comply with it (AP 2008; see also Merican 2008a, 2008b; Galesburg Register Mail 2008).

Publicly funded education in PCCR states will not, as a matter of practice, fund information that suggests that the PCCR process provides a vital democratic function. For example, state public television documentaries may provide a hagiographic account of the framers that proposed a state's constitution. This may include praise of the framers as wise and public spirited. The primary credit is given to the one-time framers and their fortuitous circumstances, not the merits of the convention process as an institution.

The template for such documentary framing is America's revered 1787 national constitutional convention. Similar hagiographic framing has been used by government subsidized public TV affiliates in PCCR states Alaska, Michigan, and Montana.

One effect of such documentaries is to give sanction to current government institutions as opposed to providing a precedent for fixing those institutions. Another is to allow PCCR opponents to assert that no future convention would meet the same, magically high standards of statesmanship.

Mostly though, state-funded civic educational materials simply ignore the PCCR mechanism as though it were an obsolete constitutional detail. For example, in PCCR state Maryland, the pocket constitution state legislators hand out to constituents includes legislature referral but not the convention-based change mechanism. Similarly, the public schools do not teach about Maryland's five state constitutional conventions and why the framers of its 1851 Constitution included PCCR as a provision—even during the year when the PCCR question is on the ballot.

In summary, legislatures and their allies who oppose conventions have been creating self-fulfilling conditions that damage PCCR as an institution. John Dinan has described similar efforts to undermine the constitutional initiative (Dinan 2022a).

Given their success, it is reasonable to ask whether PCCR is a genuinely viable legislature bypass mechanism if the goal is to strengthen democratic constitutionalism. The answer is that despite success in undermining PCCR, PCCR has tended to retain its basic institutional integrity.

The most telling signal that demonstrates limited success in undermining PCCR is the behavior of the most powerful political elites opposed to PCCR. If PCCR's democratic function has been completely subverted by these elites, it would be irrational for them to oppose calling a convention from which they would benefit. Yet what we see in state after state is that these

groups throw their weight behind no campaigns whereas no comparably powerful interest groups throw their weight behind yes campaigns (Snider 2017; Dinan 2022b). For example, in 2022, convention opponents in Alaska, led by the National Education Association, spent both 78 times as much as those advocating for a convention and more per capita opposing a convention than opponents on more than 140 other referendums in all fifty states (Snider 2023a).

As with many democratic problems, the current problems with PCCR have democratic solutions. The meta political problem described here is the classic who-will-guard-the-guardians-problem; that is, a Catch 22 situation where in many PCCR states the legislature must be relied upon to fix PCCR's democratic problems but only seems to have an incentive to exacerbate them.

The seven PCCR states with either the statutory or constitutional initiative could potentially alleviate the problem (a statutory initiative is adequate to pass a constitutional convention's enabling act). But for reasons described earlier, the private groups with sufficient resources to effectively sponsor initiatives have preferred the initiative over the convention because it holds out the promise of a desired outcome at less cost and risk.

Courts could also alleviate the problem, as they have often done with efforts to undermine the initiative. But in recent decades few efforts to undermine PCCR have resulted in court cases, partly because, unlike for initiatives where there are well-resourced losers, PCCR suffers from much greater collective action problems. In Alaska and Hawaii, when cases were brought by powerful groups to overturn an election favoring a yes vote, the government attorney generals who defended the election result either did so incompetently or with minimal due diligence. Nevertheless, courts have occasionally supported conventions. For example, when Rhode Island's legislature imposed a limited convention agenda that the convention ignored in proposing PCCR, which the public then ratified, the courts refused to overturn the referendum result ratifying PCCR (Conley 2002, 187–88).

A caveat to the analysis above is that when legislatures want to call a constitutional convention, they can temporarily reverse their anti-convention policies. Consider Maryland. In the early 1960s, the U.S. Supreme Court mandated the reapportionment of state legislatures so that they would comply with the one-person, one-vote principle. This led to a wave of legislature-initiated state conventions. Maryland's Legislature assured a successful yes vote for a convention by calling a special election at the same time as the general election so that the majority voting on the question would be the same majority voting at the election. At the previous election in 1950, where a PCCR had been on the ballot and the Legislature was staunchly opposed to calling a convention, four-fifths (80%) of the voters voting on the question approved it, but it still did not pass because of the large fraction of voters who did not vote on the question and the legislature's dubious claim that the voting at the election voting rule should prevail.

Conclusion

PCCR's constitutional, conceptual, and political context have evolved greatly since New Hampshire was the first state to implement PCCR in 1792. During the hundreds of years since then, it has faced increasing competition from other constitutional change mechanisms, including legislature referral and the constitutional initiative; its intellectual history has largely been barren, if what counts in an intellectual history are sophisticated democratic theorists; its politics dismal and growing worse; and its institutional foundations growing worse due to that politics.

An important caveat is that when legislatures want to convene a convention, such as for a statehood convention or to be readmitted to the United States (after the Civil War), the politics tend to be very different. In those cases, legislatures will not complain about the cost and risk of a convention and will take steps to ensure that the referendum to call a convention passes.

The underlying and often hidden politics of PCCR is vividly illustrated in Oklahoma where the legislature has refused to follow the constitutional mandate to place PCCR on the ballot at 20-year intervals and in 1994 proposed a constitutional amendment to delete the PCCR clause from the constitution but failed to get the public to approve the deletion (Tulsa World 2020). The failure of political elites to follow constitutional law and the public to effectively enforce their rights illustrates problems beyond the scope of this article but deserving of serious study. The political dynamics may be similar to the decades-long failure of state legislatures during the early 20th Century to reapportion themselves in accordance with their state's constitution until the U.S. Supreme Court finally stepped in during the 1960s to fix the problem.

Elites in other states may exercise their opposition to PCCR in less blatant ways than in Oklahoma, but the fundamental political dynamic of elite opposition and public apathy remains the same. More scholarly attention needs to address the sources and evolution of this public apathy and assess the merits of current elite contempt for voters' capacity to vote in their own self-interest in all three stages of the higher lawmaking process. This contempt threatens the foundations of America's system of democratic constitutionalism and thus the foundations of its democracy. If voters are too incompetent and apathetic to productively use conventions as a legislature bypass institution, it may at least partly be because it is to the elites' advantage that they remain so.

Studying PCCR's evolution requires a range of historical, political science, political theory, legal, and investigative journalism skills, including costly state-by-state research, that has made it difficult for scholars to pursue. But if the legitimacy of constitutional democracy--the foundation of modern democracy--should, as Colon Rios has authoritatively argued (2010, 2012), substantially depend on a constitution's provisions for future democratic change processes, including granting the constituent power initiation power as well as proposal and ratification

power, then the effort should be worthwhile. And it should be increasingly worthwhile if the current foundations of government, as specified by written constitutions, aren't keeping up with the changing needs of the American people. An ever more complex society built on the foundation of a government structure dictated by elites, who share a blatant conflict of interest in making themselves more democratically accountable, is a bad foundation that PCCR and other legislature bypass systems were designed to ameliorate.

Everywhere, American state legislatures believe they can propose the same type of constitutional change as constitutional conventions at less cost and risk. Accordingly, they act as if PCCR and the genuinely independent state convention more generally is an obsolete, inefficient, and dangerous institution. If they continue to have success stifling constituent agenda-setting power, they will damage the democratic foundations of America's constitutional democracy, which also entails stifling America's vital state laboratories of democracy.

The field of American election law should be clearly divided into the law of ordinary and higher elections, with higher election law, especially constitutional delegate election law, given much more prominence than is current in the discipline. Among current thousand-page textbooks on election law, convention elections do not even warrant a footnote (e.g., Issacharoff et al. 2016). Among American political scientists, there is also a great imbalance between the study of ordinary and higher (constitutional) democratic politics, with the former largely viewed as a science and the latter a history (e.g., Greenberg 2021). Too often the fields of election law and political science have focused on issues with day-to-day rather than long-term practical importance.

Not all constitutional conventions are equally democratic just as not all countries are equally democratic. Scholars who study conventions should categorize them according to the degree to which they follow democratic higher lawmaking procedures. Some higher lawmaking

bodies that have traditionally been labeled conventions should probably be labeled something else. A good starting point for categorization might be to rank conventions based on the mix of initiation, proposal, and ratification power granted to the constituent power.

PCCR in the sense of a constitutional change mechanism with substantial direct constituent power at the initiation, proposal, and ratification stages of higher lawmaking needs to be reformed and revitalized. No democratic institution is perfect, and the response to democratic failure for such a necessary institution should not be to eliminate but improve it. This may involve something as simple as copying reforms from ordinary elections, such as open primaries with ranked choice voting for delegate elections, or it may involve implementing more radical reforms, such as randomly chosen delegates (a type of “citizens’ assembly”) as has been done in Ireland (Landemore 2022, 152–78).

A less radical reform than the Ireland Citizens’ Assembly at the proposal stage would be to add a public deliberation stage between the proposal and ratification stages. This stage would be based on a citizens’ assembly—a randomly selected group of hundreds of citizens—who would be hosted and moderated by a panel of judges. On each convention proposal for popular ratification, it would listen to a debate between pro and con sides. The pro-proposal debaters would be chosen by the convention’s leadership and the anti-ones by the legislature’s leadership. The citizens’ assembly would then vote each proposal up or down. To maximize public education, the debate would be televised and the resulting citizens’ assembly tallies, along with a link to the debates, printed next to each proposal on the general public’s official ballot. This would provide a useful information shortcut for voters just as party labels do. Adding this stage would respond to widespread attacks on the ratification stage of the convention process (and other forms of higher democracy), where critics argue that voters are too ill-informed to vote in their own true interests.

Like the democratic ideal of political equality, which can never be fully realized in practice, constituted powers will always retain some control over constitutional change. The task for democratic reformers, then, should be to propose the best possible balance between these powers based on the interests of the constituent, not constituted, powers.

If finding the political will to reform ordinary elections is daunting, finding the political will to reform higher elections is qualitatively more daunting. Whether it is worth the effort depends in part on weighing the risk of a failed against a successful constitutional convention. The possibility of a successful convention, including how to maximize those odds, needs to be given a fairer hearing. The democratic cynicism and corresponding constitutional resignation of our current era needs to be replaced with the sense of can-do progress in democratic constitutionalism that characterized America during its founding era and for many decades afterwards.

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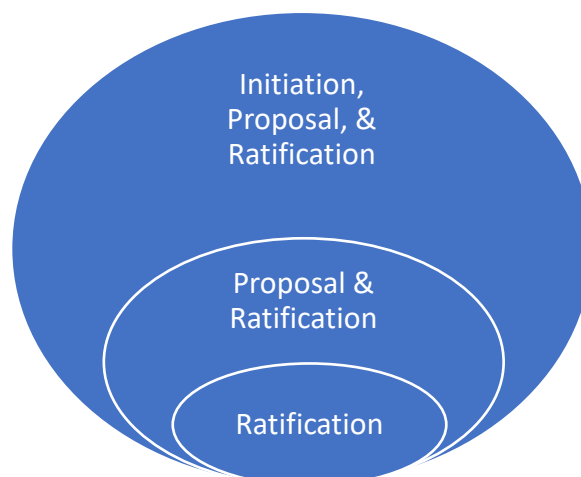
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Figure

Figure 1. Constituent Initiation, Proposal, and Ratification Power Feasibility Sets



Table

Table 1. An LBT-Based Typology of State Constitutional Amendment Processes

Amendment Mechanism	Constituent Power*			Government Agenda-Setting Cost**	Private Agenda-Setting Power***
	Initiate	Propose	Ratify		
Ordinary Lawmaking ("null case")	N	N	N	N.A.	N. A.
Legislature Initiated & Proposed ("Legislature Referral")	N	N	Y	Low	Low
Legislature Initiated, Convention Proposed ("Constitutional Convention")	N	Y	Y	High	Low
Popular Initiated, Popular Proposed, ("Constitutional Initiative")	Y****	Y****	Y	Low	High
Popular Initiated, Convention Proposed ("PCCR")	Y	Y	Y	High	Low

*Measured by a formal public vote.

**Based on the relatively high fixed costs of electing and convening a constitutional convention.

***Based on take-or-leave-it control of the text of a constitutional amendment proposal.

****Initiation and Proposal is done via popular petition rather than vote at an election. Both stages are combined into a single agenda setting stage whereas the initiation and proposal components are separated with PCCR.

Endnotes

¹ The term constitutional "change" is used rather than "amendment" or "revision" because it does not imply a scale of change, which the latter terms may do depending on their context. A constitutional convention may be used to propose minor changes, a major change, or some combination of the two. Only a statehood convention requires proposing an entirely new constitution. For example, New Hampshire's Constitution dates from 1784, the second

oldest constitution in the world, and it has subsequently held more than a dozen constitutional conventions, each of which proposed a series of amendments to that constitution rather than a new constitution.

² Among the most important differences between the national and state processes is that the Article V process is vague and lacks precedent (there has only been one national convention but an average of five conventions per U.S. state for a combined total in the hundreds) and is based on the state rather than people being the sovereign unit. Given that small states are given disproportionate power over an Article V convention and that those states are overwhelmingly Republican, an Article V convention has a partisan cast missing from a state convention based on the contemporary democratic standard of one-person, one-vote.

³ Congress mandates that any U.S. territory seeking its own constitution, such as the U.S. Virgin Islands, must do so via an independently elected convention.

⁴ In Connecticut, the legislature has the option to either arrange for a separate election of delegates or appoint delegates itself. In all other PCCR states, delegates must be elected. As PCCR opponents in Connecticut claim, if voters approved a convention call, the Connecticut Legislature would likely choose to appoint the convention delegates, thus defeating the purpose of calling a convention. By scholarly tradition, Connecticut is viewed as having a periodic *convention* referendum. But it may be more accurate to say it has a periodic constitutional *commission* referendum.

⁵ Outside the U.S., the last PCCR to pass and result in a convened convention was in the Federated States of Micronesia, which approved a call for one in 2019. Other former U.S. colonies in the Pacific adopted PCCR as well as Fiji, a former British colony

⁶ Georgia's 1777 Constitution was arguably the first. But its use of an initiative to call a convention was never implemented and soon cut from its constitution.

⁷ The reason for this omission is beyond the scope of this article. But it may partly be explained by the fact that, in comparison to U.S. state and many other countries' recent constitutional change mechanisms, Article V more weakly implements CPT principles so has less practical salience. Perhaps the most salient fact about Article V is that it is rarely used; most national constitutional change in America is made informally via the judicial system. Constitutional scholarship is also overwhelmingly focused on that mode of constitutional change.

⁸ Most legislatures that call a convention provide for an initial vote on whether to call a convention. But this type of "initiation" vote is very different than the PCCR vote to do the same because the legislature has control over the

former but not the latter. This control includes not only the power to place the question on the ballot but also encumber the question with convention related provisions favorable to the legislature.

⁹ A speaker also has other special powers such as calling the House to order, allowing members to give speeches on the Floor, and appointing other House leadership positions.

¹⁰ This is a very simple ranking system that would overlook important variations, as the difficulty of ranking conventions based on the extent to which they are democratic should not be underemphasized. For example, many key convention provisions are part of a state's unwritten constitution, and a legislature may subvert a convention's independence through a variety of subtle means such as through control of its budget, staff, and location. Additional difficulties would arise from applying such a scale to actual conventions. But distinguishing between weakly and strongly democratic conventions—or public bodies labeled as conventions that should be labeled something else—could add valuable analytic rigor to the higher lawmaking literature and allow for new types of research just as the Freedom House and Polity indices of national democracy revolutionized comparative democracy studies. Examples of weakly democratic conventions include early American, Southern Civil War secessionist, and Jim Crow conventions that skipped the ratification stage. Some widely cited convention counts in the scholarly literature seem to rely on political actor claims and state constitution terminology, rather than independent scholarly analysis, to classify public bodies as conventions.¹¹ Applying this scheme to the 14 states with a so-called periodic convention referendum, Connecticut should be recategorized as having a constitutional commission, not a convention, initiated by a periodic popular vote. Connecticut's Constitution grants the legislature the power to “prescribe by law the manner of selection of the membership of such convention.” (“Constitution of the State of Connecticut” 2024 Article 13, Sec. 3). Given the likelihood that the legislature would seek to appoint the convention delegates, Connecticut should receive zero points because without independent convention delegates, the convention loses its democratic function as a meaningful legislature bypass body.¹² A vivid example is in Maryland. In 2012, supporters of a gaming referendum—all casinos—spent \$49.9 million to win gaming rights in Maryland (iSolon.org 2010) with a 51.9% majority voting on the question in favor. In 2010, supporters of the convention referendum spent \$0 (Open Secrets 2010) with 54.4% voting on the question in favor. The convention referendum nevertheless lost because the State Board of Elections ruled that the required majority was a majority voting on any question at the election.

¹³ Louisiana's 1972 “convention” might appear to be an exception. But it consisted of the legislature reconvening as a “convention” and thus should not be treated as a convention in the sense used in this article.

¹⁴ Delaware is a partial exception. There, the legislature by a 2/3 vote can propose an amendment and after an intervening popular election for legislators, the successor legislature can ratify it by a 2/3 vote. Although there is no direct popular ratification of constitutional proposals, this is a robust indirect popular ratification requirement, unlike in Virginia and other Jim Crow states where, for example, there was no intervening election between proposal and ratification.

¹⁵ *Butterworth v. Dempsey*, 237 F.Supp. 302 (D. Conn.1965).

¹⁶ To pass a constitutional amendment, Rhode Island's Constitution required a supermajority vote over two legislative sessions. To make it easier and faster to propose constitutional amendments, the legislature passed legislation for conventions with limited agendas in 1944, 1951, 1955, 1958, and 1973. Delegates to the 1973 convention ignored the limitations and proposed a PCCR provision, which voters ratified and The Rhode Island Supreme Court refused to overturn (*Malinou v. Powers* 1975; see also Conley 2002, 187–88, 194).

¹⁷ From the U.S. Declaration: “We hold these truths to be self-evident, that all men... are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness... That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

From the Virginia Declaration of Rights: “That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community... that, when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.”

¹⁸ The federal process is also specified so vaguely (Sabato 2008, 202–5) as to invite procedural controversy, litigation, and abuse by the constituted powers, especially Congress, with effective control of the process. State convention provisions also suffer from ambiguity but not to the same extent. For example, New Hampshire, with 16 conventions under its belt, suffers from far less ambiguity.

¹⁹ Similar arguments would be made earlier in Pennsylvania and New York but without the full procedural breakthrough implemented in Massachusetts (Adams 2001, 74–77, 82).

²⁰ The independently elected convention to enhance constituent proposal power became a norm before constituent ratification became a norm—which did not happen outside of New England states until the 1830s. New England may

have had an advantage in implementing ratification technology early because it was especially well suited for town meetings, where direct ratification voting was first implemented.

²¹ The other was in Georgia, also in the 1790s.

²² There were two other efforts to implement initiation power during the Revolutionary Era that are not discussed here because they did not instigate an enduring movement. Georgia's 1777 constitution included a provision to call a convention via a petition. But that provision was never used and was quickly removed from its constitution. It would not be until the 20th Century that four other states--Florida, Montana, South Dakota, and North Dakota--would explicitly include such a provision in their state constitutions. But those four states would also have the constitutional initiative, which private groups always prefer to use when seeking to bypass a legislature. The second method, a Council of Censors was adopted in Pennsylvania's Constitution and then Vermont's before being removed. Both were essentially identical and involved electing a council of censors at seven-year periods to act as a sort of combined inspector general, constitutional court, proposer of constitutional changes, and caller of a ratification (as opposed to proposal) constitutional convention (see generally Meader 1898). The PCCR approach to initiation was simpler and more direct. Some of the advocates for Pennsylvania's Council of Censors would advocate for LBT with almost as much eloquence as New York's leading advocates for PCCR in the 1840s (Kruman 1997, 57–59). The Massachusetts convention of 1853 proposed, in addition to PCCR, allowing town meetings to initiate a convention. But the people rejected the proposed constitution (Lord 1916, 25).

²³ Wes Adams points out that the first known use of the term “constituent power” was in an open letter dated April 11, 1777 from Pennsylvania radical Thomas Young “To the Inhabitants of Vermont.” On the other hand, instead of the term “constituted power” Young used the phrase “delegated power” (Adams 2001, 63). Despite the different wording, the basic concept of delegated and constituted power was essentially the same and was reflected in the Council of Censors adopted by both Pennsylvania and Vermont.

²⁴ *State v. Howell*, 181 P. 920, 922 (Wash. 1919). (See also Dinan 2022a)

²⁵ As a practical matter, the merits of the difference are less important than the politics of the difference. As observed earlier, given a choice between pushing for a constitutional initiative and a convention, advocates invariably prefer the constitutional initiative because it gives them much more control over the constitutional change process. With a convention-based process, advocates could spend a fortune enabling and then electing delegates to a convention yet still not get the convention to propose their desired change.

²⁶ If convention opponents argued that convention elections would be more corrupt than legislative ones, their risk argument would make more logical sense. But the typical argument made is only that convention elections will be equally, not more, corrupt.

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