

# DECISION '17

## The Citizens' Guide to the Constitutional Convention



**Shall there be a convention  
to revise the constitution  
and amend the same?**

**Jim Malatras, Editor**

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Jim Malatras, Editor<sup>1</sup>

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## Foreword

In New York, there are two ways to change the state constitution: through the legislative process or a constitutional convention. Either way, any changes must be approved by voters. A constitutional convention could be convened by the state legislature at any time but, at the very least, the question of whether to convene a convention is automatically placed on the ballot every twenty years.

This November, New Yorkers will have the authority to call a constitutional convention. A constitutional convention is a special body that assembles to propose changes to how our government works, as well as rights and protections granted to the people. New York is one of a handful of states that possess this constitutional clause and something that comes out of a Jeffersonian view that state constitutions should be revisited every “nineteen or twenty years” or for “periodic repairs.”<sup>2</sup> The last time a convention was approved by voters was in 1967.

Not only must New Yorkers decide on whether to approve the organizing of a constitutional convention this year, voters must also decide on two constitutional amendments that made their way through the legislative process and appear on the ballot for final adoption or rejection.

In other words, there is a lot at stake. Given the importance of these issues, it is imperative to provide as much information to the public so they may make an informed decision. That is why the Rockefeller Institute of Government, with other stakeholders, is working to educate New Yorkers on what it means to hold a constitutional convention, as well as the other specific changes to the constitution.

As an educational organization, we have no position on the constitutional convention or other individual constitutional amendments on the ballot. Therefore, in the following pages, we offer an overview of the process; benefits, and challenges to convening a constitutional convention; and, finally, various perspectives on the issue — those who support, those who are against, alternative pathways to reform, and potential agendas and issues to be considered at a convention.

In addition to this *Guide*, there are various other resources I urge one to visit to help make their decision, including our website at [http://www.rockinst.org/nys\\_concon2017/](http://www.rockinst.org/nys_concon2017/) as well as an important piece the Rockefeller Institute of Government did many years ago called *The New York State Constitution: A Briefing Book* at [http://www.rockinst.org/pdf/government\\_reform/1994-nys\\_constitution\\_a\\_briefing\\_book.pdf](http://www.rockinst.org/pdf/government_reform/1994-nys_constitution_a_briefing_book.pdf).<sup>3</sup> This report was turned into an excellent review of all the issues in *Decision 1997: Constitutional Change in New York*.<sup>4</sup> Both works are still valuable sources of information.

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2 Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) in Thomas Jefferson: Writings, ed. Merrill D. Peterson (New York Library of America ed., 1984): 1395, 1402.

3 *The New York State Constitution: A Briefing Book*, ed. Gerald Benjamin (New York: Temporary State Commission on Constitutional Revision, 1994).

4 *Decision 1997: Constitutional Change in New York*, ed. Gerald Benjamin and Henrik N. Dullea (Albany: Rockefeller Institute Press, 1997).

Thomas Jefferson said, “An informed citizenry is at the heart of a dynamic democracy.” The New York State Constitution has granted New Yorkers an awesome power to directly shape their government. Whether to hold a constitutional convention is ultimately up to you. We hope the information provided is useful and informative to inform your decision.

Sincerely,

A handwritten signature in blue ink that reads "Jim Malatras". The signature is fluid and cursive, with the first name "Jim" and last name "Malatras" clearly distinguishable.

Jim Malatras  
President  
Rockefeller Institute of Government



# How the New York Constitution Can Be Changed

## ARTICLE XIX: AMENDMENTS TO CONSTITUTION

### **[Amendments to constitution; how proposed, voted upon and ratified; failure of attorney-general to render opinion not to affect validity]**

Section 1. Any amendment or amendments to this constitution may be proposed in the senate and assembly whereupon such amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his or her failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon. (Formerly §1 of Art. 14. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 4, 1941; November 6, 2001.)

### **[Future constitutional conventions; how called; election of delegates; compensation; quorum; submission of amendments; officers; employees; rules; vacancies]**

§2. At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been

completed. Every delegate shall receive for his or her services the same compensation as shall then be annually payable to the members of the assembly and be reimbursed for actual traveling expenses, while the convention is in session, to the extent that a member of the assembly would then be entitled thereto in the case of a session of the legislature. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the ayes and noes being entered on the journal to be kept. The convention shall have the power to appoint such officers, employees and assistants as it may deem necessary, and fix their compensation and to provide for the printing of its documents, journal, proceedings and other expenses of said convention. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the state at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendment, shall go into effect on the first day of January next after such approval. (Formerly §2 of Art. 14. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 6, 2001.)

#### **[Amendments simultaneously submitted by convention and legislature]**

§3. Any amendment proposed by a constitutional convention relating to the same subject as an amendment proposed by the legislature, coincidentally submitted to the people for approval shall, if approved, be deemed to supersede the amendment so proposed by the legislature. (Formerly §3 of Art. 14. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

## **Section 1. The Constitutional Convention Process and History**

In this section, the process of calling and preparing for a constitutional convention is summarized. In addition, we provide a brief history of the previous constitutional conventions.



## How the Constitutional Convention Process Works

Peter Galie

The New York Constitution mandates that the question “Shall there be a convention to revise the constitution and amend the same?” (*NY Const., Art XIX, sec 2*) be placed on the ballot every twenty years. The last successful convention in 1938 reset this clause for 1957 and twenty year intervals thereafter.<sup>5</sup> The next vote on this question will be held on November 7, 2017.

### How it will appear on the ballot:

**Shall there be a convention to revise the constitution and amend the same?**

- If the voters answer yes,<sup>6</sup> the legislature passes enabling legislation establishing the rules for the nomination and election of delegates who would be selected at the general election to be held on November 6, 2018.
- Legislative or executive action setting up a preparatory commission for the convention is common, though not mandated. Some commissions have been established by executive action (Governor Herbert Lehman’s commission for the 1938 convention and Governor Mario Cuomo’s 1993 commission created in anticipation of the 1997 vote). Some have been established jointly by the legislature and governor; this was the case with the 1915 and 1967 preparatory commissions.<sup>7</sup>
- The constitution requires that three delegates be elected from each of the sixty-three senatorial districts, plus fifteen at-large statewide, for a total of 204.
- The convention selects its own leadership, adopts its own rules, and is empowered by the constitution to incur the necessary expenses for it to do its job. The legislature adopts enabling legislation appropriating funds, staffing the convention, providing a venue, and the like.
- The convention convenes in Albany, on April 2, 2019.
- With one exception (1867), conventions have submitted their work to the voters for approval or rejection in the general election of that same year, in this case November 5, 2019. There is no time limit for the convention to do its work. The

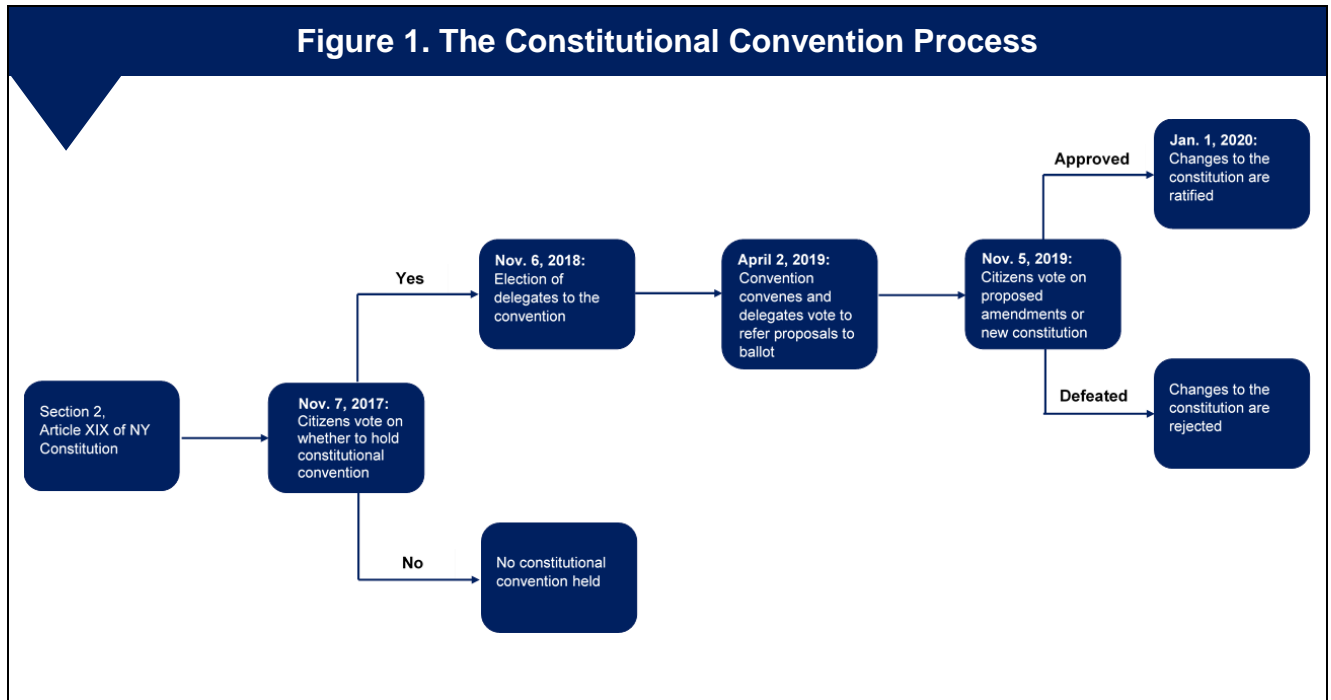
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5 The legislature can put the question on calling a constitutional convention on the ballot anytime it wishes and did so in 1965. The voters approved, and a constitutional convention was held in 1967. The legislature’s decision has no legal effect on the every twenty year requirement, so the question appeared on the ballot in 1977 (not approved) and 1997 (not approved) and will appear in 2017.

6 A convention call is approved by a majority of those voting on the proposition and not a majority of those voting in the election. In 1965, the vote was 1,681,438 for a convention and 1,468,431 opposed, with 2,948,332 not voting on the proposition!

7 When these commission are created has varied. Governor Lehman’s was created by executive order in July 1937 after the vote to approve a convention, but less than a year before the convention convened in 1938. The preparatory commission established in 1965 was created in June 1965 prior to the November general election at which the convention call question was presented. The Cuomo commission was established in 1993, four years prior to the mandatory call in 1997.

date for submission must to be “not less than six week after adjournment” (*Art XIX, sect 2*).



## Highlights of the Constitutional Conventions Held In New York, 1777-1967

Peter Galie and Christopher Bopst

The US Constitution was drafted in 1787; New York State's first constitution was adopted ten years earlier, in 1777. The first constitutions of twelve of the first thirteen states (all but Rhode Island) preceded the adoption of the US Constitution. Indeed, the national Constitution built on these constitutions both by way of imitation and avoidance of what seemed to be missteps. The separate, but parallel, development of state and national constitutions is known as dual constitutionalism.



State constitutions, like the US Constitution, provide the framework for governance, distribute and limit power, and protect liberties. In addition, they complete the national document. States are referred to fifty times in forty-two sections of the national Constitution. The national Constitution does not even contain a definition of citizenship, and says very little about voting.

Other dimensions of American life, such as public business and policymaking, are left untouched by the national Constitution. No national constitutional provision dictates that New York must keep the Adirondacks and Catskills “forever wild”; the state constitution does (NY Const., art. XIV, sec. 1). The US Constitution does not mandate the state to care for the needy; the state constitution does (NY Const., art. XVII, sec. 1). The US Constitution says nothing about education; the state constitution has an article devoted to it (NY Const., art. XI). In spite of an ever-expanding national government, state constitutions and the policies made pursuant to them are most likely to affect the daily lives of citizens. Finally, the state constitution protects rights. In many areas the New York Constitution provides greater protection for individual rights than the national Constitution.

Throughout its history, New York has adopted four constitutions (1777, 1821, 1846, and 1894), and has convened nine constitutional conventions (1777, 1801, 1821, 1846, 1867, 1894, 1915, 1938, and 1967). The constitution of 1894, as amended (including

substantial revisions by the 1938 convention) is the document currently in force. Over 225 amendments have been added to the constitution since 1895, resulting in a document of over 50,000 words distributed among twenty articles as follows:

Article I — Bill of Rights	Article VIII — Local Finance	Article XV — Canals
Article II — Suffrage	Article IX — Local Government	Article XVI — Taxation
Article III — Legislature	Article X — Corporations	Article XVII — Social Welfare
Article IV — Executive	Article XI — Education	Article XVIII — Housing
Article V — Civil Departments	Article XII — Militia	Article XIX — Amendments
Article VI — Judiciary	Article XIII — Public Officers	Article XX — Effective Date
Article VII — State Finance	Article XIV — Conservation	

Unlike the national amending process, the state process is majoritarian and participatory. There are two methods for altering the New York State Constitution: legislatively initiated amendments and constitutional conventions. Amendments require: 1) first passage by a majority of the elected members of each house of the legislature; 2) second passage by a majority of the elected members of each house of the legislature following the next general election of Assembly members; and 3) approval by a majority of voters voting on the amendment in a general election. Constitutional conventions, which have the authority to submit proposals directly to the voters without the consent of the legislature, can be convened in one of two ways, both of which require the approval of the voters. The legislature can place a convention question on the ballot at any time. In addition, Article XIX requires that in 1957, and every twenty years thereafter, the question of whether to hold a convention to revise and amend the constitution shall be submitted to the voters. The last four convention votes were 1957 (mandatory), 1965 (legislative proposal), 1977 (mandatory), and 1997 (mandatory). Of these, only the 1965 convention question was approved by voters.

### **From Colony to Constitutional Republic: The Constitution of 1777**

The 1777 constitution was written and adopted in the midst of a Revolutionary War by a government literally on the run. It created an electorate in which nearly 60 percent of adult males and 70 percent of heads of families could vote for members of the Assembly, but only roughly 29 percent could vote for senators and the governor. No distinction was made between white and black males for purposes of voting. A tripartite structure was established with a bicameral legislature. The veto power resided in a Council of Revision.

The 1777 constitution provided for the strongest executive in the American states, giving him the longest term (three years), as well as providing for direct popular election and eligibility for reelection. These measures gave the office of governor in New York stability and independence.

The judiciary was given a degree of independence, with judges serving “during good behavior.” A court of impeachment made up of the president of the Senate, senators, the chancellor, and judges of the Supreme Court was established; otherwise the court system at the lower levels remained essentially unchanged.

Although no formal bill of rights was included in the document, there were provisions establishing the right of property owners to vote, religious freedom, a right to trial by

jury, a due process clause, right to counsel, a conscientious objector clause for Quakers, and protection against bills of attainder. Additionally, the constitution provided for continuation of the common law, which afforded important protections. The religious liberty provision ended the tradition of multiple religious establishments in the state, defusing the potentially explosive church-state issue.

The constitution was approved on April 20, 1777, at Kingston, New York, marking that day as the birth of New York as a constitutional state. In forty-two sections and fewer than 7,000 words, the 1777 constitution embodied the great ideas and institutions for which it is justly praised. Its preamble incorporated the Declaration of Independence, and the document directly influenced the work of the 1787 Constitutional Convention in Philadelphia. Just as important are the issues that were not addressed. John Jay lamented the fact that no clause prohibiting domestic slavery was included. No provision mentions education and, most surprisingly, no method of amendment was included. Among the reasons for the success of the document was the fact that the convention did not alter those aspects of the governing process that had proven effective. That continuity, combined with the moderate character of the document, enabled it to achieve legitimacy; which, in turn, accounted for the relatively smooth transition from colony to constitutional republic.

### **New York's Only Limited Constitutional Convention: 1801**

The first constitutional convention in New York, and the only one ever called for limited purposes, was occasioned by a defect in the Council of Appointments and the growing size of the legislature. In the absence of a formal mechanism for amending the constitution, the legislature passed an act recommending a convention and calling for the selection of delegates to address only those issues. In response to rapid population growth that had swelled the number of senators to forty-three, the convention fixed the number at thirty-two. The Assembly was set at 100 members, with the authority to increase to a maximum of 150 members. Senate seats were to be apportioned according to population, but one member of the Assembly was guaranteed for each county regardless of population.

The second issue confronting the convention was a dispute over who had the power to nominate appointees, the governor alone or shared with the council. The convention made the power a concurrent right of both, putting effective control of nominations and appointments in the hands of the council and, in effect, the legislature. This change weakened the executive and accelerated the development of the spoils system.

### **Participation and Property: The Constitutional Convention of 1821**

The state had grown from just over 190,000 in 1777 to 1,300,000, with much of the growth coming in newly settled areas of the West and North. The suffrage, apportionment, and judicial service provisions of the constitution of 1777 disadvantaged these new settlers. The Council of Appointment had become the chief vehicle for the spoils system and the Council of Revision, with the power to veto legislation, was increasingly seen as an antidemocratic and partisan check on the will of the people.

In the absence of any constitutional provision for calling a convention, it fell to the legislature to make the decision. Ironically, the Council of Revision, often criticized for stifling the popular will, required the legislature to place the question of a call for a convention before the people and to include a provision that required convention



proposals to be ratified by the people before taking effect. This decision established the tradition in New York of making constitutional conventions the creatures of the people and not the legislature.

Much of the convention's work centered on four issues: suffrage, the appointing power, the power of the Council of Revision, and reorganization of the judiciary. On suffrage, property qualifications for white males were removed, but delegates placed a property qualification on African Americans, disenfranchising all but a handful of the 6,000 free adult black males. The debates over property qualification for voting at this convention have been justly called one of the great suffrage debates in American history.

The Council of Appointments was abolished. The convention made some offices elective, while making the others appointed by local bodies, the legislature, or the governor. The much-maligned Council of Revision was also eliminated. The office of governor was modeled on the national presidency, with the governor possessing a veto that could be overridden by two-thirds of the legislature. He was also given the power to see that the laws were faithfully executed. This increase in gubernatorial power was offset by a reduction in term from three to two years and the elimination of the power to adjourn the legislature.

Concerning the judiciary, a new system of circuit courts was created, members of the Supreme Court were dismissed, and a new Supreme Court created, the latter a measure aimed at the alleged partisanship of sitting judges.

The convention added a provision requiring a two-thirds vote of the legislature for passage of any bill appropriating money or property for local or private purposes, beginning a tradition of restricting legislative action that would continue throughout the nineteenth century. For the first time, the canal policy of the state was constitutionalized.

Unlike its predecessor, the 1821 convention devoted a separate article (Article VII, now Article I) to a Bill of Rights for its citizens, drawing its provisions largely from the English Bill of Rights of 1689, the statutory Bill of Rights adopted by the state legislature in 1787, and the federal Bill of Rights of 1791. Unique to the state constitution was a provision allowing conscientious objection to any member of a religious denomination.

For the first time, a formal amending procedure was inserted in the constitution authorizing amendment by majority of the legislature in one session and a two-thirds vote of the legislature in a subsequent session. Amendments would be effective upon ratification by majority vote of the electorate. In New York after 1821, voters could do what no voter could do at the national level, namely vote directly on whether to adopt a constitutional amendment.

## **The Constitution of 1846: Canals, Commerce, and the Common Man**

Constitutional developments in New York between 1821 and the Civil War reflected the larger national movement known as Jacksonian Democracy. In 1826, the first legislatively initiated amendments to a New York Constitution took place. They made justices of the peace elective offices and established universal white male suffrage. Amendments in 1833, 1839, and 1845 made city mayors elective officers and eliminated all property qualifications for holding public office.



The convention swept away the old feudal system of land ownership, constitutionalized debt structure for the canals, and eliminated the bank monopoly by limiting the legislature's power to grant special charters.

Practically all local offices were made elective; senator's terms were reduced from four to two years; and assemblymen were to be elected from single member districts to give representation to smaller opinion clusters. The judiciary was made elective and completely reorganized, with a court of appeals established as the court of last resort. The offices of secretary of state, treasurer, attorney general, comptroller, canal commissioner, state engineer, and state prison inspector were made elective.

Reflecting general disillusionment with the legislative branch, convention delegates added twenty-two restrictions on legislative power, including two remarkable provisions mandating a popular referendum for issuance of any long-term bonds and the placing of a limit of \$1 million on the aggregate temporary debt of the state (later repealed).

The convention devoted some attention to rights, adding provisions protecting against excessive fines or bail, cruel and unusual punishment, and unreasonable detention of witnesses. The capstone of the convention's drive to democratize the polity came with the addition of a new mode of initiating constitutional reform. The delegates provided that in 1866, and every twenty years thereafter, and also at such other times as the legislature may provide, the question "Shall there be a Convention to revise the Constitution and amend the same?" must be submitted to the voters.

The proposal to repeal the property qualification for suffrage for black males, submitted as a separate proposition, was soundly defeated.

The 1846 constitution was essentially a new document, with only eleven provisions unchanged. State and local offices were democratized, legislative power was restricted, and executive power was diffused, all in the name of grass roots democracy. For this reason, the constitution of 1846 has been called the "People's Constitution." The convention tripled the size of the document to 20,400 words.

### **The First Rejection: The Constitutional Convention of 1867-68**

In 1866, the first mandatory convention call was submitted to voters. The call was approved, and the convention of 1867-68 was convened. The main issues confronting the convention were the judiciary and suffrage.

The convention proposed a new Judiciary Article. Changes were implemented to reduce the backlog of cases and extend the term of judges to fourteen years. Submitted separately in 1869, the article and was approved.

The most contentious issue, African American suffrage, embroiled the convention in the politics of race. Delegates proceeded cautiously, submitting a separate amendment that *retained* the property qualification for African American males. This amendment was also approved. The issue of women's suffrage also received some attention, but delegates declined to recommend it because public sentiment did not demand and would not sustain such a radical innovation.

The convention proposed a new constitution, which was rejected by voters, that would have:

- Increased the term of senators to four years;

- Placed more restrictions on legislative power;
- Strengthened the governor's powers;
- Created a court of claims (previously, claims against the state were resolved by the legislature); and
- Added provisions prohibiting unreasonable searches and seizures, allowing juries of less than twelve, calling for free common schools, and punishing bribery of public officials.

For the first time in a constitutional convention in New York, a Committee on Cities was created and a serious attempt was made to address the question of home rule. Caught in the crossfire between the desire to address corruption in the cities and the impulse towards local autonomy, the final recommendations did not provide much in the way of home rule.

Some of the convention's proposals, e.g., an unreasonable search and seizure clause, the creation of a court of claims, and a provision for free common schools, were subsequently adopted.

Efforts for reform continued in the state and gave birth to **a new mode of constitutional reform, the constitutional commission**. Unlike constitutional conventions, commissions lack the authority to submit their proposals directly to the voters for approval. Instead, they propose recommendations to the legislature, which has sole discretion on whether to propose them to the people in the manner required for other legislatively initiated amendments.

Commissions were created by the legislature at the behest of the governor in 1872 and 1890 and made valuable recommendations concerning the judiciary, legislature, the executive, debt, the cities, and corruption. Many of these recommendations found their way into the constitution by way of legislatively proposed amendments.

### **The Constitution of 1894: Confronting a “New” New York**

The mandatory call for a convention in 1886 was approved; but partisan disputes between the governor and the legislature as to how delegates should be selected delayed its convening for eight years.

The constitution proposed by the 1894 convention, as amended, remains the current constitution of the state.

The 1894 convention:

- Incorporated changes in the judicial article recommend by the judiciary commission of 1890;
- Created a “forever wild” state forest preserve, which cannot be developed or altered;
- Founded the University of the State of New York, which is the umbrella organization having control over all public and private education throughout the state;
- Set up a merit-based civil service system;
- Established some home rule provisions for municipalities;

- Adopted provisions regulating registration, authorizing voting machines, and setting up bipartisan election boards in an attempt to reduce electoral fraud;
- Established the present method of selecting delegates to a constitutional convention (three delegates per Senate district and fifteen at-large delegates), thus preventing another eight-year delay between the approval and commencement of a convention;
- Added a provision forbidding any aid, direct or indirect, to institutions of learning under the direction of a religious denomination (often referred to as the Blaine Amendment);
- Guaranteed a right of action to recover in wrongful death cases and prevented the legislature from capping monetary damages on such actions.

In addition to a new constitution, the convention proposed (and voters approved) a separate legislative apportionment. The convention apportioned the legislature in such a way as to ensure representation of all counties and to prevent the counties of New York City from ever dominating the legislature. Significant portions of the apportionment scheme remain in the constitution despite being found to violate the “one-person, one-vote” requirements of the Equal Protection Clause of the US Constitution.

A women’s suffrage amendment was reported to the floor of the convention. After a long and thoughtful debate, it was rejected.

### **The Second Rejection: The Constitutional Convention of 1915**

The every twenty-year clause would have put the convention question on the ballot in 1916, a presidential election year. The legislature moved the date back to 1914 and the electorate approved a convention by a slim margin. For the third time since the Civil War, the Republicans won a majority of the delegates, electing prominent New Yorker Elihu Root as convention president. The 1915 convention was held in the midst of the Progressive Movement; not surprisingly, its work reflected that movement. The constitution it proposed, grounded as it was on a philosophy of expertise, efficiency, and economy, reflected the ideas of leading reformers who extolled the virtues of business and the British parliamentary system. The constitution proposed by that convention:

- Significantly reorganized and consolidated the executive branch of government;
- Implemented a short ballot, meaning fewer offices would be elected statewide;
- Adopted an executive budget, in which the governor would control most aspects of the budget process and priorities;
- Took some steps to move the government away from a principle of separation of powers, allowing more coordination between the executive and legislative branches;
- Inserted an Equal Protection Clause, likely modeled after the Fourteenth Amendment to the US Constitution.

This constitution was rejected by the voters.

At the same election at which the 1915 convention was to submit its proposed constitution, a legislatively initiated amendment granting women’s suffrage was also scheduled to appear. The convention was also considering a women’s suffrage

amendment. To avoid confusion and in deference to the legislatively initiated proposal, it took no action. The amendment was defeated; but the defeat would be temporary as women would be granted the right to vote in New York in 1917 when the voters approved a second legislatively initiated amendment.

The defeat of the convention's work did not end the push for reform. Between 1917 and 1938, a number of the most important measures proposed in 1915 were adopted through legislative amendment, including a reorganization of the judiciary (1925), executive consolidation and the short ballot (1925), an executive budget (1927), and a four-year term for the governor (1937). Governor Al Smith, a delegate at the 1915 convention, Robert Moses, and Belle Moskowitz were the prime movers in this reshaping of New York government in the first quarter of the twentieth century.

### **Constitutional Reform and the Depression: The Convention of 1938**

In 1936, pursuant to the mandatory call provision, voters approved the convening of New York's eighth constitutional convention. For the fourth time, Republicans won a majority of delegate seats. With no clear mandate and no specific constitutional issues, few expected much from the convention. Yet the social and economic issues ignored in 1894 and 1915 could no longer be ignored in the midst of the Depression. Delegates embraced a more sympathetic view of the role of government in society.

The convention proposed numerous additions to the existing constitution, including:

- A "bill of rights for labor."
- New articles on care of the needy and housing that recognized the state's responsibility for those who needed support for the necessities of life.
- Protections against unreasonable search and seizure. However, following one of the most enlightening debates on civil liberties in the annals of New York's constitutional history, the convention rejected an amendment to include an exclusionary rule for unconstitutionally obtained evidence.
- A provision prohibiting discrimination against an individual's civil rights on the basis of race, color, or creed, which marked the first appearance of an Equal Protection Clause in the state's constitution, including protection against private as well as state discrimination.
- A new article on local finance, which consolidated the various provisions concerning the debt and taxing powers of local governments.
- A new article on taxation.
- A new requirement that all amendments be submitted to the attorney general for an opinion on their impact on other sections of the constitution.

Reflecting a changing understanding of the role of government, convention delegates loosened some of the restrictions placed on the legislature during the nineteenth century, but simultaneously imposed additional restrictions on public authorities and the use of state credit. The convention also sought to avoid submitting the question of holding a convention during a national or state election year, by designating 1957 as the next submission date and every twenty years thereafter as the automatic submission years.

Rather than submitting an entirely new constitution for an “up or down” vote, the convention submitted its work in the form of nine separate amendments, allowing voters to pick and choose which ones they wanted. Voters approved six of the nine, rejecting the three generally viewed to be as partisan.



Credit: *The New York Times*.

## **A Modern Constitution? The Constitutional Convention of 1967**

New Yorkers amended their constitution ninety-three times between 1939 and 1966. Among others, these amendments created departments of commerce and motor vehicles (1943 and 1959, respectively), accomplished court reorganization (1961), added a bill of rights for local government (1963), and established a state lottery to support education (1966). In 1957, voters said no to the question of calling a constitutional convention. However, a series of groundshaking Supreme Court decisions declaring the state’s apportionment scheme a violation of the Equal Protection Clause of the US Constitution precipitated a 1965 legislative call for a constitutional convention. The voters approved. For the first time in over 100 years, Democrats, with the help of liberal party votes, gained control of a constitutional convention.

Although delegates did not mirror the state’s population, they were the most diverse group ever elected to a constitutional convention in New York. Delegates included eleven women; eleven African Americans; seven Hispanics; and a significant number of delegates of Italian, Jewish, and Irish extraction. Two-thirds of the delegates were lawyers with one-fourth of them judges. The alliance of Democrats, Liberal Party delegates, and civic reformers produced a substantially revised document that made extensive and far-reaching changes.



Among the changes proposed by the convention were:

- A reduction in the length of the constitution by half, with the number of articles reduced from twenty to fifteen;
- The elimination of the ban on aid to sectarian schools;
- The addition of an exclusionary rule and a conservation bill of rights;
- The assumption by the state of the cost of all state welfare programs over a ten year period, as well as the cost of the statewide court system;
- The elimination of the governor's pocket veto power, balanced by an increase in gubernatorial flexibility in administering the executive branch;
- The removal of apportionment from the hands of the legislature and its placement with a special independent commission;
- Provisions that would move the state towards providing free higher education;
- The reduction of the voting age from twenty-one to eighteen (later achieved by the Twenty-Sixth Amendment to the US Constitution);
- The removal of the requirement that all general obligation debt be approved by the voters.

The delegates produced a more streamlined document, a constitution designed for an activist state. No constitutional convention in New York was more responsive to the needs of the cities, but its bold initiatives in the area of welfare, education, and community development, among others, proved too much for the voters.



*Credit: New York Daily News*

Convention President Anthony Travia, Assembly speaker, submitted the changes as a new constitution. Voters would have to vote up or down to all the changes: all or nothing at all. That decision proved fatal. Opposition to many of the controversial provisions, combined with tepid support from reformers, resulted in a stunning defeat.

In 1977 and 1997, voters answered “no” to mandatory calls for constitutional conventions, leaving the state with the constitution of 1894, as amended.



## Section 2: Perspectives on the Constitutional Convention

This section is a collection of perspectives on the constitutional convention. In this section, there are proponents and opponents; those who talk about how to reform the constitution through the legislative process; issues with the delegate selection process; and potential agendas for a convention, if approved. Many of the pieces were compiled from a blog run by the Rockefeller Institute of Government. In other cases, pieces were adapted from other sources, and used with permission. Those pieces are noted.

## Vote ‘Yes’ for a Constitutional Convention this November

Gerald Benjamin<sup>8</sup>

In an extraordinary opportunity on Nov. 7, we New Yorkers will vote in a statewide referendum on our satisfaction with state government. That’s because our state Constitution says that once in every generation we must ask ourselves the question, “Shall there be a convention to revise the Constitution or amend the same?” The authors of this provision in the mid-19th century wanted to ensure our government would continue with the consent of the governed.

It follows that if you are satisfied with how our state government has been functioning, you should vote “No” on a Constitutional Convention. But if you are dissatisfied, you should vote “Yes.”

So, are you satisfied that criminal indictments or ethical lapses have driven an average of two state legislators a year from public office since 2000, including the Assembly Speaker and the Senate Majority Leader? How do you feel about living in a state with gerrymandered electoral districts and rule by entrenched elites?

Many ills of our state (e.g., one of the lowest voting participation rates in the nation) can be traced to antiquated portions of our state Constitution, which permits partisan election administration and voter eligibility standards.

Court rulings have modified our Constitution without our participation to allow precisely the thing that vexes school boards the most: Entirely local matters are decided by state government while state program costs are passed along to localities.

As persons interested in education, ask yourself if you are satisfied with:

- Education policy made by Regents appointed solely by the state Assembly.
- The share of education costs paid by the state.
- The manner in which state aid is calculated.

Are you satisfied with the Constitution guaranteeing a “sound basic education” to young people, in light of the disappointing results to date of the Campaign for Fiscal Equity and Small Cities lawsuits?

A Constitutional Convention offers the opportunity to align governmental goals with modern sensibilities. How about making equal educational opportunity a constitutional goal? Why is there no results-oriented definition of the state’s obligation to provide education? Why is the Constitution practically mum about public higher education?

Opposition to the Constitutional Convention is easy to understand: it threatens people currently in power. This includes legislators who fret, disingenuously, that the Constitution requires delegates to the convention to be paid the same as legislators. In a “stop me before I sin again” argument, they say, in essence, “Don’t call a convention because we will run to be delegates and win. Then we will be paid double for the year! It will cost a lot, and all will be wasted because we’ll change nothing.”

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8 This article originally appeared in the September 18, 2017, edition of *On Board*, the official publication of the New York State School Boards Association (NYSSBA). Reprinted with permission.

Opponents of a Constitutional Convention also make the exact opposite argument — that dark money will distort the results and produce a list of horrors: possible loss of pension guarantees for public employees, possible diminished rights, possible attacks on our cherished Adirondack Preserve.

Let's address these bugaboos. First, the only big money that's appeared so far is from labor unions, and it is being spent against, not for, a convention. Even without the current state constitutional provision, existing pension contracts are protected under the U.S. Constitution. And if you are concerned about the Adirondacks, note that many leading environmentalists favor a convention as opportunity to create new environmental protections.

A convention is an unparalleled opportunity to modernize government. Also, it may extend rights to heretofore constitutionally unprotected groups or assure that protections aren't lost due to adverse action at the national level — e.g., a woman's right to choose. Historically, New York's conventions have a record of advancing rights, not diminishing them.

Finally, remember that holding a Constitutional Convention changes exactly nothing without final citizen approval. Its proposals must be adopted through a referendum to be put in effect.

Some claim that government reform can be achieved through the Legislature, without the risks of a convention. The record proves just the opposite; for decades the Legislature has dodged reform, including ethics reform. One of my favorite headlines ran in the *Syracuse Post-Standard* last year: "29 New York state officials convicted, 0 ethics reform laws passed in 2016."

Your vote in November will be whether to trust or fear democracy. We need an honest, viable, balanced, effective representative democracy in New York if all of us, in our growing diversity, are to prosper together in this century. A Constitutional Convention is the only path to this end.

## **Vote No: A Constitutional Convention Poses a Serious Threat to Public Education<sup>9</sup>**

**Andrew Pallotta**

Don't be fooled.

A Constitutional Convention would have nothing to do with improving New York State government and returning it to “the people.” Instead, what a convention would really be about is ensuring government remains in control of political insiders and serves the interests of deep-pocketed donors.

History has shown that convention delegates mostly would be made up of politicians and their staff. A convention would be more than a publicly funded boondoggle, too — expected, by some estimates, to cost taxpayers hundreds of millions of dollars.

Just as troubling, a Constitutional Convention could spell complete disaster for New York State's public education system.

From Long Island to Plattsburgh, Buffalo to Albany, our public schools are already faced with significant challenges. Chronic underfunding continues to plague our most-needy schools. Districts statewide remain hamstrung by the unrelenting constraints of a tax cap that have diminished local control. And we now have a secretary of education in Washington who supports voucher schemes, privatization and the unregulated proliferation of charter schools nationwide.

By opening the state Constitution to a sweeping overhaul, the progress our schools have made could be permanently derailed. In fact, should voters in November approve a Constitutional Convention — which would put at risk everything from retirement security to environmental regulations that ensure clean water and air — the very protections that guarantee children access to a free, quality public education and a shot at a successful life could be stripped away altogether.

Why on Earth would we take such a risk?

When talk turns to the possibility of a Constitutional Convention, much of the focus is placed on public pensions. And, yes, a convention would most certainly result in reduced pension benefits for public-sector retirees, including classroom teachers, school administrators and other education professionals. At a time when New York State is facing a teacher shortage, the promise of a dignified retirement is an important recruiting tool for a profession where salaries have not kept pace with the private sector.

The retirement security of public servants who have dedicated their lives to helping children is a worthy issue to highlight when it comes to speaking out against a Constitutional Convention. But, when it comes to public education, it is far from the only issue.

The last time a Constitutional Convention was held in New York, there was a proposal to repeal the Blaine Amendment, which prohibits the use of state money to fund religious schools. Had voters not rejected this attempt, public education in our state would look very different today, and not for the better.

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<sup>9</sup> This article originally appeared in the September 18, 2017, edition of *On Board*, the official publication of the New York State School Boards Association (NYSSBA). Reprinted with permission.

In a political climate where school voucher schemes are a constant threat, wealthy donors could use their influence to secure convention delegates who would push an agenda that would devastate public schools — leading to the likely loss of critically needed funding, local control and transparency.

New York State already owes its schools roughly \$3.5 billion under the Campaign for Fiscal Equity court ruling. Wasting hundreds of millions of dollars — or more — on a bash for political insiders when, instead, it could be used to educate our children, is simply unconscionable.

The fact is, legislative changes can be imposed through the existing amendment process. And, what's more, unlike a Constitutional Convention, the amendment process doesn't cost hundreds of millions of dollars. It's completely free.

We have a responsibility to protect the right to a quality education for all students, no matter their zip code or socio-economic status.

We have a duty to ensure that teachers and education professionals working in our schools have access to the resources necessary so they can deliver to students the best education possible.

We have an obligation to the communities we serve.

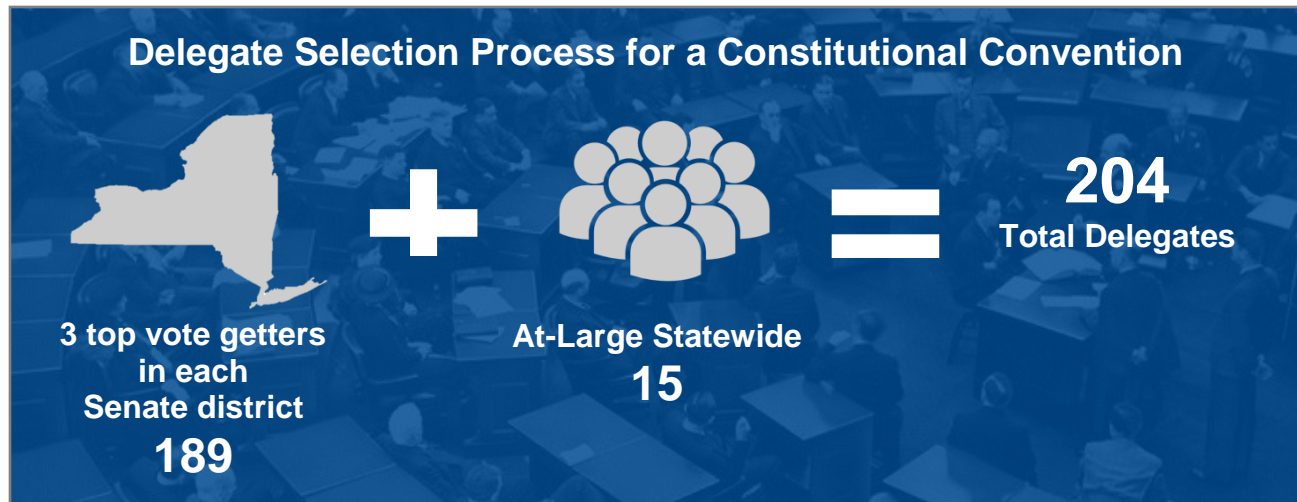
By placing our bets on a Constitutional Convention, we are gambling with the future of our children. It is not worth the risk.

It is incumbent upon all of us who work to protect public education in New York State to vote "No" in November.

## Before the Convention: Issues Surrounding the Delegate Section Process

Jim Malatras<sup>10</sup>

Over the past two decades, much has been written about how delegates are selected (elected) for a constitutional convention in New York State. The delegate selection process was added to the state constitution in 1894. Under section 2 of Article XIX of the constitution voters elect three delegates from every Senate district and fifteen at-large delegates. Currently there are sixty-three Senate districts. Thus, with the fifteen at-large spots there are a total of 204 delegates. Those wishing to run for delegate is subject to election and campaign finance laws.



The election of delegate using Senate districts has raised concerns from scholars and other stakeholders in the past, specifically voting rights, overrepresentation from political “insiders,” and strict election laws/porous campaign finance laws, which limit participation from nonelected officials. Some proponents have argued, that while not perfect, the current delegate election process is good enough. Others, have argued that changes should be made to the process, prior to any convention. Below are some potential options for reforming the process.

### Voting Rights Act Issues

The 1993 Temporary Commission on Constitutional Revision had concerns about the current delegate election process, specifically using the state Senate districts — arguing it may violate the federal Voting Rights Act.<sup>11</sup>

The Voting Rights Act prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure ... which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”<sup>12</sup> Specifically, § 1973 of the Voting Rights Act states that members of a minority group should not “have less opportunity than other members of the electorate to participate in the political

10 This piece is a modified version of a piece the author did for the report entitled, *Agenda for Constitutional Change: Reforming New York State Government* (Albany: Coalition for Constitutional Reform and the Office of Assemblyman Richard L. Brodsky, September 10, 2004), [http://www.albanylaw.edu/media/user/faculty/salkin/constitution\\_reform\\_report.pdf](http://www.albanylaw.edu/media/user/faculty/salkin/constitution_reform_report.pdf).

11 “The Delegate Selection Process” from *Decision 1997: Constitutional Change in New York*, ed. Gerald Benjamin and Henrik N. Dullea (Albany: Rockefeller Institute Press, 1997): 410.

12 42 USC 1973, § 2. See: 42 U.S.C. § 1973.



process and to elect representatives of their choice.”<sup>13</sup> A concern under the Voting Rights Act is *vote dilution* — or electoral mechanisms aimed at reducing minority representation. Specifically, multimember districts (where voters vote for multiple candidates), is highly suspect for it was historically used as a way for racial majorities to dominate the electoral process.<sup>14</sup>

According to Richard Briffault’s analysis examining the 1997 convention call, he observed that African Americans held five of the sixty-one Senate seats or 8.2 percent of the total, while African Americans held twenty-one of the 150 Assembly seats — 14 percent of the total. The total population of African Americans in New York is about 16 percent so the use of Assembly districts would be more representative of the African American and other minority populations.<sup>15</sup>

As a way to remedy this potential problem, the 1993 Temporary Commission suggested several alternatives, including:

- Changing the system to a single candidate system, where instead of choosing three candidates, each voter would vote for one candidate and the top three vote getters win. This approach has been accepted by the federal courts in the past. Moreover, it could likely be accomplished by legislation, and not a change in the New York State Constitution.
- Creating a system of cumulative voting where voters retain three votes, but can vote for an individual candidate up to three times. Again, this system would likely require only a statute change and not go through the constitutional amendment process.
- Using Assembly districts or other similar methods. However, in this case it is much more difficult to accomplish. Such a change would require a constitutional amendment.

## The Concern of Political Insiders

Others have raised concerns that a constitutional convention would be dominated by political “insiders.” As Governor Cuomo stated in his *New NY Agenda: A Plan for Action*, the delegate selection process must “be reformed to prevent such a convention from simply mirroring the existing political party power structure rather than the diversity of people of New York State.”<sup>16</sup> For example, this past year alone there were the following bills/constitutional amendments introduced:

- Assembly resolution 5663/Senate resolution 1227 would prohibit any chair of a political party; an elected official; an appointee of the governor; any person subject to the rules of the commission on public integrity; any person who is required to file an annual statement of financial disclosure with the legislative ethics commission; or any other person who is an officer of an organization,

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13 Ibid.

14 See Lani Guinier, “The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success,” *Michigan Law Review* 89, 5 (1991): 1077, 1094.

15 Temporary State Commission on Constitutional Revision, quoted in *Decision 1997: Constitutional Change in New York*, 411.

16 Andrew M. Cuomo, “The New NY Agenda: A Plan for Action” (Albany: Andrew Cuomo, 2010): 30, <https://saveriverbank.files.wordpress.com/2010/05/acbookfinal.pdf>.

association, or corporation, that receives public funding from serving a delegates to a constitutional convention.

- Assembly bill 6692/Senate bill 1004 would prohibit the governor; lieutenant governor; attorney general; comptroller; any state legislator; any elected county, city, town, or village official; or any person who currently holds elective office from becoming a delegate to the constitutional convention.

## Ways to Open Up the Process to All New Yorkers

While some have argued for prohibiting elected officials and other insiders from participating, others have suggested that groups shouldn't be prohibited and instead it would be better to make the process easier for a diverse cross-section of New Yorkers to participate. As the 1993 Temporary Commission concluded that "the way to achieve such a [diverse] convention ... is not by banning legislators or others, but by altering the process of delegate selection to make it more likely that less politically experienced candidates can successfully compete in the process...."<sup>17</sup>

In order to accomplish this, scholars have argued that the state should liberalize election rules, and provide some level of campaign financing support to ordinary individuals who do not understand New York's strict election laws and porous campaign finance laws.

### *Ballot Access*

New York has some of the strictest ballot access laws in the nation. For example, the delegate selection process would fall under the state election law for other statewide and Senate offices and there are strict rules for submitting petitions such as the type and color of paper and cover sheets.<sup>18</sup> Moreover, the number of signatures required to get onto the ballot is seen as a barrier. To get onto the ballot through the Senate districts, it takes 1,000 signatures for those enrolled in political parties and 3,000 signatures if an individual is not. For the statewide at-large delegates, it takes 15,000 signatures to get on the ballot.<sup>19</sup> There have been proposals introduced in the legislature, as well as recommendations by advocacy organizations, to lower the number of signatures needed to get on the ballot.<sup>20</sup>

The 1993 Temporary Commission on Constitutional Revision stated:

There can be little dispute that the complex and sometimes technical construction and application of the election law favors those most familiar with it.... Some have expressed concern that it would be relatively more difficult for those who are not a part of an existing political party or organization to become candidates for convention delegates. This is not only a criticism of the election law but also an expression of the view that, regardless of the rules applicable to everyday political elections, there should be afforded to persons not normally involved in partisan politics a

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17 *The Delegate Selection Process: Interim Report* (New York: Temporary New York State Commission on Constitutional Revision, March 1994).

18 See Election Law, Article 6.

19 See the New York City Bar Association, "Task Force on the New York State Constitutional Convention: Report on Delegate Selection Procedures," February 2016, <http://www2.nycbar.org/pdf/report/uploads/20073044-DelegateSelectionProceduresConConReportFINAL2.9.16.pdf>.

20 See Assembly Bill 11849 of 2004 and "Task Force on the New York State Constitutional Convention: Report on Delegate Selection Procedures."

greater and more open opportunity to become involved in the special process of constitutional revision.<sup>21</sup>

Therefore, to relax the currently strict process we could: provide a grace period to remedy errors on petitions and the like, reduce the number of signatures, and change the legal standard from strict compliance to substantial compliance.

### *Campaign Finance Reform*

In addition to relaxing some of New York's tough ballot initiatives for those seeking to run for a delegate, another area of concern has been campaign finance reform. The State Commission on Government Integrity and other groups have called for reforms in New York, especially trying to avoid a "government industry" dominance in the convention process. As the Temporary Commission on Constitutional Revision stated:

Democratic governmental processes should be inclusive, not exclusive. The Commission does believe that if a constitutional convention is held, its membership should represent the great diversity of New York.... This includes not only our racial and ethnic diversity, but also the broad spectrum of education and experience and the range of vocational backgrounds present in New York.<sup>22</sup>

Therefore, there have been proposals to create, among other things, a system of public financing of campaigns for delegate elections<sup>23</sup> in order to open up the delegate elections to more New Yorkers.

If a constitutional convention is approved, then there would be time to pass legislation to change some of the current process ahead of the election of delegates. However, those things requiring a change in the New York constitution would not be done in time to be ready prior to the election.

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21 *The New York State Constitution: A Briefing Book* (New York: Temporary State Commission on Constitutional Revision, 1994): 49.

22 *Decision 1997: Constitutional Change in New York*, 432.

23 See Assembly Bill 11849 of 2004.

# Why New York Needs a Constitutional Convention

Peter Galie and Christopher Bopst

New York needs a state constitutional convention. The state's most recent convention was held in 1967, and calls for a convention were rejected in 1977 and 1997. We believe a convention is the only way to achieve meaningful and necessary solutions to the state's systemic problems. This multipart article will address both why we believe a convention is necessary and will attempt to respond to some of the most common arguments against a convention.

## Part I: The “Yes” Argument for a Constitutional Convention

As constitutional scholars, we are often asked why we believe a constitutional convention in 2019 is necessary. We respond: “Ask yourself the following questions:

1. Are you satisfied with the way the state is governed?
2. Do you think the state is moving in the right direction?
3. Do you think the legislature will take the steps needed to change the direction of the state?”

We believe the answer to these questions is “no” and has been “no” for the last generation. Twenty years ago, *The New York Times* noted the state's problems when urging a “yes” vote on the 1997 convention question:

The system under which the convention would be organized is far from perfect. But we urge a “yes” vote because in New York politics the chances for reform are so rare, the price of inaction is so great and the status quo is so wretched. Despite New York's wealth and rich political heritage, its state government is a paralytic wreck. The constitutional convention offers voters a way out.<sup>24</sup>

Those words ring as true today as when written.

Consider that New York:

1. Continues to shrink in percentage of the US's total population. In 2014, the state surrendered to Florida the rank of third-largest state in the nation. From 2010 to 2016, the state's share of the total population of the country dropped from 6.28 percent to 6.11 percent.<sup>25</sup>
2. Has a persistent culture of corruption. Albany thrives on a pay-to-play culture that has seen: four temporary presidents of the Senate since 2008 charged with (and three convicted of) some form of public corruption; the convictions on corruption charges of one of those temporary presidents, Dean Skelos, and the speaker of the Assembly, Sheldon Silver (editor's note: the convictions of both former legislative leaders were overturned by appellate courts in light of a recent Supreme Court decision. Federal prosecutors stated both will be retried.), within

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24 “Call a Constitutional Convention,” *New York Times*, October 28, 1997, <http://www.nytimes.com/1997/10/28/opinion/call-a-constitutional-convention.html>.

25 U.S. Census Bureau, “Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016,” Last Revised January 18, 2017, <https://www.census.gov/data/tables/2016/demo/popest/state-total.html>.

weeks of each other; criminal convictions of twenty-nine sitting or former elected state officials between 2003 and 2016<sup>26</sup>; and current indictments against two of Governor Andrew Cuomo's top aides.

3. Has close to a 90 percent incumbency rate for members of the state Assembly and Senate.<sup>27</sup> More legislators leave office under indictment, conviction, retirement, or death than by losing elections! District lines are drawn in ways that not only favor one party or the other, but insulate most incumbents from primary challenges as well. Once people manage to get into office, uncompetitive districts keep them there. Members' items, campaign funds from state parties, and the incumbency advantage in fundraising all contribute to helping ensure reelection. The NY Public Interest Research Group (NYPIRG) released a study in 2013 showing that there had been 103,805 violations of New York State Campaign Finance Law in the preceding two years.<sup>28</sup> These offenders, often repeat violators, are able to commit these violations with impunity, secure in the knowledge that they will not be challenged or critiqued.
4. Continues to engage in back-door financing and sleight-of-hand tricks with the state budget in a manner that hides structural deficits and circumvents the constitutional requirement that all general obligation debt be approved at a statewide referendum. Ninety-four percent of all state-funded debt has never been approved by voters!<sup>29</sup> Whether one believes that such a statewide referendum requirement remains necessary, the current gap between the constitutional dictates and the state's practices is unacceptable and needs to be addressed.
5. Maintains a court system so complex and uncoordinated that it costs the state, litigants, employers, and municipalities over \$500 million annually in unnecessary inefficiencies<sup>30</sup> — not to mention the additional inconvenience, time, and frustration for litigants having to work their way through the system.
6. Perpetuates a local government system that promises home rule for municipalities that cannot afford to exercise home rule because of unfunded mandates.

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26 Mike McAndrew, "29 New York state officials convicted, 0 ethics reform laws passed in 2016," *Syracuse Post-Standard*, May 13, 2016, [http://www.syracuse.com/state/index.ssf/2016/05/ethics\\_reform\\_in\\_albany.html](http://www.syracuse.com/state/index.ssf/2016/05/ethics_reform_in_albany.html).

27 Linda Casey, "2013 and 2014: Money and Incumbency in State Legislative Races," FollowTheMoney.org, March 9, 2016, <https://www.followthemoney.org/research/institute-reports/2013-and-2014-money-and-incumbency-in-state-legislative-races/>. Casey notes that in the 2014 state legislative races, 87 percent of seats were won by incumbents and 97 percent of incumbents won their primary and general elections. Over one-third of the general elections for state legislature in 2014 were uncontested, and New York has frequently landed in the bottom half of the states for overall elective competitiveness as determined by Ballotpedia. See "State legislatures compared by extent of electoral competitiveness in 2016," Ballotpedia, n.d., [https://ballotpedia.org/State\\_legislatures\\_compared\\_by\\_extent\\_of\\_electoral\\_competitiveness\\_in\\_2016](https://ballotpedia.org/State_legislatures_compared_by_extent_of_electoral_competitiveness_in_2016) (ranking New York twenty-eighth out of forty-four legislatures for competitiveness in the 2016 elections).

28 *Blueprint for Reform: NYPIRG's Recommendations to the Moreland Commission to Investigate Public Corruption*, (New York and Albany: NYPIRG, November 2013): 14, <http://www.nypirg.org/pubs/goodgov/2013.11.24BlueprinttoMorelandCommission.pdf>.

29 Kenneth Bond, "Till Debt Do Us Part: The Opportunity for New York Finance Law to Enter the Twenty-First Century," in *New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness*, ed. Peter J. Galie, Christopher Bopst, and Gerald Benjamin (Albany: SUNY Press, 2016): 193 n.15.

30 See, e.g., *A Court System for the Future: The Promise of Court Restructuring in New York State* (Albany: New York State Special Commission on the Future of the New York State Courts, 2007): 96, [http://www.nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://www.nycourts.gov/reports/courtsys-4future_2007.pdf).



7. Has failed to act for the last quarter-century on reforms that might address these problems and is not likely to act on them in the near future.

However, we are not without hope. We have a constitutional provision mandating that the question of calling a convention must be placed on the ballot every twenty years (NY Const., art. XIX, sec. 2), bypassing the need for legislative approval. That year is 2017. Can we afford to wait another twenty years on the slim hope that the legislature will address these problems?

### *The Legislature Will Not Fix the Problems*

Like all states, New York permits constitutional amendments to be submitted to the voters by the legislature. A proposed amendment must be adopted by two consecutively elected legislatures and then approved by the voters at a statewide election (NY Const., art. XIX, sec. 1). Opponents of a convention, including the state comptroller, the speaker of the Assembly, and the majority leader of the Senate, claim that the legislative process works fine and that the legislature will deliver the necessary change. People even cite the significant number of legislative amendments — 222 — approved by voters since the adoption of the state constitution in 1894 as evidence that this process is working.

The number of amendments, however, does not correlate with an effective constitution. Most significantly, the amendments that have been approved during the last thirty years have largely tinkered around the edges. Adding new exceptions to the “forever wild” provision of the forest preserve, increasing preferences in the civil service system for military veterans, and constantly renewing exemptions to the local debt limitations account for a majority of the amendments approved by the voters since 1991. These may have been necessary changes, but they hardly amount to systemic constitutional reform.

Does anybody really believe that a legislature benefitting from the current power structure and anxious to retain that power would adopt, or even seriously consider, institutional reforms such as:

- term limits;
- an *independent* redistricting commission that would end political gerrymandering;
- public financing of elections;
- an indirect initiative that would enable voters to require the legislature to vote on policies they would not otherwise bring to a vote;
- an *independent* Moreland/Ethics Commission?

These possibilities “scare the daylights” out of members of the legislature because they threaten the legislature’s power, institutional status, and the control that body now exercises over the decision-making process and the electorate. The argument that we do not need a constitutional convention (ConCon) because the legislature will propose measures that will reform the process is fatuous and disingenuous.

### *What Might a Convention Accomplish?*

Below are some reforms a constitutional convention might propose. We are under no illusion a convention will adopt all of these changes, but even if a convention were able to achieve a handful of them, New Yorkers would be well served:



- Stronger constitutional requirements to educate our youth, take care of our mentally ill, and mandate a commitment to clean air and water.
- Term limits for members of the legislature or legislative leaders to prevent the accumulation of unchecked power by a small group of individuals.
- A revised Suffrage Article that encourages voter participation through such devices as same-day registration and no-excuse absentee balloting.
- A constitutionally created ethics commission with the power to prosecute violations of state ethics laws unencumbered by the need for legislative or gubernatorial approval.
- Replacement of the “most un-unified, dis-unified, fragmented, cumbersome, complicated, antiquated trial court system in the United States,” according to Chief Judge Judith Kaye<sup>31</sup> with a streamlined state judiciary that could save the state and litigants an estimated \$500 million per year currently wasted on inefficiencies.
- Amendment of the Executive Article to eliminate the prospect of a governor filling a vacancy in the office of lieutenant governor with no approval by the state legislature or the voters.
- Fiscal autonomy for local governments by limiting unfunded mandates and revising the outdated tax and debt limits imposed on those governments.
- Reform of the state finance provisions of the constitution that have been in existence since the nineteenth century and have proved ineffective for the finances of a state having a gross domestic product (GDP) that is higher than all but about a dozen countries around the world, which have allowed the state to incur unlimited debt with reckless abandon.
- Remedying the “fox in the hen house” — the question of legislators and judges serving as delegates to constitutional conventions.
- Adoption of constitutional-amendment methods that would provide a means to achieve constitutional revision that do not depend on the whim of the legislature.
- Simplification and modernization of our 50,000-word behemoth of a state constitution and elimination of the thousands of words of obsolete, superseded, and trivial material.

## **Part II. Not the “Same Old Same Old Politics as Usual”: Why **Insiders** Won’t Dominate a Constitutional Convention**

New Yorkers have a legitimate concern about politics as usual in the state, with the same three men sitting in a room making all the state’s decisions behind closed doors. Opponents of a constitutional convention make the argument that the process for selecting delegates, which in part resembles the process by which legislators are

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31 Quoted in Ross Sandler, “Judge Kaye’s Vision for Consolidation and Simplification of the Trial Courts,” CityLand, February 12, 2016, <http://www.citylandnyc.org/judge-kayes-vision-for-consolidation-and-simplification-of-the-trial-courts/>.

chosen,<sup>32</sup> will enable “insiders” to dominate a convention, creating a duplicate forum for inaction when we already have one in our legislature. Why, they ask, should we expect anything better from a convention run by the “same old politicians”? They say that today’s political climate would make any convention a waste of time and money that could be spent more productively.

However, in light of the facts and previous conventions, the critics of the convention are wrong. Specifically, we explore three criticisms leveled against holding a constitutional convention.

1. A constitutional convention is so similar to a legislature in the way it operates as to make its efforts duplicative of the legislature.
2. Past conventions produced more of the same or so little that they were a waste of time and money.
3. Past conventions were dominated by elected officials (legislators and judges).

### *Why a Convention Is Different Than a Legislature*

One argument critics make against holding a constitutional convention is that it is similar to a legislature in the way it operates, thus making its efforts duplicative of the legislature. However, there are important differences between the state legislature and a constitutional convention. A constitutional convention:

- Is a unicameral body, so there is no need for passage by multiple houses and the attendant reconciliation required between the two houses.
- Is autonomous and transitory because it is called for a specific purpose and goes out of existence when that purpose is accomplished. This frees delegates from the pressures of reelection campaigns.
- Does not use a seniority rule for the appointment of chairs and leadership.
- Allows judicial, executive, and local government officials to participate jointly in its deliberations. Personnel are not separated into three branches as they are in state government.
- Limits the power of political leaders and parties. Convention officers do not have the political and legal influence that leaders of the state legislature wield. They cannot bury the proposals of maverick members in committees. Future committee assignments cannot be promised, and no local project can be initiated or delayed. As the leading scholar of the 1967 convention writes about that event: “leadership was generally much more constrained than normally would have been the case in the legislature.”<sup>33</sup>
- Has no institutional memory. Throughout New York’s history, there have only been a handful of delegates that have attended multiple conventions. Nearly all of the delegates to a 2019 convention will be new to the game. No delegates will

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32 If the convention call is approved in November 2017, delegates will be elected in November 2018. Three delegates will be elected from each of the state’s sixty-three Senate districts (for a total of 189) and fifteen delegates will be elected statewide, making a total of 204.

33 Henrik N. Dullea, *Charter Revision in the Empire State: The Politics of New York’s 1967 Constitutional Convention* (Albany: Rockefeller Institute Press, 1997): 18-9.

exert special influence because of their experience in a prior convention (last held fifty years ago).

- Proposes only constitutional changes and focuses exclusively on that task. A convention engages in none of the other activities and exercises none of the responsibilities that are part of the state legislature's duties, such as adopting a budget and the day-to-day business of governing.
- Has less demanding procedures for constitutional revision than the ones imposed on the state legislature. Constitutional amendments in New York that are initiated by the legislature must pass two separately elected legislatures; a convention requires only single passage by that body.
- Contains a mix of (senatorial) district and statewide delegates (there are fifteen delegates selected at large). As opposed to a legislature, in which all delegates are representing local interests, a convention combines both local and statewide interests.

These differences contradict claims about the similarities of the two deliberative bodies. We now turn to the question of whether past conventions have produced meaningful reform.

### *Past Conventions Have Been of Great Value in Creating Our Constitutional Tradition*

Many convention opponents assert that previous conventions have been boondoggles — do-nothing events that have squandered taxpayer money on partying while fattening up pensions, but producing little or nothing of value.

The best test of this claim is readily available: What did past conventions produce?

The 1821, 1846, 1894, and 1938 conventions, all of whose work was approved in whole or in large part by the voters, had their share of sitting or former legislators and judges. Yet nearly every right and most of the important constitutional reforms that we now look at with pride were the products of these conventions.

Here is a partial list:

- The state bill of rights;
- Environmental protections (the “forever wild” clause preventing state forest lands in the Adirondacks and the Catskills from being developed);
- The Education Article, which has been interpreted to provide the right to a sound basic education;
- The requirement that the state provide aid and care for its needy;
- Provisions encouraging the state and municipalities to provide low-income housing for their most vulnerable residents;
- A bill of rights for organized labor;
- The state's equal protection clause;
- Constitutional protection for public employee pension benefits; and
- Protections against illegal searches and seizures.

The very constitutional protections opponents use to scare people from approving a constitutional convention happened *because* we held conventions! In the absence of conventions, would these cherished rights and policies be in the constitution? We wouldn't bet on it. Since the state's founding, conventions have had a much stronger record of creating and enhancing rights than the state legislature. Although we cannot predict what a convention will or won't do, we have no evidence whatsoever to believe that a convention in 2019 would undo this strong tradition.

Our last constitutional convention, held in 1967, continued the state's tradition of providing additional rights. That convention proposed a new constitution (ultimately rejected by the voters)<sup>34</sup> that included, among others, the following reforms:

- An independent redistricting commission;
- Suffrage for those eighteen years or older;
- A more equitable school funding formula;
- Prohibition against discrimination based on sex, age, or handicap;
- A constitutional provision protecting clean air and water; and
- Reduction in the length of the document by 50 percent to 26,000 words.

In the face of these proposals, we think it is difficult to contend that conventions have been do-nothing boondoggles. Conventions have brought about remarkable transformations despite the inclusion of former politicians, legislators, and judges.

### *Conventions Have Not Been Dominated by Political "Insiders"*

Contrary to popular misconceptions pushed by opponents of the constitutional convention, elected officials have not dominated past conventions. Of the 186 delegates to the 1967 convention, only thirteen (7 percent) were sitting legislators and twenty-four (13 percent) were sitting judges — hardly dominant and nowhere near a majority. If we include former elected legislators and judges in our numbers, the total rises to sixty-six delegates, slightly more than one-third of the body.<sup>35</sup>

There are good reasons, however, for not lumping together former and current elected officials. If the claim is that a convention will not do anything differently than the legislature because it will be dominated by legislators, we would have to assume that former legislators — even though no longer subject to the rules, norms, and sanctions of that body, and not under any pressure to be reelected — will, nonetheless, behave as if they were still legislators. This strains credulity and common sense and does not comport with the actual behavior of legislators. Who has not observed the willingness of former legislators to speak out or take positions on issues that, while legislators, the constraints of party, legislative norms, and need to be reelected counseled silence? Branding former legislators and judges as "insiders" without closer analysis papers over real differences, especially on the important issue of delegate independence.

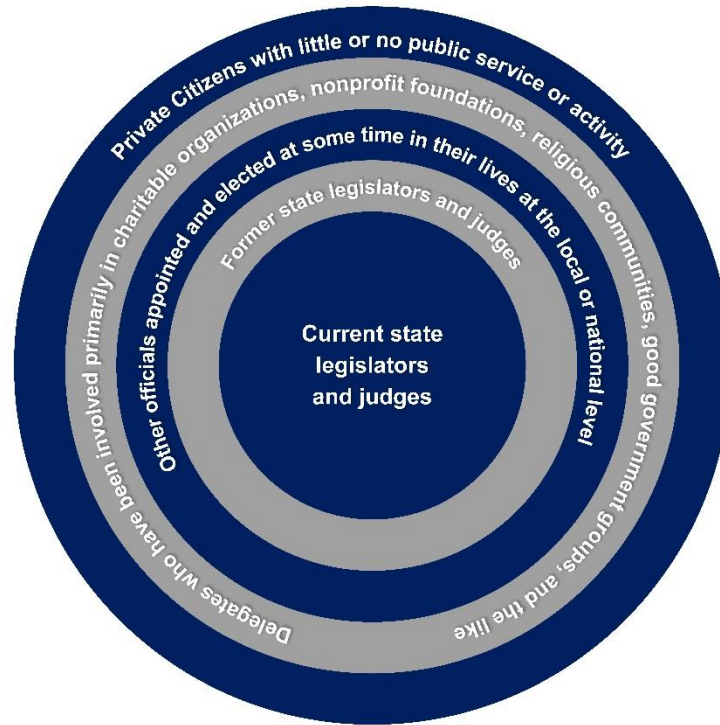
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34 The constitution submitted by the 1967 convention, although forward looking in many respects, was rejected by voters. One of the main reasons for the proposed constitution's defeat was the controversial repeal of the existing prohibition against the use of state funds for parochial schools. By submitting its work as a single, "take it or leave it" constitution, the 1967 convention eschewed the prudent decision of the 1938 convention to submit its work in nine separate proposals. This proved to be a fatal mistake.

35 At the 1938 convention, seventy-three delegates (approximately 45 percent) had either current or past state legislative or judicial experience. In 1967, the comparable figure was 35 percent, down 10 percent.

To our argument that legislators and judges, former and current, did not constitute a majority of the delegates, opponents might reply: “The term ‘insiders’ includes not just former and current elected officials, but local politicians like mayors, county attorneys, supervisors, local legislators, and non-office holding political party leaders.” Of course, broadening the categories of those termed “insiders” to include these additional categories, by definition, increases the number of “insiders” at a convention, but it also takes the sting out of the conclusion opponents have drawn from their presence.

Let’s locate each category of delegates in one of a series of five concentric circles:



The first three circles contain the “insiders,” broadly interpreted. However, lumping these individuals together ignores crucial differences among them — differences that suggest much more diversity of opinion and independence than the homogenizing pejorative “insider” implies.

Should we label as insiders both a legislator who served one term and left because she thought she could promote legislative reform better from the outside and one who has been in the legislature for twenty-five years? How helpful is that? Would you put them in the same category?

Ask yourself: Should a former judge with a sterling record and the admiration of the community be tainted with the label “insider”? How about a former legislator who served with distinction? Consider a judge who sat on a city court having retired thirty years prior to serving as a delegate. Isn’t it likely that that judge will have perspectives and experiences quite different from a currently serving Court of Appeals judge? Or consider a former governor or attorney general who, since retiring, has been an active member of a good government group like the League of Women Voters or Common Cause. Should we dismiss as “insiders” past or present local officials who have earned the trust and respect of their constituents?



Do we do them a disservice by labeling them with the presumptuous and denigrating label “insider”? Is that label at all helpful? Should we call such labeling by its proper name: *propaganda*?

If there are delegates at future conventions who have distinguished themselves in public life and earned the esteem of the voters who chose them as delegates, should we fault the process for producing such results? Would we want a convention filled with delegates who had no political experience or familiarity with decision-making in democratically organized forums? Between the two ends of the spectrum — a convention dominated by current legislators, judges, and party leaders and one dominated by political neophytes — there is a middle ground. That middle ground is revealed by examining the background of the delegates to the 1967 convention:

Delegates Backgrounds from the 1967 NYS Constitutional Convention	
1. Public service ( <b>excluding party or elected office</b> )	46
2. Sitting state legislators or judges	37
3. Locally elected officials	33
4. Former state legislators or judges	29
5. Party leaders	22
6. Labor union officials	4
7. Academics	4
8. Other	11

What is most striking about this list is that the largest number of delegates were in the public service category. These delegates were most notable for their public service, and not by extensive party leadership positions or elected office. They were individuals who had distinguished themselves as **citizens**.

Even among the minority of sitting and former legislators, profound and significant differences existed. Here are some examples.

These delegates were from:

- different parties (Democratic, Republican, Labor, Liberal);
- different parts of the state (upstate, downstate, etc.); and
- different courts (ranging from justice courts to the Court of Appeals).

Some former legislators and judges had been off the bench or out of legislative office for over a generation. Most importantly, the individuals occupying each circle did not think alike on all or most of the issues at the conventions.

Social science research, not to mention our daily experience, recognizes that the loyalties of men and women in public life are diverse; obtaining office under the label of a major party does not mean that person is in harmony with all those who likewise profess that label. To assume that these demographic characteristics (age, race, religion, ethnic background, and life experiences) would not create a diversity of opinions is naïve, if not willfully ignorant.

## *What Insiders Will Share*

What delegates with lengthy careers in public service and extensive political experience do share — and what we believe they would ensure — is that we will have a convention comprised of delegates who are:

- Familiar with our constitutional system of local, state, and national governments; and
- Committed to our constitutional values: the rule of law, an independent judiciary, a viable legislature, and the rights and policies New Yorkers cherish.

Such delegates are the best defense against the charge that a convention will open Pandora's Box and threaten our constitutional values.

When we move beyond the breezy cynicism of “the insider’s game” phrase, the argument falls of its own weight. Let’s call this argument what it really is: an argument made by insiders!

### **Part III: Money Worth Spending: A Response to the Argument That a Constitutional Convention Would Cost Too Much**

**Or**

### **A \$300M Error: When a Mistake Became an Alternative Fact to Oppose a Constitutional Convention**

In 1967, the constitutional convention cost \$47 million. The estimate today, if you move it forward, it would be close to \$350 million, with no guaranteed results.

— John J. Flanagan, Temporary President of New York State Senate<sup>36</sup>

Senator Flanagan was not the originator of the \$300 million-plus figure for a constitutional convention, nor will he be the last to use it. Opponents of a constitutional convention, such as former Assembly Member Jerry Kremer and Anthony Figliola at the lobbying firm Empire Government Strategies, have incorporated that number in their anticonvention literature.<sup>37</sup> Like manna from Heaven for convention opponents, this figure is high enough to scare both conservatives and liberals — after all, they argue, couldn’t the state find better ways to use close to \$350 million?

There is a problem with this argument: The \$350 million amount is pure fiction — a historical inaccuracy birthed by an honest mistake from a reporter who later admitted the mistake.

A review of the state comptroller’s reports from 1967 to 1971 show that the total amount spent for the constitutional convention and its preparatory commission was \$7,580,885 (much less than the \$10 million appropriated by the legislature for the

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36 John J. Flanagan, quoted in Bill Mahoney, “How the cost of a convention became urban legend,” *Politico*, February 9, 2017, <http://www.politico.com/states/new-york/albany/story/2017/02/how-an-implausible-cost-estimate-for-a-constitutional-convention-spread-109467>.

37 Arthur “Jerry” Kremer, quoted in Matthew Hamilton, “Analysis: Holding a constitutional convention is ‘nothing but a con,’” *Times Union* Capitol Confidential Blog, June 23, 2016, <http://blog.timesunion.com/capitol/archives/250781/analysis-holding-a-constitutional-convention-is-nothing-but-a-con/>; Anthony Figliola, “Another Voice: Constitutional convention is nothing but a con,” *Buffalo News*, January 20, 2017, <http://buffalonews.com/2017/01/20/another-voice-constitutional-convention-nothing-con/>.

convention),<sup>38</sup> which translates to \$55,425,833 in 2017 dollars.<sup>39</sup> These amounts approximate those used in recent literature by the Civil Service Employees Association (CSEA), no friend of a constitutional convention, who pegged the cost of the 1967 convention alone as \$6.5 million, or \$46 million in 2015 dollars.<sup>40</sup>

Neither of the above amounts includes long-term actuarial costs, such as pension credits for delegates. Frank Mauro of the Fiscal Policy Institute prepared an estimate before the 1997 vote that included these costs. Mr. Mauro estimated the total cost of a convention in 1999 that finished its work in one year (as all but one convention have) and that would have low printing costs and minimal public education at \$50.1 million (or \$73.6 million in 2017 dollars).<sup>41</sup>

Nobody who has carefully researched this issue has come up with a number anywhere close to \$350 million. So, where did it come from?

In December 2015, a media boot camp was held in which several state constitutional scholars (in the interest of full disclosure, both authors of this piece attended and presented) spoke with the media about the constitutional convention process. At that time, political scientist Gerald Benjamin, an expert on New York State government, identified the cost of the 1967 convention in 2015 dollars as \$47 million. Casey Seiler, a reporter for the Albany *Times Union*, identified the \$47 million as the cost of the 1967 convention, not the inflated cost of a convention in current dollars. This inadvertent error was then multiplied by convention opponents who inflated the \$47 million figure from 1967 dollars to current dollars, resulting in the \$350 million amount. Mr. Seiler wrote an explanation of how this happened in a February 2017 article, in which he concluded: “So if you hear anyone throw out [the \$350 million] number, tell them it’s bunk — and tell them I said so.”<sup>42</sup>

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38 The comptroller’s reports did not differentiate between costs for the convention and costs for the preparatory commission, so they are included together. The appropriation for the preparatory commission was \$800,000.00. In the event the full appropriation for the commission was spent during Fiscal Years 1967 and 1968, the total amount spent for the convention would have been \$6,506,569, which translates to \$49,449,879 in 2017 dollars.

39 Conversion amounts were done using the website <http://www.in2013dollars.com/>. Conversion amounts were rounded to the nearest dollar. Because the comptroller’s reports use a fiscal year that ends on March 31, the conversion date used was for the calendar year before the fiscal year end (i.e., Fiscal Year End March 31, 1967, dollars were converted using year 1966 since nine months of the fiscal year were in 1966).

40 CSEA Legislative & Political Action Department, “New York State Constitutional Convention?: Here’s what you should know,” n.d., <https://cseany.org/wp-content/uploads/2015/10/con-con-flier.pdf>.

41 Frank Mauro, “How Much Would a 1999 Constitutional Convention Cost?,” n.d., on file with the authors.

42 Casey Seiler, “Only off by \$300 million,” *Times Union*, February 11, 2017, <http://www.timesunion.com/tuplus-opinion/article/Only-off-by-300-million-10926419.php>.

“ There is a problem with this argument:  
The \$350 million amount is pure fiction — a  
historical inaccuracy birthed by an honest mistake  
from a reporter who later admitted the mistake. ”

Despite Mr. Seiler’s best efforts to correct the record, convention opponents trumpet the \$350 million number unabashedly, seeming unfazed by the fact that it is no truer than Donald Trump’s claims about his inaugural crowds. It bears repeating, however: **The \$350 million number is patently false.** Depending on the study being used, the best estimates are that a 2019 convention would cost somewhere between \$50 million and \$75 million.<sup>43</sup>

#### *The Question Becomes: How Much IS Too Much?*

The cost of any endeavor, as such, is not the decisive factor. Any cost of a convention, no matter how small, would be too great if there were little likelihood of a positive return. If we have reason to believe that the convention would accomplish real reforms, the \$50 million figure — and even the \$75 million figure — would be “a drop in the bucket.” This is especially true when we consider that we spend over \$1 million per legislator (so more than \$213 million total) each legislative session, and that includes dubious expenses like the money spent to cover the legal defenses of legislators accused of sexual harassment, charged with submitting travel expenses for no-show travel, and stipends that certain chosen legislators receive for chairing committees they did not actually chair.

Companies often spend significant amounts of money to clean up their operations. When Greyhound fell prey to lower airline costs in the wake of that industry’s deregulation, it upgraded its service and equipment and spent over \$110 million (close to \$217 million in 2017 dollars) to move and improve depots to get itself back in the running.<sup>44</sup> After realizing that customer dissatisfaction was costing it sales, Walmart, notoriously known for its cost-cutting, built 200 training centers for employees looking to rise into management and raised pay for both managerial and nonmanagerial employees — reforms that cost the company an estimated \$2.7 billion, but reversed the tide of declining sales.<sup>45</sup> Money well spent in both cases!

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43 These amounts are for the convention only. They do not include any amount for a preparatory commission.

44 Kenneth Labich, et al., “The Year’s 25 Most Fascinating Business People,” *Fortune*, January 1, 1990, [http://archive.fortune.com/magazines/fortune/fortune\\_archive/1990/01/01/72929/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/1990/01/01/72929/index.htm).

45 Neil Irwin, “How Did Walmart Get Cleaner Stores and Higher Sales? It Paid Its People More,” *New York Times*, October 15, 2016, <https://www.nytimes.com/2016/10/16/upshot/how-did-walmart-get-cleaner-stores-and-higher-sales-it-paid-its-people-more.html>.

The taxpayers of this state spent over \$45 million to clean the facade of the Capitol building. That cleaning did not improve government operations or the output of the state legislature. It did not enable the government to operate more efficiently or effectively. We did it because the character and condition of the building in which state governance takes place reflects the pride and commitment we have in our government. Do we owe our founding document any less?

A number of studies of New York's byzantine court system have estimated that merging and streamlining that system would save the state, litigants, businesses, and municipalities over \$500 million annually — \$50 million of that cost being to the state itself. If the convention cost \$50 million and delivers court reform, the state would recoup that cost in one year (not to mention the savings realized by the other affected individuals and entities). And that's just for starters. Convention reforms would bring savings in other areas as well.

Spending \$50 million (or even \$75 million) on a convention, if that is what it takes to restructure and reform New York's \$163 billion-a-year state government, is a bargain. Put another way, it is approximately three hundredths of 1 percent of the state's budget.

Annual elections have costs. Participating in democracy has costs. But the ability for people to have an active voice in how they are governed independent of a legislature that has been unwilling or unable to meaningfully confront the structural problems facing the state is an investment worth making.

We have the power to control our destiny — to shape the government and policies of this state. Regardless of what happens in Washington, we can adopt reforms that will correct the dysfunctions in government; reduce, if not eliminate, the pay-to-play culture in Albany; and place in our constitution policies and rights protections that reflect New York's distinct political culture. In an age of uncertainty and turmoil at the national level, we can seize the day. We have much work to do. In November 2017, we can begin that work. Let's do it!



# “The Risks Outweigh the Rewards”: Who Are the Opponents of a Constitutional Convention and What Are Their Arguments?

David Siracuse

Proponents of the constitutional convention (ConCon) have argued in this forum about its benefits, particularly that it is needed to enact comprehensive ethics reform separate from the legislature. However, many organizations are opposed to the convention. Several weeks ago more than 100 organizations across the political spectrum [came out against](#) holding a ConCon. Many of the organizations are among the most powerful interest groups in the state.

Why are these groups opposed to convening a ConCon? The basic premise is the risk is not worth any potential reward. Below is a summary of the players and reasons behind their opposition.

## The Opposition

Opposition comes from the political Left, Center, and Right including the AFL-CIO; NYSUT; environmental groups; the State Rifle and Pistol Association; Republican NY Senate Majority Leader John Flanagan; Democratic Assembly Speaker Carl Heastie; the Independent Democratic Conference (a group of conservative Democrats in the NY Senate); and a lobbyist group (Empire Government Strategies) led by Jerry Kremer and Anthony Figliola, who wrote a book (with Maria Donovan) called *Patronage, Waste, and Favoritism — A Dark History of Constitutional Conventions*. To highlight the strange bedfellows another way, Planned Parenthood has joined Right to Life and the Working Families Party has joined the Conservative Party of NY in opposition to the convention. A full list of groups that have joined the anti-ConCon coalition called New Yorkers Against Corruption (NYAC) can be found [here](#). These groups and individuals make many of the same arguments about cost, outside money, unnecessary, and New Yorkers' rights.

## Opponents Argue a ConCon Would be Dominated by Special Interests Who Would Drive the Convention and Its Outcomes

At its core, the groups argue that the process would be structured in such a way as to make it less a “people’s convention” and more of an “insider’s convention” meant to eliminate various rights because outside money could dominate the delegate selection process and, subsequently, the convention.

Candidates, for instance, running to be delegates wouldn’t be subject to normal campaign finance laws. J.H. Snider, a constitutional convention scholar — while an advocate of constitutional conventions in general — notes that contributions made during the last nineteen days before a referendum election are exempt from disclosure laws. The article describing these loopholes is available [here](#). Campaign finance rules fuel many groups’ concerns that the process could be dominated by “political insiders” because big money would dominate the process.

State ConCons are generally low-information affairs. Even though holding a ConCon was supported by 62 percent of New Yorkers, the most recent [Siena poll](#) found that two-thirds of voters hadn’t even heard of it. J.H. Snider notes that “... better-organized and well-financed interest group information campaigns can be especially persuasive.”

Not only are opponents concerned about undue outside moneyed interests, they believe it would be wasteful because conventions have been dominated by elected officials, especially from the state legislature. Constitutional scholars have argued that ConCons should aim to be as independent as possible from the legislature. Snider explains it best, stating “Conventions whose membership overlaps with that of the legislature may more aptly be described as special sessions of the legislature than conventions.” The governor recently reiterated his concern about a convention being made up of elected officials, and it is something he’s argued against since his [2010 campaign](#). Snider says, “Labeling them conventions, however, may have procedural benefits for legislative leaders, such as smaller majorities required for constitutional amendments submitted to voters, double-dipping in salary as both a legislator and a delegate, and exemptions from ethical safeguards that apply to legislators but not to delegates (depending on how the legislature drafts the enabling act for the convention).” In fact, the 1967 ConCon was headed by then-current Assembly Speaker Anthony J. Travia and virtually the entire state legislative leadership from both the Assembly and Senate.

1967 New York State Constitutional Convention Leadership		
Name	Background	Convention Title
Anthony Travia	Speaker of the Assembly	President
Moses Weinstein	Majority Leader of the Assembly	Majority Leader
Earl Brydges	Senate Majority Leader	Minority Leader
Perry B. Duryea	Assembly Minority Leader	Vice President
Robert Wagner	Former NYC Mayor	Vice President
Charles Desmond	Former Chief Justice of the Court of Appeals	Vice President
William J. vanden Heuvel	Former Assistant to U.S. Attorney General Robert Kennedy and Counsel to Governor Harriman	Vice President
<a href="#">Source: League of Women Voters of New York State</a>		

Currently there is no law in New York that would prevent current legislators from running for a delegate position, and a [recent set of proposals](#) to do so by Assemblyman Brian Kolb (R – AD 131) was summarily dismissed during this year's legislative session. For thoughtful counterarguments on who exactly we consider “insiders” and why we should value their expertise.

### **The “Special Interest” Convention: Loss of Constitutional Rights and Significant Taxpayer Cost**

Opponents argue that a convention dominated by “special interests” would put essential rights in the constitution at risk. On the Left, labor groups worry that worker rights would be at risk, such as the right to collectively bargain; the prohibition against pension reductions; worker compensation guarantees; and a provision for social welfare of the needy. Independent Democratic Conference Member Diane Savino speaks to potential setbacks to worker rights, noting, “Whether it's repealing pension protection for workers, whether it is repealing prevailing wage laws, whether it's repealing collective

bargaining rights, in a post-Citizens United world, none of us can feel safe about a constitutional convention.” Keeping these protections in place has been the rallying cry of large membership networks, and they note other recent setbacks such as Wisconsin’s Act 10 in 2011 that, among other things, limited unions from negotiating on anything other than wage increases based on cost-of-living adjustments.

If a ConCon is approved, the opposition groups worry that these sections of the constitution would not be included in the new version and would invalidate provisions that they spent many years fighting for.

At the same time that more liberal groups are concerned with opening up a “Pandora’s Box” to more conservative legislation, conservative groups have the same concern in reverse. For example, gun control measures could be codified, making them more permanent than the current SAFE Act. Timing is also important. As delegates would be selected in 2018 (a gubernatorial election year), the typically higher turnout could favor Democrats and lead to more liberal constitutional measures. Although the control of the legislature was split between Republicans (controlled the Senate) and Democrats (controlled the Assembly) in 1967, more Democrats were elected as delegates. The potential for more Democratic delegates heightens the conservative group opposition to a ConCon. As a counterpoint, however, it has been noted that the way delegates are currently selected — three per Senate district, and 15 at-large — would help the Republicans since the districts are gerrymandered in their favor.

Environmental groups have also come out against the ConCon. One particular element of the constitution, the “forever wild” provision (Article XIV) for New York’s Forest Preserve lands, does as it states — protects forests from being tampered with. One vocal group, the [Adirondack Mountain Club](#), notes that allowing the constitutional convention the potential to change the “forever wild” clause could only be worse than what is already on the books. Another general concern is the current national political climate. Environmentalists are apprehensive that much of the Trump administration’s antienvironmental rhetoric could influence the New York ConCon agenda.

Some opponents state that a ConCon would not only be dangerous, it would be costly. Estimates for it — including salaries, staff, and organization — run anywhere between \$47 and \$108 million. A \$350 million price tag was being bandied about, but that number was the result of the 1967 convention cost (\$10-\$15 million) being mistakenly inflated *twice*, as was pointed out by Gerald Benjamin. See the potential convention cost estimates discussed [here](#). [Mike Long](#), the chairman of the Conservative Party of New York said, “It is important for voters to understand that the history of holding constitutional conventions proves they are a colossal waste of taxpayers’ money that fails to accomplish what supporters claim.” [Former Assemblyman Arthur “Jerry” Kremer and Anthony Figliola said](#), for example, that “The reality is that the convention process in New York has been, for the most part, an expensive, time-consuming production that offers little in terms of accomplishment.” Whatever the cost, the opponents argue that this money could be spent on more pressing issues.

### **A Better Way: The Current Amendment Process through the Legislature**

Opposed groups also note that it would be unnecessary, as changes could be enacted through the normal amendment process in what would amount to legislators “just doing their job.” Senate Majority Leader Flanagan has been on record stating that the current constitutional amendment mechanism is satisfactory. Anti-ConCon groups

frequently cite the fact that the New York constitution has been amended over 200 times in the past 100 years as proof of this fact. The constitutional amendment process in New York requires changes to pass two separately elected legislatures (in other words, passed once before and once after a November election) and then approved by voters. Per [Ballotpedia](#), the state legislature referred nineteen constitutional amendments to the ballot in recent history (1996 through 2016). Voters approved 15 and rejected four of the referred amendments. In fact, voters will decide on two new constitutional amendments this year alone. The 2017 November election will present voters with the option of stripping pensions from public officials who have been convicted of a felony in relation to their official duties. In short, opponents find that a ConCon would be an unnecessary expenditure and there is a viable alternative to enacting change already in place.

### **Moving Forward and Other Subjects of Contention**

Other issues also make it to this political battle, such as whether stronger/weaker reproductive rights would be considered and whether the state would legalize recreational use of marijuana. Other areas of reform include the court systems, the relationship between state and local government, and ethics.

With five months until the 2017 elections, heavy persuasion and mobilization efforts by both proponents and opponents to the ConCon have yet to be seen. As it comes closer to the election date, it will be important to keep a pulse on what messages various groups are pushing and what resonates with the public in what should be a typically low turnout off-year election.

## Amending New York's Constitution, In Between Conventions

### *People to Vote on Changes to the Constitution's "Forever Wild" Clause This Fall*

Jessica Ottney Mahar

With all the talk of this year's vote on a constitutional convention, there's little attention being paid to another ballot measure that voters will be asked to approve. This is an amendment to Article XIV of the New York State constitution known as the "Forever Wild" Clause, which establishes the Forest Preserves in the Adirondack and Catskill mountains and now includes more than three million acres. State land within these delineated areas is constitutionally protected: they are required to be kept in perpetuity as wild forest land, and may not be leased or sold, nor is timber removal allowed.<sup>46</sup> Many believe that New York's constitutional protections for the wilderness are some of the strongest in the world.<sup>47</sup>

While these uniquely protected areas of the state are clearly defined by bright blue lines on maps, there is something unique about New York's giant Forest Preserve parks: they are home to thousands of New Yorkers living in sixteen counties and more than 100 towns and villages. The Adirondack and Catskill Parks are each a patchwork of public and private lands, intermixing wildlands with homes, schools, businesses, hospitals, infrastructure, and all the other things that you find in Upstate New York communities. The Adirondack Park, for example, is roughly six million acres, but less than half of it, or about 2.6 million acres, is public land.<sup>48</sup>

This blend of private and public lands in a constitutionally protected area creates an unusual problem — in order for some development and improvements to take place that everywhere else would be a matter of course, within communities that host Forest Preserve lands those activities require an amendment to the state constitution. Accordingly, since the enactment of the "Forever Wild" amendment in 1895 (the amendment was a result of the 1894 constitutional convention), there have been various amendments adopted that create carve-outs from the constitutional restrictions for various purposes such as the construction of the Piseco airport, the expansion of the cemetery in the town of Keene, and siting new drinking water wells for the town of Raquette Lake. At the core of each of these amendments has been the question of how to balance the strong and important protections for wilderness provided by the "Forever Wild" Clause and the needs of communities located within the blue lines.

Generally speaking, the New York State Constitution can be amended in two ways. One, which there is much discussion about this year, is a constitutional convention. Every twenty years there is a requirement that New Yorkers be asked on the ballot if they want to hold a convention. This is one of those years. A constitutional convention would open the entire document up for revision.

The other way to change the state constitution is through a legislative/public referendum process. That might sound like it is not a big deal — after all, scores of bills pass in Albany every year. What is different about a constitutional amendment is that it

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46 NYS Constitution Article XIV, Section 1.

47 "The Adirondacks," Adirondack Research Consortium, n.d., <http://www.adkresearch.org/adirondacks>.

48 "The Adirondack Park," Adirondack Park Agency, n.d., [https://www.apa.ny.gov/About\\_Park/index.html](https://www.apa.ny.gov/About_Park/index.html).



requires passage of legislation in the state Senate and Assembly by two consecutively elected legislatures.<sup>49</sup> First, the bill must be introduced by members of the legislature and receive an opinion from the state attorney general. The bill authorizing the amendment to be placed on the ballot must pass in both houses, and then, rather than being sent to the governor's desk for signature, it is referred to the next legislature. An election must take place (which occurs every two years for New York State legislators), and then the same bill must be introduced and passed again by both houses in the exact form it was passed the first time. Following that second legislative passage, the amendment is placed on the ballot and must be approved by a majority of voters.<sup>50</sup> In addition, there is usually separate "implementing" legislation that must be passed as well, which does require approval by the governor. This is separate legislation that outlines how the amendment will be operationalized, and must only pass one time.

There are challenges to meeting this high bar for success, which is by design. Amending the constitution is serious business, and is not supposed to be something that can be done easily, or in haste. This process, by virtue of the requirement that two legislatures (separated by an election) approve the proposal, necessarily takes multiple years. Additionally, it can require newly elected members of the legislature to enter discussions without having input on the content or the language of the amendment, which can lead to tension during negotiations about the second passage or the language of the implementing legislation. These challenges are in addition to the "normal" challenges one faces when working to pass legislation in Albany, which is no easy feat. It involves negotiations with stakeholders of various political stripes and ideologies such as local governments, community organizations, academia, state agencies, the governor's office, and legislators; votes in various Assembly and Senate committees; and work to ensure the bill is scheduled for a vote from the entire house.

After years of work by my organization, as well as many other stakeholders, voters will have the opportunity to decide on not only whether to have a constitutional convention, but also whether to approve an amendment to Article XIV — the "Forever Wild" Clause. The amendment would create a Forest Preserve Health & Safety Land Bank.<sup>51</sup>

The concept of a land bank for the Forest Preserve is not new. There is a land bank for the State Department of Transportation (DOT) to use to construct and maintain state highways through a set amount of Forest Preserve acreage that the agency may draw from for specific purposes. The DOT land bank was established with 300 acres. To put this in context, the Forest Preserves in the Adirondacks and Catskills now encompass nearly three million acres.<sup>52</sup>

The amendment that received second legislative passage this year and will appear on the November ballot is aimed at enabling communities located within the Adirondack and Catskill Parks to address critical infrastructure needs and to site new, necessary facilities for public health and safety without having to make changes to the constitution

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49 NYS Constitution Article XIX, Section 1.

50 Ibid.

51 S2414 (NYS Senate Sess. 2017-18), <https://www.nysenate.gov/legislation/bills/2017/s2414/amendment/original>; A8301 (NYS Assembly Sess. 2017-18), <https://www.nysenate.gov/legislation/bills/2017/a8301>; and S2608B (NYS Senate Sess. 2017-18), <https://www.nysenate.gov/legislation/bills/2017/S2608/amendment/B>.

52 "New York's Forest Preserve," NYS Department of Environmental Conservation, n.d., <http://www.dec.ny.gov/lands/4960.html>.

each time. Due to the patchwork of public and private lands that exists in the two parks, there are instances where infrastructure abuts or even crosses the Forest Preserve, or where Forest Preserve lands are the only option for placing new infrastructure. An example is in Raquette Lake where several years ago the town needed a constitutional amendment to drill new drinking water wells. There are also instances where town or county roads, not covered by the previously mentioned DOT land bank, have dangerous curves or grades and, to fix them, Forest Preserve land may be impacted.

The Health and Safety Land Bank will be 250 acres, to be shared among all of the communities located in the Adirondack and Catskill Parks — sixteen counties and more than 100 towns and villages. There are strict rules about the types of projects that can be undertaken using the new land bank, and there are limits on how much total acreage one county or town can utilize. The State Department of Environmental Conservation and the legislature will oversee the implementation of the amendment and, to use the land bank, the locality must show that the use of the Forest Preserve land is a last resort, and no other options exist. They must also pay fair market value for the land, which would be deposited into the state's Forest Preserve Expansion Account to fund a future purchase of additional Forest Preserve land.

The idea for this legislation came out of a locally driven process called Common Ground in the Adirondacks, where local government leaders, conservation and community organizations, and state officials collaborate to think about issues related to the future of the Adirondack Park's public and private lands. Despite its origins in a collaborative process, the negotiations around setting a new precedent with another land bank for the two Forest Preserves were complicated. This initiative involved a broad array of stakeholders, and legislators from not only the sixteen counties that host the Forest Preserve, but many more who chair or serve on key committees through which the legislation needed to pass. Happily, the ultimate goal of creating a framework for ensuring greater sustainability of communities living within the blue lines, which in turn would make the permanent nature of "Forever Wild" more sustainable, was enough of a motivator for all sides to work through differences and come to an agreement that will benefit both people and nature in the Adirondack and Catskill Regions. Now, it's up to the voters to determine if that agreement is acceptable when they head to the voting booth this fall.

# When Rhetoric Attempts to Trump Reality: Why a Constitutional Convention Would Not Take Away Public Employee Rights

Peter Galie and Christopher Bopst

Imagine if you will a day when the state of New York ... is relieved of its pension obligations to retirees....

— [Ned Hoskin, New York State United Teachers](#)

Large scale campaigns consisting of emails and presentations sponsored by public employees unions such as the Civil Service Employees Association (CSEA) and the New York State United Teachers (NYSUT) have sounded an alarm about the dangers a constitutional convention might pose to their members. The picture is ominous, frightening, and meant to be so. The charges are that a constitutional convention would, among others, endanger public-sector pensions and the right to organize and bargain collectively. The union literature makes it clear that these dangers are real and that a convention is an existential threat.

## What Rights Does the State Constitution Afford Public Employees?

A first step in evaluating the concerns of public employees is understanding what the constitution currently protects and what it does not protect:

- **Collective bargaining.** Many people would be surprised to learn that *collective bargaining on the part of public-sector employees is not even guaranteed by the state constitution*. That's correct: although the state constitution [protects the rights of employees to organize and collectively bargain](#), it contains [no reciprocal obligation on the part of government employers to negotiate with worker organizations](#). Rather, collective bargaining for public employees is protected only by the Taylor Law, a legislative enactment that could be undone through the legislative process (single passage by a majority of both houses and approval by the governor). So in the case of collective bargaining, there is not even a constitutional right to take away.<sup>53</sup>
- **Pension benefits.** The New York Constitution makes [public employee pension benefits contractual and protects them from impairment](#). In treating pensions as contracts between the state and the employee, as opposed to matters of legislative grace, New York's position on this matter resembles six other states.<sup>54</sup> Unlike some states that only protect accrued benefits, [New York's provision protects both accrued and future benefits](#).
- Even though the pension provision of the state constitution protects retirees and current participants in the plan, the state has made a number of changes over the course of time to the pension system for *future* employees. The most recent revision was in 2012, when the legislature put in place a new tier (Tier VI) and

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53 One may respond that collective bargaining rights for public employees do not have to be in the state constitution to be "at risk." After all, delegates to a constitutional convention could insert a provision in the constitution banning collective bargaining for public employees — in essence abolishing the Taylor Law by constitutional means. For the reasons stated throughout the remainder of this article, the evidence does not support that this is remotely likely.

54 The other states having constitutional pension protections are Alaska, Arizona, Hawaii, Illinois, Louisiana, and Michigan.

significantly altered the pension conditions for employees joining the retirement system on or after April 1, 2016 (while not affecting existing employees and retirees). In 2017, New Yorkers will vote on a constitutional proposition that would allow pensions to be taken from public officials who have been convicted of felonies related to their public office.

- **Health benefits.** These are not protected by the state constitution so there is no constitutional protection that could be taken away.
- **Income taxes.** The state constitution [protects public employee pension benefits from state income taxation](#). Nonpublic employees have no constitutional exclusion from state income tax for pensions and annuities, [although by statute \\$20,000.00 of such income is excludible annually](#).

## **A Convention Could Not Reduce the Pensions of Current Employees and Retirees**

The most irresponsible assertion being perpetrated by convention opponents is that the pensions of existing and retired public employees could “vanish” if a constitutional convention were to be held. This is patently false. Existing public employee and retiree pensions are protected by both federal and state law.

The US Constitution has a provision known as the Contract Clause, which prohibits states from doing precisely what is feared — retroactively changing the terms of existing contracts. [It provides:](#)

No State shall ... make any ... Law impairing the Obligation of Contracts.

Ever since the constitutional convention of 1938 made public pensions contractual, the rights of each public employee have vested on the date he or she entered the system, and any impairment of those rights through elimination of pension, reduction of benefits, or unfavorable changes in the way cost of living adjustments are calculated would violate the US Constitution.

Other states with similar constitutional provisions that have attempted to change the existing terms of their public employee pension programs through legislation have been routinely rebuffed by courts applying the Contract Clause. A 2013 Illinois statute that halted automatic cost of living increases for retirees, raised the retirement age for current employees, and capped the salary used in determining benefit amounts was held unconstitutional by a unanimous Illinois Supreme Court. Multiple Arizona laws adopted in 2011 that increased employee contribution rates for existing employees and altered the formula for calculating cost of living adjustments were found unconstitutional by a series of different courts.

In addition to violating the Contract Clause of the national Constitution, any attempt by a constitutional convention to retroactively reduce benefits to retirees or to adjust accrued benefits to current employees would almost certainly run afoul of the state constitution — either the due process clause, the takings clause, or the pension provision in effect when every current and retired public employee entered the system. Even if a convention were inclined to eliminate the nonimpairment provision of the state constitution, such a change would apply only to employees hired after the effective date of the change; it could not bind existing employees whose rights already have been fixed.

## New York's Support for Public Employees

The fear public employees have that they will be targets of a convention's anger is anecdotal and unsupported by any measure. Among the states, New York continues to maintain a significant union presence. While union membership nationwide continues to decline, [the percentage of employed New Yorkers that are union members — 23.6 percent — is the highest in the country, with the next highest state, Hawaii, having less than 20 percent](#). Union membership in [New York City is on the rise and has been for three straight years, increasing from 21.5 percent in 2012 to 25.5 percent in 2016](#).

New York also leads the states in public union membership. With close to one million public employee union members in 2014, [New York is second in the nation in raw number of members, dwarfing both Texas \(275,893\) and Florida \(276,746\) despite their larger populations](#). That same study showed New York to be the highest in the nation in percentage of public employees belonging to unions, 72.3 percent, with Rhode Island coming in second at a distant 66.9 percent. Almost 5 percent of the state's total population belongs to public unions, the highest by far of the country's ten most populous states (the next closest in that group, California, claims only 3.3 percent of its total population as public union members). In addition to the state's large number of active public employee union members, there are currently over 900,000 retirees and beneficiaries receiving benefits from the state's different public pension systems.<sup>55</sup>

The state has shown substantial support for public unions. [A poll taken in 2011](#), when the country was just recovering from the Great Recession and support for unions had fallen off considerably nationwide, found that a majority of New Yorkers supported the Triborough Amendment, the statute that preserves salary and benefit levels when public employee contracts expire, as well as the right of public union workers to strike (a practice currently banned by the Taylor Law). More recently, [a Quinnipiac Poll showed](#) by a 49-41 percent margin public support for an amendment to prevent reductions in public employee pension benefits. The polling supports the notion that a constitutional convention would likely ENHANCE public employee rights (perhaps by adding the right to strike or giving more robust pension protections), not diminish them.

## What Is a Constitutional Convention Likely to Do? The Politics

As we have noted above, a convention could not legally reduce or eliminate anybody's pension. The unions are well aware of this. Beyond the legal prohibitions, however, an examination of the constitutional and political tradition of New York, our current political culture, and party divisions in the state, make it clear that elimination of pensions would be dead on arrival at a convention. The same would likely be true for proposals banning public employee collective bargaining (e.g., a constitutional reversal of the Taylor Law) or elimination of the income tax exemption (for which no serious efforts have ever been made legislatively to do).

Any assessment of the likelihood that pensions or other public employee rights could be eliminated or impaired should begin with an examination of our constitutional tradition. Conventions in New York have added, not taken away, rights. Nearly every right — individual or collective — in the New York State Constitution is the product of a constitutional convention. The notion that the values and ideals that have defined New

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<sup>55</sup> This number was calculated by reviewing the annual reports from each of the state's (including New York City's) eight public pension funds.



York, including its commitment to organized labor and its desire to compensate those who have served the public good, will somehow fall prey to a rogue convention does not comport with our constitutional tradition, the statistics cited above, or common sense. A more likely scenario would be that a convention would **STRENGTHEN** the collective bargaining rights of public employees by constitutionalizing them; would **AUGMENT** income tax exemptions for **ALL** retirees, public and private alike; and would **INCREASE** the state's obligation to constitutionally provide for its public servants.

Aside from the historical about-face that would be needed to roll-back constitutionally protected pensions and other hard won benefits, such an effort would face a political obstacle course. Where are the delegates who would promote such an agenda going to come from? Convention delegates will be selected by voters, among whom are the approximately two million active and retired members of public sector unions unlikely to support delegates who would propose radical changes outside the values embodied in our constitutional tradition. Finally, voters at a general election must approve all convention proposals. It strains credulity to assert that in a state with such large numbers of active and retired public union members; where enrolled Democrats won majorities in both houses of the legislature; where the last Republican to win any statewide race was George Pataki in 2002; and where Democratic registrations are more than double those of Republicans, voters would support changes that threaten our constitutional and political values, especially the state's commitment to organized labor.

To those who may ask: how can we be sure New Yorkers won't reflect the same hostility towards unions as Wisconsin, where collective bargaining rights of public employees were drastically reduced in 2011, or Michigan, which adopted right-to-work legislation in 2013, one need look only at the most recent presidential election. Donald Trump took both Wisconsin and Michigan; Hillary Clinton won New York by 23 percent. Moreover, New York has more favorable demographics in terms of numbers of public employees, percentage of public employees, and attitudes about public employment than either of those states. In addition to the political demographics noted above that make it difficult to locate a constituency of any significant size and cohesion that would support and have sufficient power to effect such changes, there is no public demand for eliminating or even reducing pension protections. In response to concerns in the early 21st century that the pension system as it was then financed was not sustainable, significant reforms were adopted and most commentators agree have put the pension system on a sounder financial footing. In response to the spectacle of prominent members of the government convicted of felonies and receiving comfortable pensions, the legislature placed an amendment on the November ballot to stop that practice — a palliative measure by a body unwilling either to address the underlying causes of the “pay to play” culture that provides the breeding grounds for those felonious acts or to correct the significant structural problems in the state's institutions.

Convention proposals generally reflect the problems and conditions that exist when conventions are called. The real issues confronting New Yorkers today are political corruption and government dysfunction. Whatever legitimate concerns about the pension system that might have spilled over into convention deliberations have dissipated, making it a nonissue for any convention.

In light of these facts, we pose the following questions: do you believe delegates to a New York ConCon would vote to eliminate pensions for public sector workers in New York? Do you believe *voters* in New York would approved such a measure? We do not.

New York State needs real constitutional reform — even opponents of a convention concede that much. To hold that reform hostage to a phantom danger to public employees is to deny the good sense and common decency of New Yorkers and do a disservice to the future of our state.

## When Misinformation Spirals Out of Control: The Case of a “Rigged” Constitutional Convention Process in New York State

Heather Trela

The power of social media can be a wonderful thing. It can provide a forum for people to share opinions and ideas and make information more accessible. The downside is that the *quality* of the information being shared on social media is sometimes suspect; Twitter, Facebook, and other social media platforms allow for false or misleading information to be shared quickly and widely, before the information is properly vetted or debunked. Fake stories about the 2016 presidential election that quickly went viral on social media platforms have [come under scrutiny](#), specifically the responsibility of social media platforms to weed out patently false information.

In New York State, a recent example of how false information can quickly go viral over social media, like Facebook, has been over the upcoming vote to decide whether to convene a constitutional convention (ConCon).

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a blue rectangular background.

The ballot itself has been rigged. When you go to vote you won't even see the proposal, as it is on the BACK of the ballot. Unless you remember to turn the ballot over YOU HAVE NO CHANCE. If you don't actively vote NO your vote is automatically read as YES. If you plan on being out of state in November, due to vacation or other circumstances, you need to get an absentee ballot. Keep or establish New York State residency, if only for voting purposes. Vote NO to the proposed Constitutional Convention. Please COPY

Though there are variations of the post, the gist is the same — the proposal for a constitutional convention has been placed on the back of the ballot to purposely make it hard to find and ballots that are left blank on the question of convening a ConCon will automatically be counted as votes in favor of a constitutional convention. The implication is that the system is rigged to force a constitutional convention to be convened, even if that is not the will of the people. Based on the high number of calls and emails that the Rockefeller Institute has received in the last few weeks from concerned citizens, Facebook posts like this have been shared widely. Unfortunately, the information that is being circulated is mostly false.

While it is likely that the proposal for a constitutional convention may appear on the back of the ballot, this is not necessarily a done deal. Evan Davis, manager of the Committee for a Constitutional Convention, [has sued the New York State Board of](#)

[Elections to obtain a court order](#) requiring that the question of whether to convene a constitutional convention appear on the front of the ballot. Though [his initial suit was dismissed](#), Davis does plan to appeal the court's decision to the New York Court of Appeals.

What is not in doubt, however, is how blank ballots are counted. Contrary to what has been circulated, failing to vote on this measure does not default to being considered a vote in favor of holding a ConCon. How to count blank votes is very clearly outlined in New York State Election Law [§ 9-112](#):

If the voter marks more names than there are persons to be elected or nominated for an office, or elected to a party position, or makes a mark in a place or manner not herein provided for, or **if for any reason it is impossible to determine the voter's choice of a candidate or candidates for an office or party position or his or her vote upon a ballot proposal, his or her vote shall not be counted for such office or position or upon the ballot proposal, but shall be returned as a blank vote thereon.** (Emphasis added)

If a voter leaves the question of convening a ConCon blank on their ballot, whether because they miss the proposal or by design, it will simply be counted as a blank vote. End of story. In other words, only those individuals who voted "yes" or "no" on whether to hold a ConCon are counted.

Whether people decide to vote for or against a constitutional convention in New York or ignore the question entirely is up to them. But they should make that decision with accurate information. Misinformation that goes viral muddies the truth and confuses voters. But the bigger danger is that viral misinformation may undermine faith in our electoral system.

# A Constitutional Agenda for the Protection and Expansion of the Rights and Liberties of the People of New York

Richard Brodsky

The single most important task of a constitutional convention is the protection and expansion of the rights and liberties of the people. It is an urgent command of justice: It is made more urgent by the recent retreat of the federal government as a defender of such rights. New York has a distinguished history of strong constitutional protections, beyond those in the federal Bill of Rights. The people have repeatedly approved their expansion through constitutional conventions. Now, more needs to be done.

The national government has long assumed the leading role in protecting the people's rights. The executive, legislative, and judicial branches of the federal government were, at least since the Civil War, widely viewed as the most reliable defenders of minorities and the rights of women, and the civil liberties of all.

There is now reason to be concerned as to whether that historic function is being abandoned. We can no longer take for granted that our national government has the will or the resources to protect our rights of expression, equality before the law, personal privacy, reproductive rights, access to schools, a healthy environment, and more, as my [colleagues at the Rockefeller Institute and Albany Law School have written](#). Inclusion of such rights in our state constitution is a practical guarantee that New Yorkers will not suffer if the federal government abandons its historic commitment to our liberties.

This agenda is by no means exhaustive, and the individual proposals will benefit from considered analysis by convention delegates. I welcome suggestions for improvement of these proposals or additions to the agenda.

Additions to the text of the Constitution are in **bold**. Deletions are in *italics*.



A Blueprint for Protecting the Individual Rights and Liberties of All New Yorkers			
<i>Amendment</i>	<i>New &amp; Amended</i>	<i>Changes</i>	<i>Reasons for Change or Addition</i>
ARTICLE I: BILL OF RIGHTS Article 1, §3 <b>[Freedom of worship; religious liberty]</b>	Amended	Amended by adding the word “ <b>spiritual</b> ” to the existing “religious profession and worship”	There are organized and individual value systems that are as worthy of protection as those of established churches, synagogues, temples, and mosques; by the deletion of the words “ <i>acts of licentiousness</i> ,” which is ill-defined and vague.
Article 1, §11 <b>[Equal protection of laws; discrimination in civil rights prohibited]</b>	Amended	Amended by adding the words “ <b>ethnicity, sex, or gender identity</b> ”; by deleting the words “ <i>his or her</i> ” and adding the word “ <b>their</b> ”	Equal protection of the laws should be available to all persons regardless of ethnicity, sex, or gender identity, including the right to marry; words limiting gender identity are no longer adequate.
Article 1, §12 <b>[Security against unreasonable searches, seizures]</b>	Amended	Amended by deleting the words “ <i>telephone and telegraph</i> ” and adding the word “ <b>electronic</b> ”	Technological advances have made the limitation of search and seizure protections to only “telephone and telegraph” communications obsolete.
Article 1, §18 <b>[Reproductive freedom]</b>	New	The legislature may not enact, nor the governor sign, any law that unreasonably restricts the right of a woman to full and free control over reproductive decisions.	Under current law, legal protections for reproductive freedom are derivative of a judicially constructed constitutional right to privacy. Reliance on that legal doctrine is no longer sufficient.
Article 1, §19. <b>[Right of privacy]</b>	New	The right of each person to a reasonable expectation of privacy shall not be infringed.  -or-  The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.	Increased intrusion by government and corporations into the lives of the people requires a clear legal response guaranteeing an enforceable right to be left alone and to bar unreasonable intrusion. The alternative language appears in other state constitutions.
ARTICLE XI: EDUCATION Article 11, §1 <b>[Common schools]</b>	Amended	Amended by deleting the word “ <i>common</i> ” from the section heading, adding the word “ <b>public</b> ” in its place; adding the words “ <b>primary and secondary</b> ” to the phrase “common schools”; adding the words “ <b>public schools of higher learning</b> ”	Current social and economic conditions make it necessary that students in the state have the same opportunity to seek education at a school of higher learning as they currently have for primary and secondary schools.
ARTICLE XVII: SOCIAL WELFARE AMENDED Article XVII, §3 <b>[Public health]</b>	Amended	Amended by adding the words “and environment” to the section heading; adding the words “The right of each person to a clean and healthful environment shall not be abridged.”	The protection of the right of the people to a clean and healthful environment is a necessary part of the existing constitutional protection of the health of the inhabitants of New York.

## Text of proposed Constitutional Amendments

### ARTICLE I: BILL OF RIGHTS

Article I, §3. **[Freedom of worship; religious liberty]** The free exercise and enjoyment of **spiritual or** religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse *acts of licentiousness*, or justify practices inconsistent with the peace or safety of this state.

Article I, §11. **[Equal protection of laws; discrimination in civil rights prohibited]** No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, **ethnicity, sex, or gender identity** be subjected to any discrimination in *his or her* **their** personal or civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Article I, §12. **[Security against unreasonable searches, seizures and interceptions]** The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The right of the people to be secure against unreasonable interception of **electronic telephone and telegraph** communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

Article I, §18. **[Reproductive freedom]** The legislature may not enact, nor the governor sign, any law that unreasonably restricts the right of a woman to full and free control over reproductive decisions.

Article I, §19. **[Right of privacy]** The right of each person to a reasonable expectation of privacy shall not be infringed.

-or-

Article I, §19. **[Right of privacy]** The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

### ARTICLE XI: EDUCATION

Article I, Section 1. **[Common Public schools]** The legislature shall provide for the maintenance and support of a system of free common **primary and secondary** schools **and public schools of higher learning**, wherein all the children of this state may be educated.

### ARTICLE XVII: SOCIAL WELFARE

Article XVII, §3. **[Public health]** The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be

made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine. **The right of each person to a clean and healthful environment shall not be abridged.**

# A Constitutional Reform Agenda for New York: Some Suggestions

Peter Galie and Christopher Bopst

We see this agenda as a start — one open to additions, subtractions, and refinements. We hope it will serve as a *vade mecum* for citizens who will be asked in November 2017 to vote on the question of whether to convene a constitutional convention and a starting point for those charged with the task of providing the background preparation for delegates elected to that convention, should it be called.

We have arranged our suggestions using a fourfold classifications scheme: Housekeeping, Institutions, Policies, and Constitutional Change.

Following the sequence of articles in the constitution or listing proposed topics in the order of their importance are two alternative organizing frames.

## I. HOUSEKEEPING

Consider:

- Reducing the length of the document by eliminating redundant, obsolete, and superseded provisions.
- Bringing more coherence to the document by revising and rearranging current material.

## II. INSTITUTIONS



### Article III: The Legislature

The heart of any system of representative government is the legislative branch. Not surprising that it has received more attention than other branches of state government. To reestablish it, constitutional reform coming from an outside body is necessary. A legislature unwilling or unable to initiate that renewal needs help in rescuing itself.

Here are some lifelines for consideration:

- Fix the size of the Senate by changing the apportionment requirements generally (which have been attempted at every convention since adopted in 1894).
- Create an independent redistricting commission.



- Strictly limit outside income.
- Require full disclosure.
- Create terms limits for leaders or members.
- Enact campaign finance reform.
- Restructure the process by which salaries and related benefits are distributed and raises granted.
- Join the majority of states in differentiating the terms of the two houses of the legislature.
- Reduce the size of the legislature (currently the fourth largest — although none of the three states having larger legislatures have greater populations).

#### *Article IV: The Executive*



- Eliminate the message of necessity.
- Gubernatorial succession — consider legislative involvement in appointment of a new lieutenant governor when the lieutenant governor ascends to the governorship.
- Eliminating the power of the lieutenant governor to assume the office when the governor is out of the state.
- Eliminate the pocket veto.
- Departments — define the functions of the attorney general; eliminate departments specified in the constitution, leaving them within the control of the legislature.

#### *Article VI: The Judiciary*

- Complete the consolidation of the court system.



- Leave jurisdiction in the hands of the legislature: Do we need the most detailed judiciary article in the country?
- Equalize the size of the appellate departments, or restructure them so that all of the boroughs in New York City are subject to the same appellate law.
- Eliminate elections for trial judges and explore alternative procedures. We have a constitutional provision that requires trial court judges to be elected by the people, but they are not. The promise of voter selection is belied by such practices as cross endorsements, and the reality that one party dominance in many areas means whoever the party nominates is the winner: There is no effective choice, the constitution to the contrary notwithstanding.



#### *Article VIII: Local Finance and Article IX: Local Governments*

- Address unfunded mandates.
- Reevaluate the use of the property tax as the primary source of revenue.
- Bring the local finance law into the twenty-first century by eliminating dated exemptions, changing the debt limits to those based on personal income, etc.
- Revisit debt and tax limits on local government: There are so many exceptions in the document that, when coupled with the use of local public authorities, debt extends much beyond the constitutional limits. So, although it is exempted debt for constitutional purposes, it is debt nonetheless.
- Address the problems created by a local government “system” consisting of thousands of units with overlapping jurisdictions and responsibilities, i.e., the issue of consolidation.

### **III. PUBLIC POLICIES**

#### *Article I: Gambling*

- Eliminate the prohibition on gambling.

#### *Article III: Pension Benefits*

- Deny pensions for public officials convicted of a felony.

#### *Article VII: State Finance*

- Revise the constitutional debt limit provisions, which appear to be at odds with the state’s debt incurring practices. We have a constitution that limits the general obligation debt the state can incur to debt approved by the voters in a referendum, but there is no institutional mechanism that limits the amount of debt the state can and does incur outside that provision.

- Review the budget process and the current balance (or imbalance?) of power that exists between the executive and legislature.
- Examine the state's practice of using cash budgeting and various other practices that discourage transparency and accountability, allowing structural deficits to build while the state claims balanced budgets, a situation that threatens the long term financial health of the state.
- Authorities: provide more than one section to deal with these bodies.
- Constitutionalize the Public Authorities Reform Act.

#### *Article XVI: Taxation*

- Eliminate the constitutional protections for tax exemptions.

#### *Article XI: Education*

- Include in the Education Article the court-ordered standard of a sound basic education.
- Provide benchmarks or criteria for monitoring the state's efforts to meet that standard.
- Examine the status and role of the Board of Regents.

#### *Article XIV: Conservation*

- Strengthen the conservation Bill of Rights section of the Conservation article.

#### *Article XVIII: Housing*

- Afford counties the same incentives to participate in housing as cities and towns.

## **IV. CHANGING THE CONSTITUTION**

#### *Article XIX: Amendments to Constitution*

- Review the process for selecting delegates.
- Examine the "fox in the hen house" problem — public officials as delegates.
- Reconsider the status of the fifteen at-large delegates.
- Create a permanent constitutional revision commission empowered to make recommendations for changing the constitution directly to the voters.
- Institute a limited or indirect constitutional initiative.
- Create a limited convention.

## Why a Constitutional Convention Can Strengthen Enforcement of New York State's Constitutional Rights

Scott Fein

New York State's Constitution, at its core, is designed to safeguard the fundamental rights of our state residents. In many respects, the rights guaranteed by our state constitution are greater in scope than their federal counterparts. Yet, despite the breadth and importance of these protections, citizens are largely barred from seeking damages for violations of state constitutional rights. Deterring misconduct, absent the potential for damages, becomes illusory. How this happened and whether a remedy may emerge from a constitutional convention merits discussion.

States enjoy sovereign immunity deriving from the Eleventh Amendment of the United States Constitution, which grants such immunity to states unless waived by the state or Congress. In 1939, New York State chose to provide a limited waiver of its immunity with the adoption of the New York State Court of Claims Act. The Court of Claims Act, while reaffirming the principle of sovereign immunity, authorized claims, only to be adjudicated in the Court of Claims, against the state arising from the appropriation of real or personal property, breach of contract, or torts of state officers or employees acting within the scope of their service. However, the Court of Claims Act was not deemed by the courts to authorize a claim or compensation for alleged infringement by the state of a right protected by the state constitution. The judiciary perceived that a free-standing constitutional tort was inconsistent with the state's sovereign immunity and could not be recognized.

Commentators observed it was odd that rights deemed to be sufficiently important to be enshrined in the state constitution could not easily be enforced and their violation deterred. Injunctive relief was inadequate since the violation had already occurred. Redress and compensation for constitutional violations remained unavailable, with one caveat. Defendants in criminal matters alleging that evidence was obtained in violation of the federal or state constitution could request that the evidence be suppressed, so that whatever the evidentiary value, the information could not be introduced at trial.

Then in 1996, the New York State Court of Appeals, in *Brown v. State of New York* (89 N.Y.2d 172, 674 N.E.2d 1129 (1996)), concluded that to meaningfully safeguard state constitutional rights, a separate constitutional tort should be deemed to exist and available to those who believe their rights have been violated.

Judge Simons, writing for the majority of the Court of Appeals in *Brown* opined:

[T]he point is that no government can sustain itself, much less flourish, unless it affirms and reinforces the fundamental values that define it by placing the moral and coercive powers of the state behind those values. When the law immunizes official violations of substantive rules because the cost or bother of doing otherwise is too great, thereby leaving victims without any realistic remedy, the integrity of the rules and their underlying public values are called into serious question.

*The New York Times* reported:

Although the effects of *Brown* are yet to be realized, the New York State Court of Appeals' decision could have tremendous implications in the

future. Aside from overturning decades of lower court rulings, this decision appears to have paved the way for redress for those citizens whose constitutional rights have been violated by New York State officials by expanding the protections of the state constitution. Furthermore, because the New York State Court of Appeals is one of the most influential state courts in the nation, this case will, most likely, have a domino effect that spreads into other jurisdictions.

The reaction to the Court of Appeals holding was swift. Civil rights organizations, heralding the decision, said for the first time since the inception of our state, citizens could seek to meaningfully enforce state constitutional violations. Localities, state agencies, and law enforcement authorities decried the decision, predicting that it would open the floodgates to litigation and drain the public treasury.

The concerns on both sides may have had validity, but were never tested. The lower and intermediate courts sought over the next twenty years to materially reduce the circumstances in which a constitutional tort could be asserted. Courts concluded that free-standing state constitutional torts should only be allowed if there was no other available common law right or cause of action (such as wrongful imprisonment, medical malpractice, or personal injury). Nor would a constitutional tort be available if there was an analogous cause of action arising from the federal Constitution. Only self-executing provisions of the state constitution (those that bar the state from taking action) were deemed enforceable by a constitutional tort action. However, the courts differed on which of the hundreds of provisions of our state constitution were self-executing. Throughout the development of the case law, the Court of Appeals remained largely silent.

Where are we now? Twenty years after the Court of Appeals recognized an independent cause of action for damages arising from violation of state constitutional rights, the concept remains illusory. Statutory ambiguity and judicial ambivalence have limited application of this cause of action. Therefore, reasonable questions remain: Does a free-standing constitutional tort remain desirable? Would it deter inappropriate state conduct? Are there other alternatives to guarantee our constitutional protections? These questions merit consideration and would appear suitable for discussion at a state constitutional convention should one be convened.

## Why New Yorkers Should Vote ‘No’: Basic Rights Could Be Put at Risk<sup>56</sup>

By Karen Scharff

Citizen Action of New York, an organization I’m proud to help lead, has worked for decades to make our democracy more responsive to ordinary New Yorkers through improving voting rules and creating a campaign finance system based on small donors instead of big money. We see democracy reform as crucial to achieving economic, racial, and environmental justice reforms. With that history, you might expect us to support holding a constitutional convention. But we don’t.

We oppose it because of the way delegates would be elected if it voters approve a constitutional convention this Election Day, and the role large corporate interests would have in shaping those delegate elections and the convention that would follow. There is too much at stake in our Constitution to risk a convention controlled by real estate developers, hedge fund managers, and other big money donors.

Many New Yorkers are unaware of all the rights the State Constitution defends. In fact, it provides more important protections than the U.S. Constitution for New York residents, especially people of color and working class people who are often underrepresented. These rights include:

- Article II, which allows voters to identify themselves by signature at the polls (no ID required);
- Articles I and V, which protect workers from wage theft and hours exploitation, and defend workers’ right to collectively bargain and receive benefits;
- Article XIV, which safeguards environmental regulations, including the “Forever Wild” clause that keeps the Adirondacks and Catskills protected from development;
- Article XI, which guarantees that every child in New York receives a sound basic education, and prohibits public funding for religious schools;
- And Article XVII, which states that the aid, care, and support of the needy are public concerns that will be provided by the State.

Our State Constitution has been a foundation for our state’s progressive values. Take, for example, Article XVII, one of the many crucial articles at risk for compromise or outright elimination. It is the greatest protection that low- and middle-income New Yorkers have to keep them out of poverty. As programs and supports for so many people continue to be threatened at the Federal level, we cannot afford to put it at risk.

Giant corporations, charter schools, and the super-rich have their eyes on a convention. They see it as their chance to use their money and power to undercut the rights and values enshrined in our Constitution. Here’s a taste of what it could look like: groups will campaign to make stricter voter ID laws; lobbyists will work to delegitimize workers’ rights and reduce environmental standards and protections; supporters of privately run charter schools will look for a chance to take more funding and resources away from our kids’ public schools.

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<sup>56</sup> This article originally appeared in *Urban Matters* (New York, NY: Center for New York City Affairs, The New School, October 4, 2017), <http://www.centrernyc.org/constitutional-convention>. Reprinted with permission.



Given the big-money campaign finance landscape after the Supreme Court's *Citizens United* decision, the vast resources these groups have at their disposal would allow them to throw millions of dollars behind electing the delegates of their choosing.

While a convention sounds great in theory, the fact is that rich and powerful individuals and their lobbyists would dominate the process and use their money to elect the vast majority of delegates. Delegates would be elected through State Senate districts, which are designed to guarantee that the big money interests who currently control the State Senate remain in control. That's the same State Senate that has blocked major pieces of legislation designed to strengthen our democracy and put working families first.

In addition to the obvious rights at risks, past constitutional conventions have proven to be ineffective and full of uncertainties. There are no limits on the duration of a convention, no rules on what can be changed, and we don't know who the delegates will be or who their paid staff will be. If a convention is approved, we'll be left with far more questions than answers.

We don't need to risk our rights to make important changes to our Constitution. There's already a strong process for amending the Constitution that is effective and doesn't risk endangering critical protections. It's a process that has worked over 200 times, including seven times over the last five years.

Nearly 150 organizations and groups across the political spectrum have spoken out to oppose a constitutional convention, including Citizen Action of New York, the New York ACLU, Planned Parenthood Empire State Acts, Environmental Advocates of New York, and the Sierra Club.

New York is recognized as a national leader on important issues, and the values upheld in our founding document reflect that. A constitutional convention would open the entire document up for revision — not just select parts. That's why I'm urging New Yorkers to vote “no” this November.

## Why New Yorkers Should Vote ‘Yes’: It Comes Down to Trusting or Fearing Democracy<sup>57</sup>

By Gerald Benjamin

Are you tired of State government characterized by repeated criminal indictments or ethical lapses that have driven almost three dozen State officials from public office since 2000, including the Assembly Speaker and the Senate Majority Leader? Are you satisfied with partisan election administration and voter eligibility standards, resulting in one of the lowest voting participation rates in the nation? How about regular State intervention in local matters, imposing costs and bypassing the Mayor and City Council? Or entrenched incumbents continued in office, supported by gerrymandered districts and virtually unlimited campaign contributions from moneyed lobbyists? Are you happy with a complex, sprawling, often indecipherable judicial system that costs at least \$500 million more each year than it should, while making justice harder to obtain for ordinary citizens?

If these things bother you, this is your chance to do something about it. Once every 20 years our State Constitution says New Yorkers must hold a referendum on citizens’ satisfaction with State government. It’s in the Constitution because delegates at a constitutional convention in the mid-19th century believed in democracy; they wanted the people to retain control of government, and knew that entrenched politicians and their cronies, beneficiaries of the status quo, had to be bypassed to achieve real reform.

The State Legislature, with more than half of its members from outside New York City, now decides on such matters as the size of sodas sold on Times Square, the availability of taxi service on city streets, and whether city shoppers can bring their groceries home in plastic bags. The local “home rule” intended by the State Constitution has been undermined by State courts’ predisposition to favor State power over local authority, while City government is forced to pay for State programs.

A constitutional convention could:

- Create a constitutionally based and empowered independent ethics watchdog.
- Establish term limits for State elective offices.
- Provide for truly independent, neutral legislative redistricting.
- Force reconsideration of State constitutional provisions that undercut genuine home rule.
- Make our court system truly unified, enhancing efficiency and assuring greater access to justice
- Assure competent, neutral election administration, and eased ballot access to increase voter participation.

The leaders of the Senate and Assembly majorities and organized interests that pay for their members’ campaigns don’t want you to vote “yes.” They like things just the way they are. They want you to fear a convention because the constitutionally prescribed question used for the referendum is unlimited in its scope, and processes for delegate

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selection and compensation are also constitutionally fixed — all put into the Constitution to keep legislators' hands off them.

Their “Stop me before I sin again” argument is particularly disingenuous. Legislators say, “Don’t call a convention because we will run to be delegates and win, and be paid double for the year (the Constitution requires paying delegates at the same rate as legislators). It will cost a lot, and be wasted: we’ll change nothing.”

They also make the exact opposite argument, conveniently ignoring that in Democrat-dominated New York every serious analysis of delegate election outcomes under current rules predicts a Democratic Party convention majority. “Democracy has lately produced bad results,” they say. “Look at Trump. Bad people will be elected backed by massive dark money from malevolent sources, and they will make big changes to hurt you.” Fear is stoked with a list of horrors: Possible loss of pension guarantees for public employees; possible diminished rights; possible attacks on our cherished Adirondack Preserve.

In fact, the big money that’s appeared so far is from labor unions, and is being spent against, not for, a convention. In fact, existing pension contracts are protected under the US Constitution. In fact, many leading environmentalists favor a convention that can achieve further environmental protections. In fact, a convention can extend rights to heretofore constitutionally unprotected groups, or assure that protections aren’t lost due to action at the national level — e.g., regarding a woman’s right to choose.

There have been nine constitutional conventions in New York. They have a record of advancing rights, not diminishing them. Virtually every constitutional provision opponents now wish to protect was adopted by a convention. Essential reforms in the structure and operation of State government are achievable by no other means. Remember, any convention must have its actions adopted at referendum to be put in effect. Delegates interested in achieving a reform agenda will not want to provoke opposition by altering or undermining cherished protections.

Opponents say that government reform can be achieved through the Legislature, without the risks of an unlimited convention. The record proves the opposite; the Legislature has for decades failed to reform itself or the broader system.

It comes down to balancing self-interest with the public interest, deciding whether to trust or to fear democracy. We need an honest, viable, balanced, effective representative democracy in New York if all of us, in our growing diversity, are to prosper together in this century. A constitutional convention is the only path to this end.

## Contributors Biographies

**Gerald Benjamin** is the associate vice president for regional engagement and director of the Benjamin Center for Public Policy Initiatives at SUNY New Paltz. He previously served as chair of the Department of Political Science and dean of the College of Liberal Arts and Sciences at the college. Professor Benjamin is also former director of New York State and Local Studies at the Rockefeller Institute of Government. From 1993-95, he served as research director for the NYS Constitution Revision Commission; was co-editor with Hank Dullea of the Commission's papers, published as *Decision '97* by the Rockefeller Institute (1997); and is co-editor (with Peter Galie and Christopher Bopst) of *New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness* (SUNY Press, 2016).

**Christopher Bopst** is chief legal and financial officer of Sam-Son Logistics, Inc. in Buffalo; co-author (with Peter Galie) of *The New York State Constitution*, 2nd ed. (Oxford University Press, 2012); and, as earlier stated, is contributor and co-author of *New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness*. Mr. Bopst has, additionally, co-authored (with Peter Galie) five articles that have been published in the *Albany Law Review* about the New York Constitution or New York constitutional history and has been involved in efforts to educate high school students statewide about the New York State Constitution.

**Richard Brodsky** is a senior fellow at Demos and NYU Wagner. He previously served fourteen terms in the New York State Assembly, where he chaired the Committee on Environmental Conservation and the Committee on Corporations, Authorities, and Commissions. During his tenure as a Member of the Legislature, Assemblyman Brodsky was active in numerous constitutional reform issues and authored an amendment to the New York State Constitution.

**Scott N. Fein**, a partner at Whiteman Osterman & Hanna, received his Juris Doctor from Georgetown University School of Law and Masters of Law degree from New York University School of Law. He served as assistant counsel to New York Governors Carey and Cuomo, and prior to that as a criminal prosecutor. He has lectured and written extensively on government and regulatory issues, as well as on the New York Constitution. Mr. Fein serves as chair of the Board of Advisors of the Government Law Center at Albany Law School.

**Peter Galie** is professor emeritus of political science at Canisius College in Buffalo. He is the recipient of a John R. Oishei Foundation Three Year Teaching Professorship, "Rewriting the New York State Constitution" (1999-2002); authored *Ordered Liberty: A Constitutional History of New York* (Fordham University Press, 1996); and co-authored the previously mentioned *The New York Constitution*, 2nd ed. and *New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness*.

**Jessica Ottney Mahar** is the policy director for The Nature Conservancy of New York. Her team has successfully advocated for state and federal laws and regulations to protect and restore New York's natural resources, and secured billions in public funding for conservation. Jessica has more than fifteen years of policy experience, previously working for The Adirondack Council and Citizens Campaign for the Environment, and currently serves as Policy Committee co-chair on the NY Advisory Board of the Land Trust Alliance.

**Jim Malatras** is the president of the Rockefeller Institute of Government and prior to that served as Director of State Operations for Governor Andrew Cuomo and Vice Chancellor for Policy and Chief of Staff at the State University of New York.

**Andrew Pallotta** is president of New York State United Teachers, a statewide union with more than 600,000 members in education, human services, and health care.

**Karen Scharff** is executive director of Citizen Action of New York.

**Dave Siracuse** is a fourth year doctoral student at SUNY Albany. He has completed his coursework and exams in public policy and American politics, covering topics such as elections and campaigns, lobbying, political scandal, and health and education policy. For the Fall 2017 semester, he is the head teaching assistant for "Introduction to American Politics." He has also worked at the Rockefeller Institute of Government for the past three summers, conducting various policy research. Other policy-related work includes a summer at the NYS Executive Chamber for the Public Safety division and for the teacher's union, United University Professionals. His dissertation research will continue to study political scandal and the intersection between framing, the media, and public policy responses.

**Heather Trela** is the chief of staff at the Rockefeller Institute of Government who oversees the day-to-day operations of the Rockefeller Institute and serves as the president's primary liaison with management, staff, and other stakeholders. She was a doctoral candidate at, and holds a master's degree in political science from, the Rockefeller College of Public Affairs and Policy, as well as a bachelor's in economics and political science from Hartwick College.