

Written Testimony of J.H. Snider on the Preparatory Commission's Report

I appreciate the opportunity to present this written testimony for the public record concerning the Preparatory Commission's report, including how it deals with questions concerning constitutional convention costs vs. benefits, the democratic functions of a legislature- vs. convention-based mechanism of constitutional reform, the attack on the ratification process, and how the Preparatory Commission Report should contribute to the Voter Information Handbook. Please mark my viewpoint as "neutral."

Convention Costs Vs. Benefits

The question whether and if to include constitutional convention costs in the Preparatory Commission's Report has come up repeatedly at the Commission's public meetings. The question of a convention's cost has also been the sole subject of the Commission's invited public expert testimony except for a discussion of Rhode Island's campaign finance laws relating to ballot measures.

The question is highly politicized because convention opponents prefer to talk about convention potential costs and risks while convention proponents prefer to talk about potential benefits. During the last two reporting cycles in 2004 and 2014, the preparatory commissions aligned themselves decidedly with the convention opponents by featuring a convention's costs rather than potential benefits. A "trust-us" cost forecast methodology—that is, using key undocumented assumptions—should not be acceptable. As of the Commission meeting on August 21, 2024, this Commission seems to be embarked on a similar course of action.

I suggest that the Commission include two adjacent sections in its report: one labeled "potential benefits" and the other "potential costs." The potential benefits section should include all the proposals a convention might consider that would make Rhode Island government more democratically accountable, which includes an efficiency as well as effectiveness component.

This is the way public policy analysis is generally done: benefits are explicitly weighed against costs. The indirect way the preparatory commission has in the past presented such cost-benefit information has failed to meet this minimal requirement of serious public policy analysis.

For costs, I recommend providing a breakdown of past and projected convention costs because of Rhode Island's track record of aggregate cost data being so highly politicized. For example, the public should be able to compare the differences in line-item costs between Rhode Island's 1973 and 1986 conventions and ask why the 1986 convention was charged particular costs that the 1973 convention was not. I would also suggest that cost data be provided for Rhode Island's 1944, 1951, 1955, and 1958 constitutional conventions when it was the state legislature, rather than the people, driving the call for a convention. Only after 1973, when Rhode Island supreme court ruled that the state legislature could not limit a convention's agenda, did the legislature's current strategy of focusing on convention costs come to the fore. I should add that elections for convention delegates have often occurred at general elections, where no extra cost need be incurred. Your report should note this if you include the cost for a special election.

Nor should it be assumed, as preparatory commissions have assumed in the past, that low convention costs are necessarily good. Democracy is actually a very expensive form of

government. The most efficient type of government is a dictatorship that does away with both the “high” cost of elections and the “high” cost of the legislative and judicial branches of government. But I think most people would agree that these are the costs civilized people need to pay to enjoy the benefits of democracy. Similarly, the cost of a high-quality constitutional democracy can be expensive. By this I mean that not ordinary lawmaking (e.g., by the legislature) costs money, so does higher lawmaking (e.g., by a convention). I would suggest that the latter cost, like the former, is an essential part of the price that civilized people pay to live in a high-quality constitutional democracy. If you want a high-quality democracy, you must pay for it.

Whether the public is right or not in its beliefs, the cost-benefit analysis should take into consideration public surveys concerning state government waste; for example, a [Gallup Poll](#) that the public thinks state government wastes 42% of the state’s annual budget (the specific percentage of claimed waste can vary by the poll). The key to such an analysis is not the actual state government waste but a breakeven analysis concerning how much more efficient a convention would need to make state government for a convention to break even on its costs over the ten-year period between convention referendums. For convention costs based on the cost in current dollars of Rhode Island’s 1986 convention, the breakeven answer would be well under .1%, thus promising a return on investment of over 1,000% if a convention improved the efficiency of Rhode Island state government by 1%.

The Democratic Function of Legislature- vs. Convention-Based Constitutional Reform

But before addressing the cost-benefit question in the body of the report, I suggest addressing another question that previous preparatory commissions have never seriously addressed: why does Rhode Island have the periodic constitutional convention referendum? That is, what democratic function does it provide that the legislature does not? I suggest that the report should open with this big picture question before moving on to the potential benefits and costs of a convention. (The 2004 preparatory commission report did have a section “Comparison of Methods: Convention V. Legislative Proposal.” But it made no genuine attempt at balance in answering this question. Instead, it merely compiled some of the “no” side’s talking points.

I would suggest that the traditional American answer to the question posed above is that we don’t want a legislature designing its own constitutional powers because it has an inherent conflict of interest doing so. That’s why America invented the institution of the convention and why Rhode Island had the Dorr Rebellion in the 1840s. Of course, to make constitutional amendments where the legislature lacks conflicts with the people, the legislature is a more cost-effective proposer, which provides the rationale for the follow-up cost-benefit analysis.

Your preparatory commission could argue, like other opponents of the convention process, that the convention process has no unique democratic function; that is, that a legislature can do anything a convention can do. But if you do make this argument, you should make it explicitly rather than implicitly, as has been done in the past by preparatory commissions that focused readers’ attention on a convention’s costs and risks, leaving the reader to infer that a legislature can do everything a convention can at less cost and risk. You might ask the question, for example, why a 2023 [University of Rhode Island Poll](#) (page 11) cited during the Commission’s public hearing on August 14 found that only 10% of Rhode Islanders had a lot or a great deal of trust in the Rhode Island state legislative branch of government, consisting of the members of the

Rhode Island General Assembly. This was considerably lower than a similarly worded Gallup Poll that found that 32% (but still a very low number) of Americans have either a fair amount or great deal of trust in their state legislature. Incidentally, both results concerning low public trust in state legislatures might be comparable to America's Founding Era, when neighboring leaders in Massachusetts, like John Adams and the Berkshire Constitutionalists, who invented the independently elected constitutional convention, often warned about "legislative tyranny" and legislatures "usurping" constitutional powers that should belong to the people.

Based on my reading of American state constitutional history from the late 18th Century to the present—as well as Rhode Island's Dorr Rebellion history—I think a more reasonable explanation for this amendment process existing in Rhode Island's constitution is because constituted powers (e.g., a legislature) should not have monopoly proposal power over determining their own constitutional powers. This could be stated more simply by observing that some constitutional convention advocates believe that a legislature is not as well suited as an independently elected constitutional convention to propose certain types of popular democratic reforms. These include reforms that weaken a legislature's powers, strengthen the executive or judicial branch's powers, strengthen home rule (local powers), or weaken the power of special interests. The latter was the primary reason that, during the 20th Century, some 25 U.S. states adopted either or both the statutory or constitutional initiative. During the same period, eight states, including Rhode Island, adopted the periodic constitutional convention referendum.

Among Rhode Island's New England neighbors, Massachusetts and Maine have the initiative, New Hampshire, Connecticut, and New York the periodic constitutional convention referendum, and Vermont a strong town meeting tradition. New Hampshire—similar in size to Rhode Island—had ten unlimited constitutional conventions during the 20th Century. New York pioneered the modern periodic constitutional convention referendum in 1846 in the wake of Rhode Island's Dorr Rebellion a few years earlier. Vermont's strong town meeting tradition functions akin to both the initiative and periodic convention referendum.

At the Commission's August 21 public meeting, one commissioner exhorted the Commission's report writer to highlight that a convention has an unlimited agenda, with the unstated implication, as many of the "no" advocates asserted at the public hearings, that this power could be used to take away (rather than increase) the people's rights. No other commissioner objected to this recommendation. I do not object to the Commission's report noting that a convention has unlimited proposal power. But I would argue—along with most democratic theorists who have considered the matter—that this is a feature, not a bug. Indeed, the primary contemporary democratic function of a convention is to provide the people with a legislative bypass mechanism, and the only way this can be accomplished is by not allowing the legislature to limit its agenda. A convention is thus granted "unlimited" constitutional proposal power in the same sense that the legislature is granted that power; that is, subject to federal law and popular ratification. If the Commission wants to berate the "unlimited" power of a convention, it should feel free to present the "no" side's argument that this unlimited power is bad. But it should also present the competing position, much more in tune with America's intellectual tradition, that this is the most democratic feature of the convention process. It should also explain why it is okay for the legislature but not a convention, to have this type of "unlimited" power. State supreme courts, which former U.S. President Woodrow Wilson described as sitting constitutional conventions because of their power to determine what constitutions mean, especially the rights in

constitutions, arguably have even more “unlimited” power over constitutional lawmaking because their constitutional rulings aren’t subject to popular ratification. They have enactment as well as proposal power.

The Attack on the Constitutional Amendment Ratification Process

As for all the anti-majoritarian talk about the ratification process for constitutional amendments, this should be understood as nothing less than an attack on U.S. state constitutional democracy. It smacks of the fearmongering and warped histories that the enemies of democracy have employed for thousands of years, albeit masquerading in new civil rights and campaign finance clothes. During the last 240 years, the track record of genuine state constitutional conventions in enhancing American political rights, including voting rights and related civil rights, is much better than the track record of state legislatures. Just look at Rhode Island’s Dorr Rebellion for one example in Rhode Island’s backyard. The convention process is not perfect. But the goal, as with all other democratic problems—of which America has many—should be to try to fix the problems (many of which are easily fixable) rather than to abandon our democratic institutions, which is what demagogues have always sought to do. And yes, Rhode Island’s 1986 convention, for all its problems like any other democratic institution, did far more democratic good than harm, not least of which was to create a readable document, create a desperately needed state ethics commission, and give average Rhode Islanders the right to use their shoreline.

Please enter Patrick T. Conley’s op-ed, [Political paranoia and constitutional constipation](#), Warwick Beacon, August 22, 2024, into the Commission’s record for its thoughtful and authoritative treatment of some of these issues. Conley was the author of Rhode Island’s periodic convention referendum clause as well as an active participant in Rhode Island’s three last state constitutional conventions.

As for claims that the legislative process is more accountable than the convention process, the argument that has been made is full of dubious and unstated assumptions. First, legislatures both propose and pass laws; conventions only propose them, which the people then have the right to approve or reject. I would suggest that that makes the convention process more accountable than the ordinary legislative process. Just think of all those special interest riders that legislatures add to must-pass bills at the last minute, often at the end of a session, and with virtually no public discussion. This is not possible with the convention process, where there are months between the proposal of a law and its possible enactment via popular ratification.

Second, on constitutional as opposed to statutory questions, both the legislature and convention only have proposal power. But special interests, including both big business and big labor, vastly prefer the legislative process for proposing amendments because they can exact penalties on legislators that they cannot with convention delegates, who, by definition and by careful design, are not up for reelection. It’s thus a feature, not a bug, that the convention process forces delegates to focus on proposing reforms that the median voter, popularly known as “the people,” will approve.

Third, legislatures have more so-called agency loss than conventions because legislatures have a vastly larger agenda, given that a legislature passes both statutory and constitutional law. Agency loss includes the difficulty principals have holding agents accountable when the agents are doing many different things and the principals must evaluate the agent as a large, very complex

package. Convention delegates, by contrast, generate a much smaller package, with each major item in the package divided for separate approval or rejection by the voters. This is also one of the democratic rationales for the initiative process and why polls consistently show that the initiative process is highly popular with voters in the states that have it.

The Preparatory Commission's Impact on the Voter Information Handbook

Regarding the Secretary of State's Voter Information Handbook, which has in the past been highly influenced by preparatory commission reports, I believe he should follow Rhode Island tradition and law by not including costs in descriptions of non-bond referendum items (e.g., see both the 2014 letter on this matter by former Rhode Island supreme court Justice Robert Flanders to the Secretary of State and the apparently concurring legal opinion of the Secretary of State's legal counsel). My guess is that the above no-cost rule regarding ballot summaries has generally been followed on legislature and convention proposed constitutional amendments because it is so hard to quantify benefits for many proposed referendums, not just convention referendums. For example, how do you quantify in dollar terms the benefit from 1) eliminating asbestos or lead pipes in school buildings? 2) creating safer communities, 3) eliminating sexist and obsolete language from the constitution, 4) creating a state ethics commission, or 5) creating stronger home rule or other competing branches of government? Thus, selectively adding cost estimates to the convention referendum ballot summary can reasonably be interpreted as introducing anti-convention bias. If the Commission, with its much greater resources, has trouble quantifying the benefits of a constitutional convention, the Secretary of State will surely, too. And if he cannot precisely state the benefits, he should avoid doing so with the costs, which have proven to be based on equally politicized assumptions. As the Commission's legal counsel said at the commission's August 21 public meeting, "nobody knows" the future costs of a convention.

To be sure, the laws regarding the Secretary of State's use of costs on the ballot summary may be unenforceable and thus easily ignored. This is partly because the Voter Information Handbook is published and mailed to all Rhode Island voters near the last possible moment before voting begins. As a consequence, there isn't time to litigate and then, if successful, rewrite, reprint and resend the Voter Information Handbook (all this assumes that it isn't prohibitively expensive to litigate, which is a dubious assumption). And if the litigation were postponed until after the election, it would make no difference because no judge is going to later overturn a convention election because of a biased ballot summary in a Voter Information Handbook.

I would suggest, then, that you head off this type of lawless outcome by explicitly including in your report a request that the Secretary of State not include in his ballot summary any cost information that you include in your report. I would also suggest that, if you choose not to quantify any of the potential benefits of a convention, your report should avoid any quantification of the costs of a convention as well.

For your convenience, I'm attaching below the convention cost section from the 2004 and 2014 preparatory commission reports. The 1984 report included no cost section.

Sincerely,

J.H. Snider, Editor

[The Rhode Island State Constitutional Convention Clearinghouse](#)

2004 ReportCONVENTION EXPENSE

The consideration of whether to call a Constitutional Convention cannot properly be undertaken without a complete understanding of the substantial cost of such action. Even if delegates are uncompensated, delegate expenses must be paid. Other necessary expenses include staff salaries, printing costs and operational expenditures. The foregoing examples suggest the careful study and evaluation required to effectuate major constitutional reform. The General Assembly has resources budgeted for the kind of research and data gathering necessary when it proposes amendments, but a Convention would require a substantial staff to work with delegates and with the Convention committees to which proposals are referred. A convention in 2006 would unquestionably require the use of experts, consultants, and researchers. Particularly since Convention delegates themselves are volunteers, they must be provided with the information and resources needed for study, deliberation and decision-making. Consequently, the expense of a convention in 2006 will far surpass the cost of the 1985 convention. The cost of the 1985 constitutional convention was \$891,000; the projected cost of a similarly-conducted convention in 2006 would be at approximately Two Million Dollars, after adjusting 1985 costs for inflation. Because many of the parameters of a Constitutional Convention would be decided by the General Assembly and the elected delegates to the Convention, the cost could be considerably higher.

2014 ReportCONVENTION EXPENSE

Many of those who testified at the public hearings encouraged the Commission to consider the cost of holding a Constitutional Convention. Although delegates to a Constitutional Convention will be volunteers, the expenses incurred to carry out their duties must be paid. A convention in 2016 would not only require a substantial staff to work with delegates, it would unquestionably require the use of experts, legal counsel, consultants and researchers as volunteer-delegates must be provided with the information and resources needed to carry out their responsibilities.

Identifying a likely total cost for a Constitutional Convention in 2016 this early in the process is fraught with uncertainty. There are substantial unknowns that will affect costs, e.g., the location and total number of meetings to be held, the expense of the experts, and the size of staff necessary to assist delegates in carrying out their duties. The Constitutional Convention in 1973 was held at a total cost to taxpayers of approximately \$20,000. The Constitutional Convention in 1986 was held at a total cost to taxpayers of \$891,000. After adjusting 1986 costs for inflation and in consideration of the factors listed above, a similarly conducted convention in 2016 would be approximately Two and One-half Million Dollars, (\$2.5M). However, as many of the parameters of a Constitutional Convention would be decided by the General Assembly and the elected delegates to the Convention, the cost could be considerably higher.