



# **If Not Now, When?**

**Only a constitutional convention gives the people the tools to make real change**

**By Don Canning**

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## Foreword by J.H. Snider

The pamphlet format used here has a special place in American history, as it was the format used during America's Revolutionary Era by citizens unhappy with British rule and seeking to replace rule by monarchy with rule by the people. Don Canning has written this pamphlet in the spirit of those forbears. To me, it has the ring of Tom Paine's *Common Sense*, originally a 47-page pamphlet written in 1776, which helped inspire not only American independence but a wave of state constitutional conventions as the colonists tried to turn their colonial governments into independent states ruled by the people, not the British Crown.

The late 18<sup>th</sup> Century was the era when American states invented the democratic institutions that have proven to be America's greatest contributions to the development of democracy worldwide, including the written democratic constitution and the independently elected constitutional convention to propose constitutional changes followed by a popular vote to ratify or reject them.

Since the fall of the Soviet Union in 1991, the world has witnessed a golden age of democratic constitution making that has left both America and Alaska in the dust. Just compare the rights protected in many modern constitutions to the miniscule set of rights protected in Alaska's Constitution. The current scaremongering campaign in Alaska against calling a state constitutional convention is a vivid illustration of the political forces that have caused not only Alaska's but America's governmental stagnation and dysfunction.

Author Canning explains the merits of the convention process and outlines some of the ways it could be used to enhance democratic accountability in Alaska. I am especially pleased that Canning has proposed ways to improve legislative bypass institutions, of which the best known are the constitutional convention and constitutional initiative. His proposals may seem radical to an Alaskan audience. But to leading contemporary democratic theorists they would not, and I have long supported similar reforms. Even if readers dismiss them as impractical, I hope they will thoughtfully consider them not only in 2022 but in future eras of Alaskan politics.

--J.H. Snider, Editor,  
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## 1. An Awkward Problem

On election day, this November 8th, you will be faced with a question on your ballot. Verbatim it will read: “Shall there be a constitutional convention”? Article 13, Section 3 of Alaska’s constitution requires that this referendum be presented to voters every ten years.

Most people fear the convention - fear what might happen if a convention were enacted. Paraphrasing the late former Attorney General John Havelock, the political right fears that, in a new convention, Alaska’s constitution would become a “plaything” of the political left. And the left, of course, fears the same thing from the right. So, for many people, this is a simple matter: Just vote “no.”

A constitutional convention would be the most powerful assembly that can exist in Alaska. It would have Plenary power, which means that it could make any changes to Alaska’s constitution that don’t violate the federal constitution, and that’s a lot of latitude. It’s understandable for people to look around them, see contentiousness and discord everywhere and assume that that same atmosphere will prevail at the convention itself. The risks, for many, will appear to outweigh the benefits - possibly far outweigh them. In contrast, if we vote “no”, we can reassure ourselves that we stood watch with our foot on the lid of Pandora’s box. Come November 9th (the day after election day) we can return to our harbor of safety: the status quo.

*The status quo, our harbor of safety.* The morning after we reject the convention we can once again resume our undistracted fears of where we are headed as a society: social fragmentation and deep divisions in government and politics that are spilling over into civil society, the disfigurement of our public discourse, a political system and an electoral campaign system so money-intensive that many citizens have come to feel that public office is essentially purchased, Institutions and agencies go through the motions of democracy - elections, hearings etc. - but the pattern of governance leaves citizens with the feeling that the real decisions are made behind closed doors and that those with financial means have special access to those proceedings. We call it democracy, but it has come to feel more like a democracy theme park.

This presents an awkward problem because, if we take a step back from it, it is the status quo that brought us to the predicament we find ourselves in now. Can it possibly be otherwise? Some assert that we can change the status quo *through* the status quo. Maybe a little. A little around the edges maybe, but “a little around

the edges” is not the kind of change we need. Really, our predicament can be materially changed by one instrument only: a constitutional convention.

So what are we to do? We are told by many experienced and respected people that we must not vote “yes”. What was, for the delegates of 1955, a treasure chest will be, for us, a pandora’s box. Outside interests with dark money will insinuate themselves into the convention process and our only role will be as hapless bystanders forced to watch as extremist forces make a plaything of our constitution on the public nickel.

You are reading this pamphlet because I respectfully disagree. What follows are several essays mostly focused on specific reforms that I am proposing we make to our constitution to make our government and politics more representative, more transparent, more effective and more accountable. But also I address, in the next essay and in the second to last, the question of risk - the pandora’s box - and the notion of being powerless before an alien process. I aim to convince you that both are mostly a mirage: a sort of fear-of-the-unknown feedback loop that treats the risks involved in enacting the convention as though they were insurmountable while it treats the risks inherent in cleaving to the status quo as though those risks were trivial. And this fear also treats the opportunity for constitutional reform, that we would be passing up for a decade, as though it would be no loss. Or, alternatively, the other side of this fear reassures us that we can fix our problems some other way - within the status quo - that will ask of us a smaller measure of courage and responsibility.

There is no such way.

Whatever we decide, we will live with it until 2032 at least.

## 2. Structure Matters

A lonely wind is blowing through America's state constitutions these days. There has not been a constitutional convention in any state in 30 years. If that seems unremarkable, then consider that there have been over 230 state constitutional conventions since the nation's founding. Even in the 22 years spanning from 1970 to 1992 there were 13 state conventions. With four of the nine states that held conventions actually holding *two* each during this period. And, like Alaska, there are thirteen other states that have a periodic convention referendum. Which means that the referendum question that you will face on November 8 has confronted many other American voters. Since 1992, there have been 30 such referendums around the country, two of them here in Alaska. The response, in every case, has been "no", although in some states, such as Alaska in 1970, only after either litigation or disputes about the election result.

And, so it is here: five recent rejections and headed for a sixth.<sup>1</sup> In Alaska, rejecting the convention has become a formality that we go through once per decade. Everyone fears havoc to our democracy if we vote yes. The conventional wisdom holds that, if we reject the convention, then, whatever the flaws in our status quo, we will have at least averted a "runaway" convention.

But will we have?

Everything about our present political system has evolved to ensure that it will produce tomorrow mostly the same results we see today... except a little more extreme. When dedicated convention opponents invoke the prospect of a "runaway convention," they usually go no further than assuring us that the convention process will become hostage to outside influences that assuredly are more powerful than we are. But we are never given detail. In fact there have been at least two state constitutional conventions that might fit this description of "running away" and a hapless public - you and me - had nothing to do with inviting them in.

These two conventions happened, one each, in Louisiana and Texas in which the legislature *itself* convened a convention and then appointed *itself* as the delegates so that it could pass constitutional amendments under a lower vote

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<sup>1</sup> The referendum has been on the ballot six times: 1970, 1972, 1982, 1992, 2002, and 2012. The first time, in 1970, it narrowly passed, but the result was invalidated following a lawsuit asserting that the language on the ballot was misleading. This changed the decennial cycle from years ending in "0" to years ending in "2." Beginning in 1972, it was rejected the following five times.

threshold than constrains ordinary amendment processes. I see nothing in Alaska's constitution that would structurally prevent this from happening here. A real democracy needs more than just wary or grudging tolerance of citizen participation; a real democracy is *defined* by citizen participation. And the constitution does not belong to the legislature, the legislature is, itself, a creature of the constitution; the constitution belongs to the people.

When we observe the national scene and see partisan trench warfare, government shutdowns, information-less campaigns, powerful corporations essentially writing our laws, local small businesses driven under, lawmakers paralyzed to act in the face of urgent economic problems; social fragmentation and loss of trust - this has all happened, in some fashion, here too.

The status quo *itself* has all the hallmarks of a runaway convention, only set in slow motion. Familiarity has numbed us to how dangerous it is.

But when we see problems in government and society, we are not powerless to change them. In the many different ways that government and politics can be structured by constitutional language - and every state has a different recipe - there is a universe of opportunity for real reform, real results. The way constitutions interact with government and society can be complex. But understanding that complexity is worth the effort and, in the convention referendum, we are faced with an ideal context to consider more thoughtfully how much constitutions matter and why they matter.

Constitutions matter, of course, in part because of the rights and protections they confer on citizens - think of our federal constitution's First Amendment, Second Amendment or the "equal protection" clause of the 14th Amendment . This aspect of constitutions is well known and the meaning of such constitutional language regarding rights and protections is endlessly debated and fought over. But that's not the only reason constitutions matter and it's not what this pamphlet is about.

This pamphlet is about the other thing constitutions do, which is to establish and design the *structure* of government: For example, should our legislature have two chambers, or one? How long should legislative terms of office be? How will district boundaries be drawn? How will judges be selected? What happens if somebody in government does something illegal or unethical? Who runs elections? Who decides how much legislators, governors and judges will be paid? Will there be a mechanism to make changes to the constitution? If so, who gets to use it?

Government structure is like an iceberg; the immensity of its influence is not fully apparent from the surface. The structure of our government powerfully influences the effectiveness of public institutions - legislatures, courts and agencies. It affects representativeness and transparency in lawmaking and appropriations, and it affects accountability throughout government. And, by affecting how representative and transparent government is, structure influences the relationship between government and the people. Which means that the influence of structure - for good or ill - can reach deep into society itself. Structure matters. When we invoke the word “democracy”, it is structure, more than any declaration of rights, that is what actually makes the government democratic - or undemocratic. Without good structure, rights are just words on paper.

The 1955 convention, in drafting Alaska’s constitution, established the structure that we operate under today. But those delegates could not see over the horizon, nor could they foresee how every aspect of the structure they established would hold up decades into the future. And, of course, they were focused on achieving statehood. Essentially all of the convention delegates were statehooders and the convention (which convened three and a half years before Alaska achieved statehood in 1959) was conceived specifically to prove Alaska’s readiness to be a state. In everything the delegates did, they had one eye figuratively on Congress. Because, of course, it was Congress who would grant statehood - or withhold it.

Wanting Alaska to be a state was no sin, but the statehood goal did color the convention delegates’ attitudes toward constitutional structure; provisions or clauses that the delegates imagined congress regarding as deviant were dismissed as too risky.

By now, though, Alaska has been a legitimate state for 63 years and we don’t need to consider what anybody else might think about our system of government - only what will work best for Alaska, for the living generation and for the future. It’s time we took this convention referendum more seriously and thought about it more deeply.

If we can find the courage to accept the risks that come with voting ‘yes’ we will have opened a door that is otherwise shut. We can use constitutional revision to strengthen our democracy through structural reform, for which there are detailed proposals in the pages ahead. That’s a serious purpose that assumes we will take responsibility for something larger and more lasting than ourselves. That’s what the delegates to Alaska’s original convention did and they proved that ordinary people can do such work.

The generation that carried out the original convention -which included World War II veterans - were indeed a special bunch, but we today are not so degenerate as to be hopeless. To believe so is a self-fulfilling prophecy. And we don't have to be hapless bystanders; we can shape the convention process (as you will see in section 10). All the tools we need are either constitutionally built into the process or are easy to construct.

So I'm not proposing, in this pamphlet, that we should go into the voting booth and flip a coin or to just vote "yes" for no other reason than to give it a chance; I have specific reforms in mind.

And we can begin with the first branch of government: the legislature.

### 3. Make Alaska's Legislature Unicameral

Let's start by making our legislature *unicameral*, which means it would then have one chamber instead of two. Only one state - Nebraska - has a unicameral legislature, which has been in place there since 1937. But a unicameral legislature has some big advantages over a bicameral or two-house legislature.

First, it solves a problem that is baked into bicameral legislatures: when neither chamber is willing to accept the other chamber's version of the same bill they have to find a way to compromise or they can't govern. Compromise itself is a good and necessary thing in politics... sometimes.

But the solution that Alaska (and most American states - and congress) employ, called the *conference committee*, is just the sort of entity that can give compromise a bad name. Because when the two houses can't agree on whose version of a bill should become law, they call a conference committee and then are bound to what the conference committee decides. Here's why that's a problem.

The conference committee is a joint committee composed of members from both houses and, at least superficially, both parties. This makes it, ironically, a sort of small, temporary, ad hoc, unicameral legislature which is intended to rescue the larger bicameral from its impasse.

The problem is that the conference committee performs its rescue at, potentially, a high cost to democracy itself. The nature of conference committees - powerful, small, often partisan and definitely *not* selected by voters - makes them an ideal instrument for lobbyists to influence legislation at its pinch point. Unicameral legislatures don't need them.

Unicameral Legislatures are more transparent than bicameral. In most American bicameral legislatures (again including Alaska) each chamber has an effective veto over the other. This means that, if a legislator knows in advance that a bill his constituents favor - but that he does not - will be killed in the legislature's other chamber, he can make great theater of agreeing with his constituents - even excoriating other legislators who would stoop to vote against the legislation that, inwardly, he himself opposes. And he can do this, figuratively, at no cost. Bicameral legislatures afford the sort of lawmaker who might be tempted to deceive his constituents the occasional smoke screen to do just that.

Unicameral legislatures put lawmakers on the spot, affording them fewer opportunities to hold their cards close to their chest. They are simpler and easier

for voters to follow. I doubt that two Alaskans in ten really either understands what goes on in Alaska's bicameral legislature or can follow it knowledgeably.

You may have noticed earlier, regarding the conference committee, that I characterized that body as a 'small, temporary, ad hoc, unicameral legislature'. This is a point worth expanding on because, it turns out, that pretty much all bicameral legislatures rely on some form of unicameralism to do their job. That is they are forced to act in some limited fashion as a single chamber.

Most, as I said, use conference committees. Some employ *joint committees* to do their ordinary committee work, meaning that regular legislative committees are constituted by members of both houses jointly rather than each house having its own redundant committees. The joint committee is a unicameral structure embedded in a bicameral legislature.

And then there is England - the nation whose bicameral parliament America's founding fathers copied when designing our congress (which the Alaska convention delegates then copied in designing Alaska's legislature). England has, ironically, mostly solved the problems of bicameralism by so constraining the power of its upper house (The House of Lords) that it's parliament is now effectively unicameral.

You can't get around it; bicameral legislatures will always require some form of unicameralism to rescue them from themselves. Why not quit beating around the bush and just go unicameral?

A unicameral legislature can be more representative than a bicameral one of the same size. If Alaska, went unicameral, and still kept our 60 total legislators we could increase representation by 50% - at no extra cost. Here's how.

Alaska has 40 representatives and 20 senators for a total of 60, but In our bicameral system, only our 40 house districts are unique; the 20 larger senate districts are redundant (each senate district comprises two house districts). If we went unicameral (one chamber), and kept our total number of seats at 60, that would mean 60 unique districts instead of 40 - no redundancy and a 50% increase in unique districts. More districts means a better average voter-to-legislator ratio in each district. All other things kept equal, simply going unicameral would make our legislature more representative - by half.

There are 90,000 municipalities in the United States. Each is governed by a council or an assembly along with a mayor or a town manager. These are the legislative and executive branches at a municipal scale. This means that the Fairbanks North Star Borough Assembly, for example, is a little legislature and, of

course, it is unicameral, as are the assemblies of every one of America's 90,000 other municipalities. This includes New York city with its 8 million residents and \$100 billion annual budget (which dwarfs the entire state of Alaska by both measures).

Of course, states have different, and arguably more important, responsibilities than municipalities do. Maybe those weightier responsibilities merit a bicameral legislature. If one believed this, he would have to explain why the Alaska constitutional convention of 1955 was unicameral. That body was drafting the most fundamental and important laws that any state-level assembly can consider and it did so under tight time constraints. If unicameralism is adequate for our weightiest deliberations, why wouldn't it be adequate for annual lawmaking and appropriations?

Unicameral legislatures just plain work better than bicameral. And we could make our legislature unicameral at a constitutional convention.

## 4. Non-Partisan and Proportional

### Non-Partisan

I just proposed following Nebraska's lead by making Alaska's legislature unicameral. But Nebraska's legislature is not just unicameral, it is also technically *non-partisan*, and we would be wise to follow Nebraska in this example too. What "non-partisan" means in the Nebraska legislature is that the legislature's rules and leadership selection goes, not through political party structures, but through the whole legislature and it does so by secret ballot.

That's a big deal, and that's not the way we do it here in Alaska, or in most other states for that matter. In Nebraska, this system has resulted in, for example, a Republican majority electing a Democrat as president of the Senate (Nebraska's only chamber). To repeat, a legislature dominated by one party themselves elected an opposition, minority party legislator to the position of president of the senate. By taking parties out of it, Nebraska legislators can vote for who they think will do the best job - period. And Nebraska "takes parties out of" the business of selecting the legislature's leadership through a structural innovation so simple a schoolchild could understand it: a secret ballot. It follows that committee assignments are irrespective of party or seniority; legislators with the most experience in a given area are awarded those committee chairmanships. Makes sense.

And as it happens, Nebraska's procedures for constituting committees and appointing chairmen is not constitutionally fixed. It is instead, amazingly, just a rule; it could have been repealed by a majority vote in the legislature more or less at any time. But for 85 years it has held.

While I salute Nebraska for its democratic steadfastness, I think that now would be a good time to consider breaking the longstanding American constitutional tradition of letting legislatures write all their own rules. We know from decades of experience that plenty of legislators will give their allegiance first to political parties and second to the institution itself and to public service. Wouldn't it be nice if Alaska had some constitutionally fixed legislative rules that allowed legislators, of either party, to reward their fellow politicians based on a standard of public service rather than partisanship?

Nebraska probably has more information about both voter and legislator attitudes toward the structure and functioning of its state legislature than any other

state. They seem to care a lot about it and they're proud of their unicameral, non-partisan legislature.

A poll and research project conducted there in 2001 found that, from the '50s through the '90s the averaged responses of Nebraska legislators revealed that 83% opposed reverting to a bicameral system. Only 9% *avored* returning to a bicameral system (8% were neutral). The same poll revealed that Nebraskan *voters* preferred remaining unicameral by a two to one margin. And, when asked about the nonpartisan status of their legislature, both citizens and legislators favored it by strong majorities.

Going unicameral is not a step into the unknown and neither is going nonpartisan; Nebraska has 85 years of experience to prove the considerable advantages of both. We could follow their lead (our names even rhyme).

### **Proportional Representation**

We could also make our legislature *proportionally represented*. By restructuring legislative apportionment to establish multimember districts we can actually ensure that, across Alaska, nobody goes unrepresented. At the same time, we can so undermine the effectiveness of gerrymandering as to make it not worth the trouble, all by simply increasing the number of legislative seats each district votes for simultaneously.

This is not hocus-pocus; many stable, advanced democracies do it this way and it works well. In fact, over ninety countries use a form of proportional representation including Australia, Austria, Belgium, Denmark, Finland, Germany, Iceland, Ireland, Israel, Netherlands, New Zealand, Norway, Spain, Sweden and Switzerland. There are different forms of proportional representation but the version that would work best for Alaska comes from a more familiar place: Illinois.

The state of Illinois used a proportional system for almost 100 years to constitute its lower house. The system ensured that conservatives could still have some representation in liberal strongholds and vice versa for liberals in conservative districts. The Illinois system was simple; it relied only on each district voting simultaneously for three representatives rather than one. Simple change; profound effects.

In a three-seat proportional district, a candidate can win one of the three seats with as little as 25% of the votes. There are probably few conservative or liberal

districts in Alaska (and maybe none) that don't have even 25% minority party voters. So let's say, for instance a district is majority liberal. Based on Illinois' experience, that district will usually elect two liberal legislators and one conservative.

But, of the two seats won by liberals, one will be much more likely to go to a nontraditional candidate - say a registered democrat who is a party outsider or who doesn't have a big campaign "war chest" or who is an unaffiliated liberal with a strong independent streak or who is a moderate republican or even a conservative who connects well with voters and has demonstrated a willingness to cooperate for the good of the district. In conservative districts, just reverse all that. Across the state Alaskan voters would find themselves more accurately reflected in the legislature.

Think about the name - proportional representation - does it make sense that our present system habitually produces legislatures that either *do not* represent Alaskans proportionally? Or that, if it does, it does so by dumb luck. Is that good for democracy?

In Illinois, most legislators, irrespective of party, liked the proportional system as it resulted in better representation and cooperation. It necessarily encouraged cross-party coalitions within districts to accomplish district-specific goals and that atmosphere then infected the whole chamber, fostering cooperation and compromise; it made the legislature (the lower house anyway) more effective.

When it was abolished in 1980 -not because it didn't work, but as part of a "cost saving" amendment - the ink was barely dry on the enacting paperwork before at least one prominent advocate (for repeal) was already wishing she could go back and change her vote. And more would follow.

Unicameral legislatures, non-partisan legislatures, proportional representation - any one of these changes, while helpful and worth adopting, will not by itself put the democracy theme park behind us. But start adding them together - all of the above three for instance - and things could start to change. But we can do more. The next three sections focus on what may be the most important reform of all.

It involves the number four.

## 5. Separate the Powers

We have three branches of government: the legislative, the executive and the judicial. Is three branches the only way to do it? Why not two? Why not four?

*Why not four?*

Surely, it would be a mistake to get rid of any of our present three branches of government. We need a legislature, we need a governor and his agencies and we need courts and judges; each branch serves an important purpose, however imperfectly.

But still, is three enough?

It's not. Three is not enough. We need one more. And we have needed it since the beginning and we still don't have it. We need it to patch up a leak in the hull of our ship.

One can put care into making a ship's hull strong and sound and watertight. Or he can say "good enough" and rely on pumps to keep up with the rising water.

What do I mean by "pumps"? These metaphorical pumps, in the real world, can take the form of any number of remedial institutions like journalistic scrutiny, public hearings, editorials, lawsuits, campaign finance laws and much else. They work by ameliorating or treating the political problems that emerge naturally from our constitutional structure - like pumping water out of a ship's hull after it has already leaked in rather than preventing it from getting in in the first place.

Pumps break down, they have to be equal to their task and they require fuel to operate. Our metaphorical pumps are not working - not keeping up; our ship is riding mighty low in the water these days. Can it weather a storm?

This question boils down to one of the most basic tenets in American constitutional tradition - *separation of powers*. Separation of powers, as an idea, has been with us since the eighteenth century. But much gets left out of that old idea. For instance, there are a number of responsibilities and functions which have traditionally been assigned to the executive branch (a few also to the legislature) that, when so assigned, entangle the branches of government rather than separating them. This creates a conflict of interests.

This incomplete separation of powers is one of the most vexing problems in American government - state or national. It amounts to a leaky hull - a conflicted government structure that allows, and thus invites, corrupting forces into our democracy. Shortly I will examine a number of these conflicting structures in Alaska's government, but first consider a couple of prominent federal examples.

We see the fruits of incomplete separation of powers when the filling of a Supreme Court vacancy requires the chief of the executive branch - the president - to select a top ranked member of the judicial branch and this selection triggers full-on partisan war. This has happened at least five times since the nomination of Robert Bork in the late eighties - and has affected both parties. We see it when a president (or a congressman of the same party as the President) does something illegal or unethical and the Attorney General - for some reason - drags his feet about investigating his boss, or maybe he deflects the responsibility entirely. Again this has affected both Democratic and Republican administrations.

These problems and others stem from incomplete separation of powers. But, perversely, almost nobody characterizes it that way.

I want to emphasize what you have just read by repeating it. Incomplete separation of powers is one of the most corrosive influences on American politics. It contributes mightily to the dysfunction we see in government and, indirectly, to society as well. But almost nobody talks about it.

There are at least two reasons for this. The first being that separation of powers - or, more appropriately, its breaches or failures - is usually like wallpaper; as an issue, it almost always forms a background to the more immediately pressing policy dispute that media and citizens do focus on. The second reason is constitutional rigidity. In America, constitutions are hard to amend, which means that many of these more fundamental issues - like separation of powers - can come to feel out of reach, an unchangeable part of our political environment (again like wallpaper). Time and habit can render seemingly out-of-reach remedies invisible.

But on November 8th an instrument for constitutional amendment will be brought within our reach; a simple majority - 50% plus one vote - enacts a new constitutional convention. So what may be invisible at other times should be visible now - I wish it were blinding. We should talk about it.

Separation of powers matters. It is meant to prevent conflicts of interest and to prevent the concentration of too much political power in one place, which of course threatens democracy itself. Eighteenth century thinkers like John Locke, Baron de Montesquieu, Immanuel Kant and our own James Madison understood that, in order for a republic to work in practice, it could not rely on wishful thinking about human nature; it had to *structurally* prevent conflicts of interest. It had to build a watertight ship.

In the 51st *Federalist* editorial James Madison famously asserted:

“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and, in the next place, oblige it to control itself.”

Now, assuming you find yourself agreeing (as I do) with James Madison, consider the following clause taken verbatim from the last sentence of Article 2, Section 12 of Alaska’s constitution

“The legislature shall regulate lobbying”

Let that sink in for a moment - and that is not a typographical error. Does it seem to you that this is what James Madison had in mind when he proposed that a government must be obliged “to control itself”? Or consider the second to the last sentence of part(a) of Article 6, Section 8:

“Appointments [by the governor and by the leadership of the legislature to the redistricting board] shall be made without regard to political affiliation.”

These are the only two examples that I know of in Alaska’s constitution that are quite this transparently inadequate with regard to “obliging the government to control itself”. And I am sure that these examples were not written into Alaska’s constitution because the delegates didn’t care about conflicts of interest. I am sure they did care.

But those were different times; a few tiny leaks in the hull seemed a trivial matter in those days, only a decade removed from world war and smack in the middle of one of America’s most expansive and successful era’s. And the delegates were under tight time constraints and had a lot of work to do - a whole

constitution to write from scratch. But, as with the federal convention in 1787, the Alaska delegates did not seem to know what else to do with these necessarily conflicting responsibilities, so they improvised.

So now we have this constitution that, as good as it is relative to the constitutions of other states (by which measure, it's one of the best), still largely copies a number of serious flaws that run through much of America's constitutional tradition, state and federal. Here are some examples from Alaska's constitution:

- Allowing the governor primarily, but also the legislature, to play a role in selecting judges.
- Giving oversight of the Division of Elections and the Alaska Public Offices Commission to the Lieutenant Governor - himself an elected partisan politician.
- Giving the Attorney General responsibility for overseeing *all* of the states criminal investigations and prosecutions including, should it arise, of the governor himself (the A.G.'s boss and the one who appointed him) or of legislators (Who may be of the same party as the governor) or of the governor's appointees.
- Giving appointment power for the composition of the redistricting board to the governor and the legislative leadership, and the regulation of lobbying to the legislature as indicated a few paragraphs back.

Now let's consider more closely the relationship, I just mentioned above, between the political branches and the judicial branch. Presently, the governor has an equal say, with the leadership of the state bar association, in constituting a body called The Judicial Council. The Judicial Council's job is to comb through the membership of the Alaska Bar Association, (which, for present purposes, amounts to a registry of all the state's licensed lawyers) to nominate candidate judges. The governor then gets to select judges from among the council's nominees (and the legislature has confirmation power).

Take a moment to think about this. Here we have the governor empowered to select, in one four year term, one third of the body that will nominate judicial candidates that the governor then *also* gets to

choose among for appointment... to the judicial branch. Is this separation of powers?

It doesn't look like it to me. Consider that the judiciary is a different kind of branch than the other two. It is a technical, non-political branch whose members are not elected but appointed, for the same reasons that we don't elect neurosurgeons or oncologists. So far, so good. But allowing the political branches to play a role in constituting the judiciary establishes a patronage relationship, however subtle or indirect. Over time, this has the real-world effect of tying the judicial branch to the two political branches. It is a breach of the principle of separation of powers - a leak in the hull of our ship. Governors and legislators are partisan politicians; the judicial branch should not belong to them; it should belong to us.

If you can see in these examples the potential for conflicts of interest, then maybe you can also see a pattern here. American constitutional conventions, whether in Fairbanks or Philadelphia, have struggled to know what to do with some of these necessary responsibilities (somebody has to oversee elections). And so they have found an awkward home wherever convention delegates chose to put them. I call them *orphan* functions.

These orphans need a home.

And so I propose a fourth branch of government. The fourth branch is you and me - by proxy anyway. The main difference between the fourth branch and the other three is that the fourth branch is lottery selected, meaning ordinary citizens would be selected randomly and compelled to serve, as in jury duty.

Certainly, we can structure it to be flexible so that anyone chosen can opt out and pass his seat on to the next random selection. Particularly so if the convention were to make make this assembly of Alaskans permanent (serving one- or two-year terms) and salaried, rather than temporary and compensated by stipend.

For the purposes of this discussion, I will call the body that constitutes this new branch of government *the citizen's assembly*. It would serve as a politically independent reservoir - a new home - for all the orphan functions that in their present and traditional arrangement represent a conflict of interests or that leave separation of powers to the honor of politicians.

In the next section I will expand on the specific responsibilities, beyond judicial appointment and confirmation, that I envision this proposed citizen's assembly holding. And I will address what such a body will cost and why it would be money well spent. And in the section following that (section 7), I will expand

on why lottery selection encourages real deliberation and why that's so profoundly different from electoral politics - and necessary for the long term health of democracy itself.

## 6. A Citizen's Assembly for Alaska

Let's finish the job of separating the powers of government by establishing a fourth branch of government - a citizen's assembly - that will be a home for our government's orphan functions. The judiciary comes first; I already explained in the last essay why a lottery selected assembly and not the governor or the legislature should be responsible for selecting judges. Here are the rest of the assembly's responsibilities.

The fourth branch should have oversight and appointment powers for the Division of Elections and the Alaska Public Offices Commission. Currently the Lieutenant Governor has oversight of elections and the registration of candidates and direct democracy instruments (initiatives, referendums and recalls). These responsibilities should not belong to partisan politicians. Voting and elections should belong to the people.

I have come to think also that a citizen's assembly should have appointment power for the Permanent Fund Board. The Board of Trustees of the Alaska permanent Fund Corporation is meant to be a semi-independent entity, authorized to act independently of executive authority much like the independence that the Federal Reserve Board enjoys at the national level. That makes them like a little independent branch of government. Considered in this light, the Permanent fund board's independence is a separation of powers issue. It is, ostensibly, our money; we the people, and not partisan politicians, should appoint the fund's custodians.

A constitutional convention might also consider giving the fourth branch appointment powers for the Board of Game. And it would make sense to give responsibility for setting legislative and executive salaries to this body rather than asking the legislature to set their own salaries.

Appointing legislative redistricting commissions would be a natural fit for the fourth branch. Allowing partisan structures within the legislature itself to appoint the body that then redraws the legislature's own district boundaries is a system fraught with temptations to stray from the path of honor.

We all know that the current system invites gerrymandering - that is, schemes to use the redrawing of district boundaries to engineer the composition of the legislature for partisan advantage. The partisan composition of the legislature is a decision that should be submitted wholly and exclusively to Alaskan voters.

And here I would add that, If a convention were to adopt a system of proportional representation for constituting the legislature (as I proposed earlier), it would make it *intrinsically* extremely hard to gerrymander the legislature. In that case redistricting would finally become the apolitical technical matter that it always should have been.

And then there's the Attorney General. The late John Havelock, himself a former Attorney General, and a true constitutional sage, advocated, among many other things, for what he called an Inspector General. The Inspector General would be like the Attorney General but he would answer, not to the Governor, but to the people through a lottery selected body he called a *special grand jury*, which is analogous to the citizen's assembly I have proposed.

This doesn't mean we should replace the A.G. with the I.G.; we still need an Attorney General appointed by the Governor to prosecute the lion's share of the state's criminal cases. But, until the day when angels govern men, it makes sense to appoint a prosecutor who can investigate wrongdoing in the political branches but who does not answer to the Governor. Remember, we want to keep the hull of our ship watertight.

And, If you'll recall Article 2, Section 12 - "The legislature shall regulate lobbying" - the here-proposed office of inspector general would be a good home for this orphan. That's assuming, of course that a convention includes some clear wording to prohibit "revolving door" transitions between government and the private sector and other conflicts of interest and outright wrongdoing involving lobbying and elected officials.

Now, take a moment to imagine a government prosecutor who answers, not to the Governor, but to the people and is empowered to bring a case against the elected or appointed members of the political branches and to bring that case before state courts that themselves answer, in no way, to the Governor, but to the people. This is *real* separation of powers.

Of course, funding for the fourth branch would have to be constitutionally pegged to some fixed proportion of what the legislature itself costs or else the legislature will starve it. I imagine it costing, anywhere from a quarter to fully as much as the Legislature costs, depending on how large or small, and how occasional or full time we made it. Would it be a waste of money?

Well, consider that the fourth branch, as an idea, emerges naturally from an honest assessment of how certain government functions are carried out:

appointing judges, conducting elections, investigating and disciplining elected officials, overseeing the permanent fund etc.

We have to give those responsibilities to somebody, and we have to pay for them somehow. We can pay for them directly and honestly - and once - with tax dollars, as a dedicated, free-standing entity. Or we can pay for them twice, as we presently do: once with our tax dollars,<sup>2</sup> as these functions presently are figured into the budgets of the agencies that perform them now, and once in the form of corruption, as politicians, political parties and special interests seek, when they can, to accomplish their narrow goals in any way a system with less-than-fully separated powers will allow them to.

If, like me, you consider a corrupted system to be a real cost that we, as citizens, bear, then that casts the already modest potential monetary cost of a “whole new” branch of government in a new and more democratically responsible light. It’s time to start paying for our democracy up front, as though we cared about it.

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<sup>2</sup> Obviously, I’m using the term “tax-dollars” somewhat figuratively here in Alaska.

## 7. We Can Make Government Feel Different

A lottery selected assembly, such as I have described in the last two sections is an institution that was first employed in ancient Greece. Like nothing else, it embodies the idea of duty and participation in a democracy. I have come to believe that democracy can function for a while without such an institution, but not indefinitely; In the long run democracy itself will unravel and civil society with it. Are we not watching this happen in our country right now and in our state?

Take a moment to think about what lottery selection means: one's name is drawn at random, as in jury service. None of the selected members ran for that position; each one simply got chosen. And it will be a duty to serve.

A governing body constituted this way will have great legitimacy with voters; when we look at it, we will, in a sense, see ourselves and our neighbors. Lottery selection (which means random selection) will reproduce Alaska demographics with great statistical fidelity: The assembly will be about 60% - 65% conservative (this is an educated guess since 58% of Alaskan voters are unaffiliated), it will be 48% women, 16% native and 12% veterans (these categories can overlap so don't expect them to add up to only 100%). This is what Alaska looks like and so this is what the citizen's assembly will look like.

The members of this people's branch will not owe their tenure in this governing body to any wealthy campaign donors, political parties or special interest lobbies. And, because they will serve only one term, these citizen-officeholders will be able to do something that is all but missing from our legislatures: deliberate.

When citizens have to debate, contend with, argue with, brainstorm with and learn from their fellow citizens, what they also learn is the cost of an opinion; nothing is free. You want to catch all the salmon at the mouth of a river? You will learn the cost of that opinion from the fishermen who live upstream.

This is why, contrary to voting in competitive elections, where voter decisions are often highly predictable, in deliberative assemblies, researchers find that a surprising number of participants change their minds or modify their opinions in the process of deliberating. It's a learning experience. Assembly members come to appreciate how things can be more complicated than they at first appear.

That's no small thing. That kind of forthright deliberation is what the founding fathers, in their more idealistic moments, thought American democracy

was going to look like. But they were a little *too* idealistic about how easy it would be to keep political parties and even elections themselves from distorting our politics.

A lot of water has flowed under the bridge since those early days. We have a lot of evidence to show us the weak points in our system - the leaks in the hull of our ship. And we also have a lot of evidence now of alternative approaches that have worked well in other places. Adopting some of those innovations doesn't require throwing the old structure out or repudiating our ancestors, just adding some safeguards; augmenting the basic framework they gave us and tightening up the planking.

And some kind of lottery selected assembly such as I have proposed here, or the special grand juries that John Havelock proposed, is one of the most important innovations that we could adopt to make our government more truly democratic.

There remains still one more angle from which to consider these proposals, and it concerns the bird's eye view of our government. Imagine that a convention were to adopt both a unicameral, non-partisan legislature and a citizen's assembly. The legislature is popularly elected, and it writes laws and appropriates money. The citizen's assembly is selected by civic lottery, and it appoints judges, oversees elections and generally works to keep our democracy free of conflicts of interest. Each body is distinct and independent of the other. Each has real responsibilities and real power that counterbalance each other without being redundant or obstructing the other's work.

This is a new kind of bicameralism.

In such a system, checks and balances would not be wishful thinking. They would be real. And, while I am a believer in unicameral legislatures, I do think there is a place for bicameralism in a democracy. And it is here, at this higher level of organization where two separate *branches* of government counterbalance each other.

Establishing a fourth branch of government - a lottery selected citizen's assembly with real responsibilities and real power - is what makes it possible. If Alaska were to take this step - especially if it did so in conjunction with the legislative reforms that I have proposed (such as going unicameral) - our government would *feel* different. The feeling that so many of us experience, that elections won't really change things and that our democracy has become like a theme park, will begin to dissipate. The hull will be patched, the leaking will slow

and the pumps can begin to catch up. We will need it so; we face many storms - economic, social and political. We cannot afford to confront them half sunk.

And probably the most formidable storm we face here in Alaska is an economic one.

## 8. Reinststate the Income Tax at the Constitutional Convention

*Author's warning to the reader: this essay and essay #10 are significantly longer than the others.*

When a river drains its watershed, does the flowing water cut the channel, eroding and carving its shape into the earth, or is the channel the boss, guiding the flow of water and, in effect, telling it where to go?

It's not 'either/or', of course, both happen and both interact; the river is both actor and acted upon.

Are not economies like this too?

When the Alaska Legislature repealed the income tax in 1980, they set Alaska's economy and government on a course of co-dependence in which it would both shape and be shaped by economic forces that were not sustainable in the long run. Oil company underwriting of Alaska state government spending pushed that spending (especially in the early years) into areas it might never have gone were spending tied to income taxes only. Repealing the income tax in 1980 made these appropriations more painless for voters which served to reinforce expectations about how painless the financing of government services would be next year and the year after that.

Now think like a river. Constituent expectations are the river channel; they tell the flow of government appropriations - which means oil money - where to go. When the flow of oil money is high, it reshapes that channel; eroding the cutbanks and building up the bars. Expectations and appropriations: they always interact.

Repeal established a forty-year dependency on government spending without individual taxpayer responsibility. This has had profound consequences for Alaska's economy and government. I submit that this dependency on oil money - taxes and royalties from oil production - and the investment income that it has spun off, in the form of the permanent fund and the dividend, raise serious questions about Alaska's ability to be a legitimate economically independent state. Can Alaska be? Is Alaska a state or a pyramid scheme?

Economists, and others who have considered the question, estimate that if Alaska were to reinstate its income tax *and* a new state sales tax (figuring the income tax at 10% of federal tax rates and a 5% state sales tax) this revenue would cover at most 1/3 and, probably more realistically, 1/5 (20%) of state expenditures at their current levels. To restate that, if Alaskans had to support our state

government only from taxes, as most other states do, without any contributions from oil production, we would have to cut our budget by 80% to avoid going into a debt spiral. And that's if we even had an income tax.

Our oil production has been declining for years which means state revenues from oil have been declining. The likelihood that another field will be discovered that is remotely comparable to the north slope complex anchored by Prudhoe Bay is effectively nil. Considering how one-dimensional our economy is, Alaska is probably the most dependent state in the country. The long congressional tenures of Ted Stevens and Don Young constituted a blunt picture of a state with its hand out to the federal government. This from a state with no state income tax, no state sales tax and in which each year its residents collect a \$1000 dividend from its sovereign wealth fund (or even a \$3000 one). There are indeed many individual Alaskans who are paragons of self-sufficiency, but to project that characterization onto the entire state as an economic entity is a naive fantasy. Alaska is America's *least* independent state.

As will be plain from the title of this essay, I think Alaska *must* reinstate its income tax and possibly a sales tax to boot. Even if we do, it is by no means clear that Alaska will be able to support itself as oil revenues decline. There have been a number of proposals such as former Governor Walker's "Sustainable Plan" and plans proposed by Attorney Roger Cremo and by the Permanent Fund Board itself. These plans demonstrate that there is more than one way to address Alaska's fiscal problems, but they also share a common theme; they all acknowledge that there simply is not enough money for Alaska state government to function without drawing from the earnings of the permanent fund.

This arithmetic will only become sterner as oil production declines and when a drop in oil prices comes around, as it inevitably will, the attendant shortfall in state revenue will amplify this problem. We saw this in 2014 through 2018 most dramatically. Our present flush fiscal status is, of course, just a hiatus. At some point in the future, we can't know how soon, it will be worse, and these shortfalls will cut into Alaska's dividends more than they already have. Without a realistic plan that includes an income tax, the dividend will disappear. It may disappear even with such a plan.

And it's important to remember that Alaska and its economy does not exist in a vacuum. There are economic forces at play in the wider world that affect us here. From 2012 until quite recently the United States Federal Reserve Board embarked on program known as "quantitative easing" in which it pumped trillions

of dollars into the economy. It was joined in this endeavor by other central banks and some economists have estimated these sums total in the tens of trillions of dollars globally - \$35 trillion by one estimate. This is not real money; It did not exist at all before this program was initiated. But that does not mean it has not had real world effects. It has goosed credit markets and transferred immense wealth to shareholders... and, of course it has created a bubble. At some point the market will have to equilibrate and give up that imaginary volume.

The permanent fund showed an astounding 30% return for the 2021 fiscal year but so far for 2022 we're at 2.5%. This could be a blip, a momentary downturn. We can't know for sure. But either we are at the beginning of real decline (or an outright crash) or that decline is coming sometime in the future after markets rebound. But the decline *is* coming. Financial markets, which we increasingly depend on to fund state services through the Permanent Fund's earnings reserve, have become unmoored from the real economy; the above 30% growth figure happened while the covid pandemic was raging. We probably have no choice but to be dependent on these markets by way of our Permanent Fund. But it makes sense to understand the forces that can affect us so forcefully and to take them seriously. It makes sense to do what we can to insulate ourselves from their worst effects. It will be hard enough with an income tax; it will be impossible without one.

I mean for this essay to be a rejoinder to those Alaskans who believe that we can solve our fiscal problems simply by cutting spending. That's a fool's errand. For one, you might ask Governor Dunleavy how much easier it is to propose historic spending cuts than it is to implement them in the real world. The difficulty of carrying out such a program - *when the money is actually there in the permanent fund's earnings reserve* - should not be trivialized. If you think it would be easy for you, then you should run for governor and give it a shot. Getting elected will be the easy part. When you have to glibly tell the people of southeast that their ferry system is going away or tell the people of Fairbanks that their university is going to be hollowed out but that they will be better off for it, then you will have a truer appreciation for how simple and easy cutting services is.

And that's not to say that we shouldn't make deep cuts. Maybe we should. But to imagine that it will be easy, and thus realistic, is just wishful thinking. We could certainly make government more efficient but that won't be easy either. Cutting budgets has essentially no effect on efficiency it just atrophies what the government then continues to do inefficiently. Improving efficiency is a very

worthy goal but, again, it makes sense to be realistic about how much we can actually move that needle in the real world.

We need to be realistic for younger Alaskans. We are the adults. Fixing this problem will take sacrifice. It is not intellectually honest to believe that we can carry on as we have. Again, the economic problem that Alaska faces goes beyond the already contentious question of how much of the funds earnings to use for state government and whether or not it is okay to cut into dividends to pay the state's bills. It is by no means clear economically that Alaska can work in the long run. Oil revenues are declining. And oil money is all we've ever known.

I would love to see Alaska be able to maintain "full" dividends forever. But I think we missed that chance possibly as far back as 1980 itself when Alaska's legislature repealed the income tax. At the very least we would have to had to come up with some kind of a forum for discussing this sort of question openly and honestly: a forum that a broad spectrum of Alaskans would trust. I think that something like the citizen's assembly that I proposed earlier would be a necessary first step to coming up with a realistic plan.

The plan - and the assembly that would draft or propose it - would be necessary so that we could arrive at something resembling a collective decision, such as: What *is* the purpose of the permanent fund? If we were to make the dividend constitutional, how do we ensure that government can find the money to function in the event that there was an unforeseen catastrophic drop in oil prices? If we were to decide that we want the fund itself to function as a "rainy day" fund, what will be our definition of "a rainy day"? Should the dividend respond to market fluctuations or be rigidly capped? Can Alaska's economy actually work in the long run? If so, how?

These questions have never been seriously, formally, addressed in Alaska's history. But we don't have a prayer of protecting the dividend long term if we don't begin by addressing them. We have to find a way to, all of us, be on the same page about these decisions. That doesn't mean we all have to agree on every detail, which would be impossible. But we do have to agree on a decision-making process that we will all abide by and then *make those decisions*.

Most states that have an income tax, or a state sales tax, or some form of revenue that comes from actual contributions from the residents of the state, have an intrinsic link between population, the economy and state government revenues; the more the population grows - especially if it is from in-migration - the more workers there are to produce government revenue to match the inevitable increase

in demand for state services. In Alaska, because we have neither an income tax nor a state sales tax, that relationship is broken. Alaska experienced at least three decades of population increases since 1980 - the year our income tax was repealed.

The More people moved into the state the more state services expanded to accommodate the demand without any state taxes to act as a governor on either population or what amounts to deficit spending. We could extend the analogy about rivers to the dry western states which built their massive water projects in a climatically relatively wet era and did so under the assumption that it would always be so. Giant dams and aqueducts were built, and millions of acres were put into cultivation with the water those dams distributed. And millions of souls then moved to those dry places, rendered attractive by that water and by the electricity generated by those dams.

Now go and peer into Lake Mead. The water is a long way down and it's not rising. To take in such a sight is to look at the future of Alaska's economy. Up here our little economic / fiscal river has been cutting a mighty deep channel during an unusually wet era. It has attracted many of us here and, for 40 years, we have never had to pay state taxes for the services we enjoy. We should think deeply and carefully about what's going to happen when the flow dries up?

Is our current predicament the legislature's fault? Well, certainly they played an important role, but most politicians are followers as much as they are leaders. Really, this is our fault, yours and mine. We have been all too ready to believe in an economic fantasy while the oil companies were paying the bills. This goes back to the earliest days of state hood, when Alaska, even in the early sixties was betting that oil lease sales would cover appropriations for which the state did not yet have the funds. These reckless bets paid off first at Swanson River, then Cook Inlet, then through special revenue sharing deals with the federal government that other states didn't get.

And then there was Prudhoe Bay. When the true character of the Prudhoe Bay discovery became apparent at a one day, \$1 billion oil lease sale in 1968 this fantasy economic thinking was, so to speak, put on steroids. Prudhoe made it possible, in the short term, to begin paying dividends from our sovereign wealth fund and, simultaneously, to repeal Alaska's income tax in 1980. This lucky circumstance was interpreted as a license to party. It is a younger generation of Alaskans who will be forced to suffer through the hangover.

It is long since time to start thinking about those who will come after us instead of always putting ourselves first, in the present moment. It's time to

reinstate the income tax. And we can do so, at a constitutional convention, through a sub-constitutional instrument called an *ordinance* - the same instrument that was used to outlaw the much-reviled fish traps at the original convention.

Before I close this section, I would like to draw your attention to a country whose economic story roughly parallels Alaska's, but whose story has turned out differently: Norway. I'm sure some Alaskans will be acquainted with Norway and how it has invested its oil money but for many it will be a new and interesting comparison.

Like Alaska, Norway has a "sovereign wealth fund". Norway initiated its fund in 1990, thirteen years after Alaska initiated its permanent fund. Norway never repealed its income tax and, for the fund's first 30 years it never drew any money off the annual earnings but always "plowed" the earnings back into the principal. Norway has 5.5 million people and each Norwegian, by way of the country's oil fund, is worth \$236,000. At present the total value of the fund is about \$1.3 *trillion* making it the world's largest sovereign wealth fund.

Alaska's permanent fund, again 13 years older than Norway's, does not even make the top ten among the world's sovereign wealth funds at about \$74 billion - down from \$81 billion last year and approximately 1/17 the value of Norway's fund. Each Alaskan by way of our permanent fund is worth about \$101,000 - less than half what each Norwegian is worth even though our population is just 1/7 the size of Norway's.

To be fair to Alaska, this is not an apples-to-apples comparison; I don't yet know, year by year, how the contributions of the two governments compared - maybe Norway had lots more money to throw at their fund. And Part of the contributions to Norway's fund came from Norway's partly state-owned oil company. What were all these percentages? I don't know. In short, this is not a rigorous comparison.

But even as crude as it is, the comparison has some value. Alaska was exploiting, for at least the first decade of north slope development, what was considered a world class oil field - at the time the largest in the U.S. Our permanent fund had a 13-year head start on Norway's oil fund, but we repealed our income tax three years into the life of our fund and simultaneously began tapping the fund's earnings to pay dividends to all the residents of the state. In 2022, now 45 years old, Alaska's fund is ranked 20th in the world. Norway, in contrast never repealed its income tax and returned all the fund's annual earnings to enlarge the principal, never tapping the earnings, never paying dividends. In

2022, its fund, now 32 years old, is possibly the largest pile of money - strictly speaking, *wealth* - that has ever been.

There is a real irony here worth pointing out. Governor Hammond, who shepherded both the permanent fund and the dividend into existence, always wanted the dividend and the income tax to work together. He was passionate about thinking ahead, looking to the future, treating the coming generation like they should matter at least as much one's own, and about being frugal for their sake.

The Sovereign wealth fund that Hammond's opponents derided him for advocating is now worth \$74 billion dollars and it might have been worth a lot more if, as Hammond wanted, we had kept our income tax - like the Norwegians did.

So what was the epithet that the governor's opponents snickered:

*"Zero-growth Hammond"*.

## 9. A Lot has Changed in Sixty-Six Years

Alaska's constitution was ratified in 1956. A lot has changed between then and now.

The first change came when the state was just five years old and the constitution, eight. It was the U.S. Supreme Court decision of 1964 known as *Reynolds v. Simms* that established that all U.S. states would have to compose both houses of their legislatures by a one-citizen-one-vote standard. Prior to this decision, most U.S. states composed their lower house by population (as in the U.S. House of Representatives) and their upper house by geographical/political unit (as in the U.S. Senate) - typically by county.

*Reynolds v. Simms*, by requiring that all state legislatures be constituted by population only, scrambled the rationale for the two chambers of a bicameral legislature representing different constituencies.

If the delegates to Alaska's original convention had known this would happen only eight years after ratification, would they have written the same constitution?

Or consider ANCSA - the Alaska Native Claims Settlement Act. As much as ANCSA is loathed in the villages, in 1971, it was also a show of native strength, as there were many in the oil industry, and among their boosters, who had not even considered that native claims to Alaska's land would have to be addressed. Natives were regarded with significantly more political respect after it than before. If the delegates to the Alaska Constitutional Convention (or, in this case, the territorial legislature that enacted the convention and established its parameters) had known the effects ANCSA would have in Alaska, would they have allowed the convention to be represented by one native delegate out of fifty-five?

The 1950 census found that, at that time, Alaska natives comprised 26% of Alaska's population (34,000 Alaska natives out of a total population of 130,000). Had natives been represented proportionally at the convention, fourteen of the fifty-five delegates would have been native.

Fourteen, not one.

If a quarter of the delegates had been native, would Alaska have the same constitution?

*Reynolds v. Simms*, Project Chariot, the Prudhoe Bay discovery, ANCSA, limited entry, the Permanent Fund and the dividend, the repeal of Alaska's income tax, ANILCA, the Exxon-Valdez oil spill, the globalization of the U.S. economy,

the financial crisis of 2008, the devaluation of a high school diploma - so much has changed in Alaska since the Constitution was ratified. Is it really too soon to scrutinize Alaska's constitution and ask whether, in some instances, its relevance might have been affected by all that has changed?

I do think that we should be grateful for the conscientious work that those old delegates did for us in the cold winter of 1955-56 but we should also acknowledge that they could not foresee all that would change in Alaska in the future. What we, in contemporary times, lack in idealism and the sort of dynamism that marked the early post-war years, we must partly make up for in the hindsight that gives us perspective those old delegates lacked.

We have before us the opportunity to enact a constitutional convention - the most powerful instrument for democratic reform that there is - and a simple majority vote enacts it. To act, for the future, based on what we know now from hard won experience must surely be as important as venerating the past for its own sake. Don't we owe it to young people to think carefully about the future that we will be influencing by our actions now - or by our inaction - but that they will have to live with?

## 10. A Pandora's Box?

Are there risks involved in enacting the convention? Yes, there are.

A constitutional convention would have broad power; it can alter our constitution in literally any way it might choose to as long as those changes don't violate the federal constitution. That's a lot of leverage and leverage has no conscience; it can be used for good or ill.

So, yes there are risks, but they are the kind of risks we can manage. The convention seems shadowy and dangerous - because it is so powerful and so unfamiliar - but the whole process is protected by a series of four powerful checks that will work together to limit how reckless or undemocratic the convention can be. And we can add one more check that is not established by the constitution at all but that would be easy to construct. And that's the one I'll start with.

Let's first just assume the referendum has passed. We could then, next thing (say, within six months following election day), hold a *demonstration convention*. By that, I mean a preliminary, make-pretend convention with no official constitutional power and with delegates selected by lot (meaning randomly, as in jury service or the citizen's assembly I described earlier).

A demonstration convention is an unofficial event, and there certainly could be more than one (probably the more the better). In order to be effective a demonstration convention only needs to happen; they can be privately organized and privately funded and can be made to work on a shoestring budget. High schools could even hold demonstration conventions for students.

The demonstration convention could do many helpful things: It would familiarize us all with an institution and a process that almost no living Alaskans have experienced as adults - a constitutional convention. I think it would also serve to inform Alaskans about their own constitution - What does it say? How is it organized? What are its strengths? What are its weaknesses?

The demonstration convention would also amount to a poll of the most forceful and prominent kind making plain what sort of reforms matter to Alaskan's. That would serve as something of a mandate, making the work of the upcoming convention more predictable - which means less frightening - for voters. It would establish an agenda for those Alaskans considering running as a candidate for delegate (delegate elections would happen in 2024, unless the legislature calls for a special election) and thus would have influence on the agenda for the real convention.

And it would do one more thing. It would reveal to us all what democracy looks like when ordinary people, without special training, sit down together to study, debate, brainstorm and contend with each other about how to confront problems that demand deliberation and compromise.

Then there are four intrinsic checks. “Intrinsic” here means they are constitutionally established by Article 13, Section 3. They will limit how reckless or devious a convention could be and these checks will do so more forcefully in the convention process than do the checks that constrain - or fail to constrain - our ordinary politics. And they will be mutually reinforcing. Conveniently, these four checks also define the key stages of the convention process. They are: 1. the convention referendum, 2. the election of delegates, 3. press coverage and hearings at the convention itself and 4. ratification.

First, the referendum. The convention referendum itself is the most powerful check on the convention process; it eclipses everything else. It does so, not just because it can prevent the convention from happening in the first place, but because it will serve as a clear statement in its own right; if the convention gets enacted the outcome of the referendum will also announce *why* Alaskans decided to do so. And that will affect everything that follows.

I can scarcely overstate how important this is. To understand why, let’s first consider the referendum from the front side - before the November 8 election.

Begin by assuming that voters will never vote ‘yes’ on a whim - basically confronting the ballot question and flipping a coin. The convention will never get enacted that way. On the other hand, it’s *plausible* that it could get enacted if voters were to buy in to specific reform proposals. But, exactly what those proposals are, probably matters a lot. Are there some constitutional goals that, in the collective minds of Alaskan voters, would forestall passage of the referendum? I think there are and this underscores why the referendum is such a powerful check.

Broadly speaking, constitutional amendment or reform proposals that are divisive will tend to scare voters away from voting ‘yes’. Deeply partisan proposals, while they are certainly legitimate amendments for a convention to consider will strike those who oppose such changes as exactly the sort of mile-long lever that constitutional laws definitely are.

Three have risen to some prominence leading up to this year’s referendum. They are proposals to 1) amend the privacy clause in the constitution’s declaration

of rights, which would allow restricting or outlawing abortion, 2) Change the way judges are appointed and 3. Lock the dividend into the constitution.

It simply states a fact to say that the first two of these proposals are divisive (a constitutional dividend fits in a different category and, outside the context of a constitutional convention, is quite popular). Even many who might be advocates for these proposals *as policy* - including advocates for the dividend - get cold feet about using a constitutional convention to accomplish such goals. The divisiveness of these proposals ensures a potentially destructive political battle - in the context of a constitutional convention - with no guarantees that the outcome will be one that even the proposal's advocates would want.

If the above has left you convinced that it would be crazy to vote 'yes', I must remind you that it also begs another question: If voting 'yes' assures chaos, how come that's not what happened in 1955?

How come?

Different times, yes. But they had partisan divisions back then too.

One thing we can say, for sure, about the 55 convention is that, it's delegates, in spite of their differences, were unified. They enacted their convention for a reason, the reason was statehood, and they were unified in their dedication to that goal.

Which brings us back around to the question of whether there might be constitutional reform goals that, rather than dividing and scaring voters, could unify voters and allow the referendum to pass. It will come as no surprise what I believe: Democratic structural reform is the way. A truer democracy is the goal.

Reform proposals that strengthen democracy itself and that don't favor one party, or its policies, over another are more likely to move a divided and skeptical populace to actually vote yes than are proposals that seem to be aimed at accomplishing partisan policy goals under the lower, simple majority vote thresholds inherent in the convention process. Reforms that make our government more representative, more transparent, more effective and more accountable fit that definition. These kinds of reforms are much more likely, if anything can, to unify Alaskans in our present political climate. And we know from the experience of the 1955 convention that unity is the master key.

Now imagine that Alaskans vote 'yes' to enact a convention based on democratic structural reforms. That 'yes' vote itself will put us in new political territory. After half a century of rejections, it will be a mandate for reform - not just enacting the convention but *declaring what we want the convention to do*.

Right after this we would hold a demonstration convention, as I mentioned above. Then, in 2024, when it comes time to elect delegates, what exactly will happen? Will voters, across the state, vote for a majority of delegates who oppose the convention's implicit mandate?... Or who have no platform at all?

That won't happen, that's not how politics works. So now a picture is developing of how the checks that are intrinsic to the convention process will reinforce each other and also how the referendum not only prevents divisiveness from passing through its gates but then influences everything that comes after it by establishing a clear unifying purpose.

But we're not done. Once the delegates are elected the convention will follow shortly thereafter - (using the 1955 convention as a template) about two months after the election of delegates - so let's say, early January 2025. Again, following the original convention, there would be 55 delegates (although, fairly likely, that number would get bumped up to 60 for practical reasons) and they would convene, probably in Fairbanks, possibly again at the university.

So now we have a convention about to start. How is that a check on craziness? Well besides being powerful and important, which will attract interest and scrutiny from the press and the public, the convention is a two-and-a-half-month affair, over and done. There are no re-elections to prepare for; it is a onetime enterprise. This amplifies the uniqueness and rarity of the convention which will further concentrate the public's attention on its proceedings - altogether different from the ongoing near-invisibility of the work of the legislature. And, as with the original, this new convention will be open to the press (within reasonable practical limits) and it will be open to the public through hearings covering the individual articles as well as during a mid-session break in the delegates home districts.

The convention will not happen, figuratively, "behind closed doors" or "in smoke filled rooms." We will be able to follow it and interact with it as it is taking place.

And, finally, there is ratification: the voters' last check. You will be asked to approve or reject the work of the convention with your vote. This will happen probably in the spring or summer, in a special election, after the convention adjourns. Ratification works most powerfully to influence what happens before it. If we voters think that some cabal within the convention has done something deceptive or extreme or dismissive of popular will, we can reject it at the ballot

box. The work the delegates will do the, changes and revisions they will make, will be with ratification hanging over their heads.

Could voters be manipulated by the media and special interest lobbies to ratify amendments based on oversimplifications of the issues or even outright untruths; could ratification be manipulated?

Possibly. But I don't think our situation is that bleak. I don't want to trivialize how corrosive political advertising and voter manipulation can be; It has wreaked havoc on our democracy. But I do think that the convention process will be different. Not fantasyland-different, not unrecognizable-different, but it stands to reason that the unique nature of the convention process will mean that *voters* will be different - different enough to resist being manipulated. They will care more about what's going on, they will understand the issues better than in our ordinary politics and they will be invested in the proceedings of a powerful institution that they brought into being with their vote. Let's quickly follow the convention process through to get a better sense for what kind of voter will be approaching the voting booth to ratify newly drafted revisions to Alaska's constitution in 2025. Again, we'll start with the referendum.

If voters don't care, the referendum won't pass. If voters don't have specific amendments or reforms to vote 'yes' for, the referendum won't pass. If specific amendment proposals *are* presented to voters by their advocates, but only divisive ones are presented, the referendum won't pass.

If the referendum does pass, it will be a "ratification" of reforms that strengthen democracy itself and unify Alaskans. Voters will be initiating a rare and democratically powerful process of national significance and they will know it. They will know it and they will be switched-on in a way that we don't see in our ordinary politics.

The four checks - the referendum, the election of delegates, the open convention and ratification - will work together in a way that is dynamic and mutually reinforcing. A demonstration convention, an extra check we can put to use right after the referendum passes, will familiarize voters with what constitutional conventions are like and will influence who runs for delegate and why. The gauntlet of the referendum and *why* it passes will, of course, also influence who runs for delegate and what their stances will be. The delegate campaigns and the open convention -more momentous than our ordinary politics - will draw voters in as they will know they are interacting with an event of national significance. Ratification will constrain the work of the delegates at the

convention, keeping things on the straight and narrow. And the entire process will inform voters and draw them in with its importance and rarity. These voters approaching the voting booth at ratification will be a different kind of voter than we see in ordinary elections.

Here is the catch 22: We cannot avoid the peril of a runaway convention by voting 'no', because the status quo, sooner or later, leads to the same place we sought to avoid. And the status quo has no tools to realistically change the system or avert that fate.

But we are familiar with it.

Voting 'yes', on the other hand, is unfamiliar and involves risk and that's scary. But it is a path that gives us powerful tools to manage those risks and is an unmatched tool for democratic reform for a citizenry who are unified and responsible. Alaska and its delegates were certainly unified and responsible in 1955. But what about us? Are we fit only to venerate the more worthy past.

I think we are capable of more than that. And the convention process will not only ask more of us, it will encourage us to be more. That's what I mean when I say that constitutional conventions are special.

When we dismiss the convention referendum we, in effect, foreclose on the opportunity to make things better for younger generations through structural reform at the constitutional level. If we reject the convention reflexively for the sixth time in sixty years, a question hangs in the air:

If not now, when? And if never, how?

## 11. An Early 19th Century Perspective on Revising Constitutions

The following is an excerpt from a letter written by Thomas Jefferson in 1816, when he was an old man, to Samuel Kercheval on the subject of a proposed constitutional convention for the State of Virginia. The date of this correspondence placed it 40 years after the signing of the Declaration of Independence and 29 years after the drafting of the federal constitution. Benjamin Franklin was, by then, long dead. George Washington was dead. Alexander Hamilton was dead. It has been edited for coherence and continuity.

“Some men look at constitutions with sanctimonious reverence, and deem them like the ark 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. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws 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. We might as well require a man to wear still the coat which fitted him as a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.... Let us, as our sister states have done, avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise, virtuous, and well meaning councils. And lastly, let us provide in our constitution for its revision at stated periods.... Each generation is as independent as the one preceding, as that was of all

which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness.”

## To Contact The Author

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