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Making a Modern Constitution:

The Prospects for Constitutional Reform in New York

Editors | **Rose Mary Bailly** and **Scott N. Fein**

NEW YORK STATE BAR ASSOCIATION

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The Prospects for Constitutional Reform in New York

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Cover image: "Vice-President Van Cortlandt with the Members of the Convention appeared in front of the court-house, and the Secretary, Robert Benson mounted upon a barrel, read the immortal document to the assembled multitude." *Credit*: Art and Picture Collection, The New York Public Library, Astor, Lenox and Tilden Foundations.

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INTRODUCTION

Government is beyond our control, or so some perceive. The view underlies antipathy about the process and frustration with elected officials. It produces candidates who promise to dismantle its structures and an increasing number of citizens who hold the political process in disdain. The New York State Constitution appears to anticipate such periods of unease. Within the document exists a procedure to allow the fundamental precepts of government to be reconsidered by the public and reshaped every 20 years. That opportunity, in the form of a state-wide referendum asking whether a constitutional convention is warranted, will be upon us in 2017.

A moment on our Constitution and this publication. The federal Constitution soars, it ennobles, its charm is brevity and statement of common purpose. Our state Constitution doesn't soar, by design; it's little more than a lengthy instruction manual. Why the contrast? Forged in the Revolution was a commitment to circumscribe the role of central authority. The federal government's discretion was carefully drawn and all else was to be decided by the people through their respective state governments. In New York that gave rise to a 56,326-word document that, at once, safeguards underpinnings of social justice, including our fundamental rights of speech and religion and due process of law, and then turns to the myriad of activities that were perceived to merit government regulation, including workers' rights, agriculture, taxes, local governments, the needy, the state's debt, organization of the courts, public pensions and even gambling. Yet, despite the importance of the document, its very length and minutia have given rise to puzzlement and at times criticism.

2017 is just around the corner and, according to a Siena College Research Institute poll, only a very small percentage of the electorate are aware that the opportunity to reshape government will be offered to us. Last year a coalition of policy wonks, for lack of a better term, combined efforts to begin to illuminate for the public the process of amending the constitution. No agenda, no preordained view of whether a convention is prudent, just a desire to alert the electorate that the option to revisit their relationship with State government may be within their grasp. This coalition, which includes the Nelson A. Rockefeller Institute of Government, the Government Law Center of Albany Law School, the League of Women Voters, the Benjamin Center at SUNY New Paltz, and the Siena College Research Institute in collaboration with the New York State Bar

Association, suggested that this publication might further the educational effort.

We have, for this book, asked our authors, experts in their fields, to examine the history, potential benefits and pitfalls of a state constitutional convention. The proceedings of the nine prior constitutional conventions, perhaps more than any other factor, portend the issues and tensions likely to emerge at a future convention. Because the history is so important, we have given the authors considerable latitude, despite some redundancy, to provide their personal perspectives on how history unfolded. I thank them for their contribution to this book and unrelenting desire to improve governance of our State and the welfare of its inhabitants.

Scott N. Fein

Albany, New York

FOREWORD

When it comes to constitutions, the organized Bar bears a unique, singular responsibility. Every lawyer takes an oath of office in which they pledge to "support the constitution of the United States, and the constitution of the State of New York." It's not a coincidence that 34 of the 55 delegates that produced the U.S. Constitution were lawyers, or that the authors of New York's first state Constitution were lawyers. Nor is it a coincidence that lawyers fill all nine seats on the U.S. Supreme Court and the New York Court of Appeals. By training, disposition and solemn oath, lawyers are the primary guardians of our constitutional rights, privileges and immunities.

New York's Constitution mandates that every 20 years New Yorkers are asked the following question: "Shall there be a convention to revise the constitution and amend the same?" The next such mandatory referendum will be held on November 7, 2017. It presents a constitutional choice of profound importance; a once-in-a-generation opportunity for the state to reinvent itself. We will not have this opportunity again for another 20 years.

To help lay the foundation for a serious and thoughtful public dialogue regarding the mandatory referendum in 2017, former New York State Bar President David P. Miranda established the Committee on the New York State Constitution. The Committee began its work shortly after having been established, and is continuing its work under current President Claire Gutekunst. The Committee's membership is diverse, distinguished and experienced. It includes four former State Bar presidents; two former judges of the Court of Appeals; the presiding justice of the Appellate Division, Third Department; former state and local legislators; former high-level executive and legislative branch officials; and other distinguished members of the Bench and Bar from around the state.

The Committee's first report—which was unanimously approved by the State Bar's House of Delegates on November 7, 2015—recommends that New York establish a non-partisan preparatory constitutional convention commission as soon as possible. As detailed in the Committee's report, such commissions have been established for past constitutional conventions and mandatory referendums, and the state has benefitted greatly from them.

Indeed, the need for a preparatory commission is greater now than ever before. If in November 2017 the electorate calls for a constitutional con-

vention, 204 delegates will be elected to serve at it in November 2018, and the delegates will convene at the State Capitol on April 2, 2019. The state Constitution addresses subjects of unusual breadth, complexity and import, and the document itself is more than six times larger than the U.S. Constitution. Moreover, there are few living delegates from the last constitutional convention held in 1967, and little, if any, institutional memory on how to hold one.

So, the state needs to prepare for the mandatory referendum and a constitutional convention if one is held, and that work cannot begin too soon.

Henry M. Greenberg

REPORT AND RECOMMENDATIONS

CONCERNING

THE ESTABLISHMENT OF A PREPARATORY STATE COMMISSION ON A CONSTITUTIONAL CONVENTION

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

Approved by the House of Delegates on November 7, 2015

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INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20 years New Yorkers are asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such mandatory referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning the establishment of a non-partisan preparatory commission in advance of the upcoming vote on a Constitutional Convention.

The State Constitution is the governing charter for the State of New York. More than six times longer than the U.S. Constitution, the State Constitution establishes the structure of State government and enumerates fundamental rights and liberties. It governs our courts, schools, local government structure, State finance, and development in the Adirondacks — to name only a few of the countless ways it affects the lives of New Yorkers.

The State Legislature can propose amendments to the State Constitution, subject to voter approval. However, the framers of the Constitution wanted to make sure that there was an even more direct way for the citizenry to review fundamental principles of governance. That is why at least once every 20 years New Yorkers get to decide for themselves whether to hold a Constitutional Convention.

The Convention vote in 2017 presents the electorate with a constitutional choice of profound importance. Absent a legislative initiative, we will not have this opportunity for another twenty years. So, the State should properly prepare for this referendum, regardless of the outcome.

In the Twentieth Century, every Constitutional Convention in New York was (and two mandatory Convention votes were) preceded by a

1 N.Y. CONST. art. XIX, § 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. . . .").

preparatory commission created and supported by the State government. Conventional wisdom was that if a referendum vote approved a Constitutional Convention, expert, non-partisan preparations were required well in advance of the Convention delegates' assembly.[2] Indeed, most delegates to a Convention had insufficient time or resources to plan or carry out factual investigations or legal research on their own initiative. To a significant degree, the delegates had to rely on research and materials developed by others.[3]

Thus, since 1914, the State has vested in temporary constitutional commissions the important — indeed indispensable — responsibility of doing the research, data-collection and other preparations necessary to conduct a Constitutional Convention. "Some [commissions] were appointed by the governor; others were established by the legislature. Some were created in anticipation of a vote on the mandatory Convention question; others resulted from the need to prepare quickly after the question passed."[4] And some produced bodies of research and work product useful not only to Convention delegates, but also policymakers, courts and scholars decades after.[5]

The State's extensive history with preparatory commissions makes clear that the formation of such an entity — with adequate funding, top- notch staff, and support from all branches of government — is necessary to properly plan and prepare for the mandatory Convention vote and a Convention, if the voters approve the call for one. Accordingly, this Committee recommends as follows:

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2 *See, e.g.*, Robert Moses, *Another New York State Constitutional Convention*, 31 ST. JOHN'S L. REV. 201, 207 (1957) ("Today here in New York much depends on the preliminary work of the Constitutional Convention Commission if there is to be a Constitutional Convention at all. The importance of a genuinely expert, non-partisan approach cannot be overstated.").

3 *See* Samuel McCune Lindsay, *Constitution Making in New York*, THE SURVEY, July 31, 1915, at 391, 392 ("What a convention can attempt in the study of new problems depends largely upon the preparation made in advance of the assembly of the convention. There is not time for the committees to plan or carry out investigations of their own initiative, and in a constitutional convention there is not the accumulated experience and tradition of special subjects that are often carried over from session to session in a legislative committee through the hold-over members who serve several terms. The constitutional convention can do little more than study the materials put in their hands by interested parties.").

4 Robert F. Williams, *The Role of the Constitutional Commission in State Constitutional Change* [hereinafter *Constitutional Commission*], in DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 49 (Gerald Benjamin & Hendrik N. Dullea eds., 1997) [hereinafter DECISION 1997].

5 *Id.*

First, the State should establish a non-partisan preparatory commission as soon as possible.

Second, the commission should be tasked with, among other duties: (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

Third, the commission should have an expert, non-partisan staff.

Fourth, the commission and its staff should be supported by adequate appropriations from the State government.

This report is divided into four sections. Part I summarizes the background of the Committee on the New York State Constitution and the issuance of this report. Part II provides a historical overview of past preparatory commissions for Constitutional Conventions. Part III presents the Committee's recommendations and discusses various lessons from past preparatory commissions and Conventions. Part IV concludes that the importance of the mandatory referendum in 2017 and a potential Convention obliges the State to appropriately plan and prepare, and recommends that the establishment of a preparatory commission is the best way to do so.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and promote initiatives designed to educate the legal community and public about the State Constitution.

At the Committee's first meeting on August 27, 2015, President Miranda requested that the members study and make recommendations

on whether the State should establish a preparatory commission to plan and prepare for a Constitutional Convention. The Committee then heard from Professor Gerald Benjamin, Associate Vice President for Regional Engagement and Director of the Benjamin Center for Public Policy Initiatives at SUNY New Paltz, a nationally respected political scientist and commentator on state and local government. Professor Benjamin presented an overview of issues relating to the 2017 mandatory referendum and the conduct of a Constitutional Convention, and spoke about his service as Research Director of the Temporary Commission on Constitutional Revision from 1993 to 1995. Next, the Committee reviewed and discussed a research memorandum that surveyed the history of past preparatory commissions for Constitutional Conventions, described the work product created by them, and identified key issues that must be considered in creating such a commission today.

After further discussion and review, the Committee concluded that the State government should establish, in advance of the mandatory Convention referendum in 2017, a non-partisan preparatory commission, as it has done in the past. This position is set forth and elaborated on in this report, which was unanimously approved by the Committee at a meeting held on September 30, 2015.

II. HISTORICAL OVERVIEW OF PREPARATORY COMMISSIONS AND CONVENTIONS

In the Twentieth Century, the question of whether to hold a Constitutional Convention was placed before the voters on six occasions (1914, 1936, 1957, 1965, 1977 and 1997) and was answered in the affirmative three times, resulting in Constitutional Conventions held in 1915, 1938 and 1967. Preparatory commissions were established by the State in advance of these Conventions as well as the mandatory Convention votes in 1957 and 1997. Each of these commissions is discussed in turn, highlighting the circumstances leading to their establishment, composition, work product, staff support and funding.

A. Constitutional Convention Commission (1914-1915)

On April 7, 1914, the voters approved the call for a Constitutional Convention by a slim majority (153,322 to 151,969).[6] Shortly thereafter, the Governor signed into law a bill establishing the "New York State

6 PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 193 (1996) [hereinafter ORDERED LIBERTY].

Constitutional Convention Commission" with full power and authority to "collect, compile and print such information and data as it may deem useful for the delegates to the constitutional convention . . . in their deliberations at such convention."[7] The Commission was specifically tasked to supply research materials to the Convention delegates before the Convention was to convene in April 1915.[8]

The Commission consisted of the Majority Leader of the Senate, the Speaker of the Assembly, and three citizens of the State appointed by the Governor.[9] The Commission's enabling legislation provided for no compensation to the members, but provided expenses, and also provided for the employment of paid "clerical, expert and other assistance."[10] For this purpose, the Legislature initially appropriated $5,000.[11]

The Commission's Chair was Morgan J. O'Brien, a former Justice of the State Supreme Court. The Commission selected its staff and fixed their compensation.[12] The State agency responsible for providing assistance to the Commission, the Department of Efficiency and Economy, relied heavily on a newly formed private organization dedicated to producing research of government organizations, the New York Bureau of Municipal Research.[13] The Bureau assigned 20 people to this project, including Charles A. Beard, later to become one of the most influential historians and political scientists in American history.[14]

The Commission produced a 768-page report for the 1915 Convention delegates that contained a comprehensive and detailed description of

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7 L. 1914, ch. 443. *See also* THOMAS SCHICK, THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1915 AND THE MODERN STATE GOVERNMENT 42 (1978) [hereinafter CONSTITUTIONAL CONVENTION OF 1915].

8 *Id.*

9 L. 1914, ch. 261, § 1; *see* Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 12-13 (1996) (discussing constitutional commissions established in 1872, 1875, 1890, 1915, 1921, 1936, 1956, 1958, 1965 and 1993).

10 L. 1914, ch. 261, § 1.

11 *Id.* § 2.

12 *Id.* § 1.

13 GALIE, ORDERED LIBERTY, *supra* note 6, at 193.

14 *Id.*; SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 43-44.

the organization and functions of the State government.[15] The Commission also produced a 246-page appraisal of the State Constitution and government.[16] The comprehensiveness and quality of these materials established New York as the first state in the nation to lay a solid research foundation for a Constitutional Convention.[17] In fact, "[t]he report of the commission was the first comprehensive description of a state government ever prepared."[18] These materials ensured that the delegates to the Convention arrived well- prepared[19] and established a precedent of detailed preparation for two future mandatory Convention referenda (1957 and 1997) and Constitutional Conventions (1938 and 1967).[20]

B. Constitutional Convention Committee (1937-1938)

On November 3, 1936, the voters approved the call for a Constitutional Convention by a vote of 1,413,604 to 1,190,275.[21] In response, Governor Herbert H. Lehman recommended in his annual message to the Legislature that past practice be followed by establishing a non- partisan committee to assemble and collate data for the use of the Convention.[22] "It seems to be extremely short-sighted," he observed, "for us to do nothing until the day the convention assembles." The two Houses

15 NEW YORK STATE DEPARTMENT OF EFFICIENCY AND ECONOMY, GOVERNMENT OF THE STATE OF NEW YORK: A SURVEY OF ITS ORGANIZATION AND FUNCTIONS (1915).

16 NEW YORK BUREAU OF MUNICIPAL RESEARCH, THE CONSTITUTION AND GOVERNMENT OF THE STATE OF NEW: AN APPRAISAL (1915). *See* SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 44-49 (discussing the appraisal).

17 GALIE, ORDERED LIBERTY, *supra* note 6, at 193. *See also* SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 43.

18 Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1299 (2001) [hereinafter *A Worthy Tradition*].

19 *Id*. at 1299. The 1915 Constitutional Convention convened on April 4, 1915 and adjourned on September 4, 1915.

20 *Id*. at 1300.

21 *Id*. at 1304.

22 VERNON A. O'ROURKE & DOUGLAS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE 67 (1915) [hereinafter CONSTITUTION-MAKING]; Franklin Feldman, *A Constitutional Convention in New York: Fundamental Law and Basic Politics*, 2 CORNELL L. REV. 329, 336 (1957) [hereinafter *A Constitutional Convention*].

of the Legislature, however, did not adopt the Governor's recommendation.[23]

In the face of the Legislature's inaction, on July 7, 1937, Governor Lehman announced the appointment of the "New York State Constitutional Committee."[24] Consisting of 42 members, the Committee was "non-partisan and non-political in character and in motive," and responsible for undertaking and directing "the preparation and publication of accurate, thorough, and above all, impartial studies on the important phases of government, certain to be considered at the Constitutional Convention."[25] Governor Lehman made clear that the Committee's purpose was not "to determine an agenda for the Convention . . . Its functions will be confined to fact-finding studies and to the collection of data."[26] Although all of the Committee's members were appointed by the Governor, the Legislature appropriated money in support of its work.[27]

The Committee's Chair was then-State Supreme Court Justice (later Lieutenant Governor and Governor) Charles Poletti. He and the other Committee members were supported by a substantial staff of at least 16 people. In addition, at Governor Lehman's direction, 15 people were assigned from the State Law Revision Commission to work with the Committee. More than 100 others, including leading academics, government officials, and private citizens, also provided assistance, advice and counsel.[28]

The Committee produced 12 reports: five reference volumes, along with volumes devoted to problems related to the bill of rights, taxation

23 O'ROURKE & CAMPBELL, CONSTITUTION-MAKING, *supra* note 22, at 67 ("[Governor Lehman's] . . . recommendation . . . was unable to scale the heights of partisanship. A bill was passed by the Senate, but the legislature adjourned without authorizing such a fact-finding committee, despite Governor Lehman's assurance that the committee would be restricted to fact-finding, with no power over the order or the character of business to be handled by the convention.").

24 1937 PUBLIC PAPERS OF GOVERNOR LEHMAN 664 [hereinafter LEHMAN PAPERS].

25 *Id.*

26 *Id.*

27 Feldman, *A Constitutional Convention*, *supra* note 22, at 337.

28 Information regarding the Poletti Committee's staff and other support was gleaned from introductory notes at the front of each of the 12 reports produced by the Committee. The reports are accessible online from the New York State Library: http://128.121.13.244/awweb/main.jsp?flag=collection&smd=1&cl=library1_lib&field11=1301505&tm=1442777021299&itype=advs&menu=on (last visited on Sept 20, 2015).

and finance, and issues of home rule and local government. As constitutional historian Peter J. Galie has observed, "despite the haste in gathering this material, the Poletti Committee, as it became known, produced one of the most comprehensive and reliable source[s] of information on the New York Constitution."[29]

C. Temporary Commission on the Constitutional Convention (1956-1958)

In 1956, more than a year before the mandatory referendum on a Constitutional Convention, the Legislature established the "New York State Temporary Constitution Convention Commission."[30] The Commission was given three responsibilities: (1) to study proposals for change and simplification of the Constitution; (2) to collect and present information and data useful for the delegates and electorate prior to and during the convention; and (3) to issue reports to the Governor and the Legislature. The interim reports were due not later than March 1, 1957, and from time to time thereafter until March 1, 1959, provided, however, that if the voters decided against the Convention the Commission would terminate on February 1, 1958.[31]

The Commission was composed of 15 members, five named by the Governor, five by the Majority Leader of the Senate, and five by the

29 GALIE, ORDERED LIBERTY, *supra* note 6, at 233; Williams, *Constitutional Commissions*, *supra* note 4, at 50 (the "Committee produced a body of work extraordinary for its depth, breath, and quality"). The Poletti Committee's reports are often cited by New York courts. *See, e.g.*, *People v. Peque*, 22 N.Y.3d 168, 187 (2013) ("As noted in the Poletti Committee's report in preparation for the State's constitutional convention of 1938 . . . ."); *Bordeleau v. State*, 18 N.Y.3d 305, 317 (2011) ("Such concerns were the subject of debate during the 1938 Constitutional Convention. But the Convention and subsequent ratification of the amendments by the electorate demonstrated the approval for the ability of public benefit corporations to receive and expend public monies, enable the development and performance of public projects and be independent of the State [*see Problems Relating to Executive Administration and Powers*, 1938 Rep. of N.Y. Constitutional Convention Comm., vol. 8, at 325–326 . . . .") (citing the Poletti Report)].

30 L. 1956, ch. 814; Feldman, *A Constitutional Convention*, *supra* note 22, at 337-338. As the future Chair of the Commission observed: "The action taken by the Legislature in passing the bill creating the Temporary State Commission on the Constitutional Convention and the Governor's signing of it marked the first time in our State's history, or in that of any other state so far as we can ascertain, that a Commission has been established prior to the referendum on the calling of a convention." Nelson A. Rockefeller, *The Work of the State Constitutional Convention Commission*, 29 N.Y. St. Bull. 314, 315 (July 1957) [hereinafter *Work of the State Constitutional Convention Commission*].

31 GALIE, ORDERED LIBERTY, *supra* note 6, at 262-63; Moses, *Another State Constitutional Convention*, *supra* note 2, at 205-206.

Speaker of the Assembly.[32] When a dispute developed between Republican leaders and Governor W. Averell Harriman over who would serve as the Commission's chair, Harriman appointed Nelson A. Rockefeller (who later became Governor).[33]

The Commission had an outstanding staff, with nearly 70 expert consultants to conduct policy reviews.[34] On September 26, 1956, the Commission held its first organizational meeting,[35] and issued its First Interim Report on February 19, 1957.[36] The report provided a brief outline of the State's constitutional history, a description of methods of amending the Constitution, and staff studies that updated the compilation of state constitutions that had served the 1938 Convention and presented an outline of proposed background studies in local government. The Commission indicated that it would look for opportunities to simplify the existing Constitution in non-controversial ways.[37]

In June 1957, the Commission held public hearings in Buffalo, Albany and New York City to provide the public an opportunity to present suggestions and proposals for constitutional revision and simplification.[38] At the hearings more than 80 people representing their individual points of view or those of organized groups appeared before the Commission.[39]

In the spring of 1957, the Commission created an Inter-Law School Committee on Constitutional Simplification. The Committee examined 54 sections of the Constitution, recommending elimination of 23 of them as superfluous and outmoded. Other sections were deemed so cum-

32 L. 1956, ch. 814, § 2.

33 GALIE, ORDERED LIBERTY, *supra* note 6, at 262. *See* RICHARD NORTON SMITH, ON HIS OWN TERMS: A LIFE OF NELSON ROCKEFELLER 267-269 (2014) [hereinafter ROCKEFELLER].

34 Smith, ROCKEFELLER, *supra* note 33, at 270. The Commission's Executive Director was Dr. William J. Ronan, the 44-year old Dean of the New York University Graduate School of Public Administration and Social Science. The Counsel to the Commission was George L. Hinman, a highly respected 51-year-old lawyer from Binghamton. *Id.* at 270-271.

35 HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 33 (1997) [hereinafter CHARTER REVISION].

36 TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, FIRST INTERIM REPORT (1957), *reprinted* in N.Y. Legis. Doc. No. 8 (1958); *see* DULLEA, CHARTER REVISION, *supra* note 35, at 33 (summarizing First Interim Report).

37 *Id.*

38 DULLEA, CHARTER REVISION, *supra* note 35, at 34-35.

39 Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 320.

bersome and "harmfully detailed" that they could "be rewritten and substantially shortened."[40]

At the summer meeting of the State Bar in June 1957, Chairman Rockefeller said that the two questions voters would face in November were (1) whether the state Constitution needs amending, and if so, (2) whether a convention or the alternative legislative method would be more effective. He observed that there was "no group in the state which is more interested in these questions or whose judgment and informed opinion can be more helpful to the voters in deciding these issues than the New York State Bar Association."[41]

On September 19, 1957, the Commission issued a Second Interim Report[42] that summarized the proposals gathered by the Commission from individuals and 107 organizations during public hearings. The subjects receiving the greatest attention were local governments and home rule, legislative apportionments, organization and procedure.[43]

On November 5, 1957, the electorate voted against a Constitutional Convention by a vote of 1,368,068 to 1,242,538. Nevertheless, the Commission remained in existence under the name Special Committee on the Revision and Simplification of the Constitution. Before going out of existence in 1961, this body issued a number of reports, some of which provided the basis for amendments to the Constitution subsequently proposed by the Legislature and approved by the people.[44]

D. Temporary State Commission on the Constitutional Convention (1965-1967)

As a result of legislative action calling for a referendum vote, in November 1965, the voters approved the call for a Convention by a vote

40 GALIE, ORDERED LIBERTY, *supra* note 6, at 263 (quoting THE INTER-LAW SCHOOL COMMITTEE, THE PROBLEM OF SIMPLIFICATION OF THE CONSTITUTION (1958), *reprinted* in N.Y. Legis. Doc. No. 57, at xiii (1958)); Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 318.

41 Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 314.

42 TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, SECOND INTERIM REPORT (1957), *reprinted* in N.Y. Legis. Doc. No. 57 (1957).

43 *Id.*; *see* DULLEA, CHARTER REVISION, *supra* note 35, at 34-35 (summarizing Second Interim Report).

44 Williams, *Constitutional Commission*, *supra* note 4, at 50.

of 1,681,438 to 1,468,431.[45] That same year, the Legislature established the "temporary state commission on the revision and simplification of the constitution and to prepare for a constitutional convention."[46] The Commission was charged with making "a comprehensive study of the constitution with a view to proposing simplification of the constitution," in addition to the traditional assignment of collecting and compiling useful information and data for the delegates and public before the convening of, and during the course of, the Constitutional Convention.[47]

The Commission was comprised of 18 members, with the Governor, the Speaker of the Assembly, and the Senate Majority Leader each appointing six members.[48] However, the Commission's work was delayed because of policy conflicts, personality clashes, and disputes over the Commission's leadership and staff.[49] The Commission's membership roster was not announced until December 20, 1965, and its first planning meeting was not held until January 20, 1966.[50]

Also, delays in appropriating money to support the Commission's work strained the relationship between the Commission's initial chair (who resigned) and the Legislature.[51] Moreover, whereas earlier Commissions had been able to pick and choose among those subjects they wished to present to the Legislature, the Commission's enabling legislation was construed to require the Commission to address every article of the Constitution.[52]

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45 GALIE, ORDERED LIBERTY, *supra* note 6, at 307.

46 L. 1965, Ch. 443, § 1.

47 *Id.*

48 *Id.*, at § 2.

49 Galie & Bopst, *A Worthy Tradition*, *supra* note 18, at 1312-1313.

50 DULLEA, CHARTER REVISION, *supra* note 35, at 131.

51 The Commission's initial chair was Henry T. Heald, president of the Ford Foundation, who resigned on June 30, 1966. He was replaced by Sol Neil Corbin, a former Counsel to Governor Nelson A. Rockefeller. *Id.* at 130-132.

52 *Id.* at 131-134; see L. 1965, ch. 443, § 1 (requiring the commission to undertake a comprehensive study of the Constitution).

The Commission had a 28-person staff, supported by numerous consultants on a wide range of subject areas.[53] The Legislature initially appropriated $150,000 for the Commission, although the State eventually spent over a million dollars on it.[54]

Hampered by partisan divisions, the Commission issued 16 reports relatively late in the process, with modernization, simplification and reorganization as the dominant themes.[55] The reports were "non- controversial and uneven in quality" and had little impact on the Convention.[56]

E. 1977 Referendum on a Constitutional Convention

No commission was established by the Governor or the Legislature during the run up to the mandatory Convention vote in 1977.[57] The City of New York was engulfed in a major fiscal crisis, and the legislative leaders were openly hostile to a Convention. "There are a substantial number of issues that require hefty analysis," said a key staffer to the Speaker of the Assembly. "The Legislature for the past several years has been dealing with daily crises."[58] On November 8, 1977, the electorate voted against a Constitutional Convention by a substantial margin (1,668,137 to 1,126,902). The State's failure to prepare for a Convention was used as an argument against calling it.[59]

53 The Commission's staff and consultants are listed at the front of the Commission's 16 reports, which are accessible online from the New York State Library: http://128.121.13.244/awweb/main.jsp?flag=collection&smd=1&cl=library1_lib&field11=4116707&tm= 14427779 63096 (last visited on Sept 20, 2015).

54 William J. van den Heuvel, *Reflections on Constitutional Conventions*, 40 N.Y.S.B.J. 261 (June 1968) [hereinafter *Reflections*].

55 GALIE, ORDERED LIBERTY, *supra* note 6, at 309; Williams, *Constitutional Commission*, *supra* note 4, at 50. The 1967 Constitutional Convention convened on April 4, 1967 and adjourned on September 26, 1967.

56 DONNA E. SHALALA, THE CITY AND THE CONSTITUTION: THE 1967 CONVENTION'S RESPONSE TO THE URBAN CRISIS 134 (1972); *see* Galie & Bopst, *A Worthy Tradition*, *supra* note 18, at 1313 ("the reports were largely ignored by the convention . . . .").

57 Williams, *Constitutional Commissions*, *supra* note 3, at 50.

58 Gerald Benjamin, *A Convention for New York: Overcoming Our Constitutional Catch-22*, 12 GOVT. LAW & POLICY J. 13, 15 (Spring 2010) (quoting Michael DelGiudice, a key staffer to Assembly Speaker Stanley Steingut).

59 *Id.*

F. Temporary Commission on Constitutional Revision (1993-1995)

In May of 1993, four years in advance of the next mandatory Convention vote, Governor Mario M. Cuomo established by executive order the "Temporary New York State Commission on Constitutional Revision."[60] The Commission had 18 members. Its chair was Peter Goldmark, Jr., President of the Rockefeller Foundation, and its work was supported by the Rockefeller Institute of Government of the State University of New York.[61]

In his executive order creating the Commission, Governor Cuomo called attention to the mandatory Convention vote to be held in 1997 and the need to prepare for and educate the public about it (or an earlier Convention if one were called).[62] Specifically, Governor Cuomo directed the Commission to:

- consider the constitutional change process and the range of constitutional issues to be considered by the people;
- study the processes for convening, staffing, holding and acting on the recommendations of a Convention;
- determine the views of New Yorkers on constitutional matters;
- develop "a broad-based agenda" of constitutional issues and concerns;
- provide "an objective and non-partisan outline" of the range of constitutional issues; and
- engage in a range of activities designed to focus attention on constitutional change.[63]

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60 Exec. Order No. 172 (May 1993).

61 *Id.*; DECISION 1997, *supra* note 4, at viii.

62 *See* Exec. Order No. 172 ("WHEREAS, it is important that the people be educated so that they make an informed decision on whether a convention is desirable in 1997 or earlier if the Legislature agrees to pose the question; . . . WHEREAS, the State government must be prepared if the people decide that a convention should be held . . .").

63 *Id.* ¶¶ II-IV; GALIE, ORDERED LIBERTY, *supra* note 6, at 351 (citing TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, MISSION STATEMENT (1993)).

The Commission lacked the approval or financial support of the Legislature.[64] It did have a distinguished (albeit small) staff of seven persons who operated on a budget of approximately $200,000 to $250,000.[65] The Commission held hearings throughout the State and in March 1994 issued an interim report that explored and made recommendations regarding the delegate selection process.[66] It also issued a periodic newsletter entitled *Constitutional Matters* and a briefing book relating to the State Constitution.[67]

The Commission's final report was published in February 1995,[68] two years and nine months before the mandated 1997 Convention vote. In particular, the Commission called on the Legislature and the Governor to create "Action Panels" to develop a coherent reform package in four important subject areas: State fiscal integrity, State and local relations, education and public safety. If policymakers failed to adequately address these issues, a majority of the Commission's members maintained that a Convention should be held.[69]

On November 4, 1997, the electorate voted against a Constitutional Convention by a substantial margin (1,579,390 to 929,415).[70]

III. RECOMMENDATIONS

The following recommendations were approved by the Committee voting at its September 30, 2015 meeting when the recommendations were discussed.

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64 GALIE, ORDERED LIBERTY, *supra* note 6, at 353.

65 The Commission's Counsel and Executive Director was Professor Eric Lane of the Hofstra University Law School, and its Research Director was Dean Gerald Benjamin of the State University of New York at New Paltz. Both of their work for the Commission was on a part-time basis. They were supported by a staff of five.

66 *Id*.; TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, THE DELEGATE SELECTION PROCESS: AN INTERIM REPORT (Mar. 1994) [hereinafter DELEGATE SELECTION PROCESS].

67 GALIE, ORDERED LIBERTY, *supra* note 6, at 353; TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK (Mar. 1994).

68 TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY: A REPORT TO THE PEOPLE, THE GOVERNOR AND THE LEGISLATURE OF NEW YORK (Feb. 1995).

69 *Id*. at 12-21.

70 Gerald Benjamin, *Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, 65 ALBANY L. REV. 1017, 1041 (2001).

Recommendation 1: The State should establish a non-partisan preparatory Constitutional Convention commission as soon as possible.

As it has done several times in the past, the State should create a preparatory Constitutional Convention commission as soon as possible. Nearly 50 years have passed since New York last held a Constitutional Convention. Likewise, 18 years have passed since the last referendum vote in 1997. As a result, the collective memory on preparing for and organizing a Convention has waned significantly. The Commission will face not only a herculean task reviewing New York's Constitution and the numerous subjects it encompasses, but also a massive historical reclamation project to develop and provide information on the mechanics of a Convention itself.

Although past commissions have been created both before and after the referendum vote, we recommend creation of a preparatory commission as soon as possible and, in any event, well in advance of the November 2017 referendum.[71] A hastily set up commission, after an affirmative decision to hold a Convention has been made, will likely be of little use either to the public or the delegates. As Governor Lehman once observed, "[i]t seems to be extremely short-sighted for us to do nothing until the day the convention assembles."[72] "Without adequate planning," he explained, "there will inevitably be great waste of money, time and effort to the end that the very objects of the Convention will be defeated."[73]

Thus, with the 2017 referendum only two years away, there is a pressing need for a preparatory commission to begin work immediately.

The Legislature created the commissions for the 1915 Convention, the 1957 referendum and the 1967 Convention; Governors established commissions for the 1938 Convention and the 1997 referendum. History teaches that regardless how a preparatory commission is formed, it requires the support of all branches of government to produce

71 *See* O'ROURKE & CAMPBELL, CONSTITUTION-MAKING, *supra* note 22, at 273-274 (recommending that a preparatory commission "should function, at least, during the two years prior to the submission to the voters of the question of a convention"). In 1956 and 1993, Commissions were created in advance of referendums; whereas in 1914, 1936 and 1965, Commissions were created subsequent to the electorate's call for a Constitutional Convention.

72 LEHMAN PAPERS, *supra* note 24, at 664.

73 *Id.*

useful and comprehensive work product for the benefit of New York voters, lawmakers, interested groups, and delegates if a Convention is held.[74]

Likewise, it is critical that the membership of the preparatory commission be technically proficient, experienced, and diverse in every way. More, the commission must be non-partisan in character and motive, "commanding by its impartial mandate" the confidence of the general public and the delegates if a Convention is held.[75]

Recommendation 2: The commission should be tasked with

> ***(a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.***

Past preparatory commissions have been given various assignments, such as investigating the entirety of the Constitution in 1967, or only selected portions in 1997. Commissions have also varied in their approach to resulting work products. The Poletti Committee reports provided comprehensive study of nearly all areas, while the 1967 Commission's work product to the delegates was primarily questions framing the issues that the Commission felt to be important.[76] However, one contemporary commentator noted that the 1967 Commission's approach of posing questions to the delegates as opposed to providing substantive information was ineffective.[77]

The State Constitution and its ramifications "are so complex and the structure of the Government that has been erected within the framework of the constitution has so many wide and varied implications that a broad

74 A cautionary tale is the delay in funding of the Commission created for the 1967 Convention, which delay unsteadied the Commission's leadership and staff. DULLEA, CHARTER REVISION, *supra* note 35, at 132.

75 Van den Heuvel, *Reflections*, *supra* note 54, at 263.

76 *Id*.

77 *Id*.

frame of reference is essential."[78] Therefore, among its other duties, the preparatory commission should:

> Make a comprehensive study of the Constitution and compile recommended proposals for change and simplification;
>
> Research the conduct of, and procedures used at, past Constitutional Conventions;
>
> Study and make recommendations regarding the selection process for Convention delegates;
>
> Undertake and direct the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held;
>
> Brief the principal constitutional questions that were debated and considered at previous Conventions;
>
> Collect data on the constitutional amendments proposed and adopted in other states on subjects of substantial interest to New Yorkers; and
>
> Collect and collate data on the important changes that have been made in the State's structure of government since the adoption of the present Constitution in 1894/1938.

Finally, the preparatory commission should recommend ways to educate the public about the State Constitution and the constitutional change process. Indeed, "[s]ome New Yorkers do not know there is a state constitution, much less how it may affect their lives."[79]

Recommendation 3: The preparatory commission should have an expert, non-partisan staff.

The preparatory commission must have a dedicated, full-time, expert staff under the direction and assistance of an executive director, a research director and a counsel. Adequate support staff will be neces-

78 Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 317.

79 DELEGATE SELECTION PROCESS, *supra* note 66, at 36.

sary, too. The commission will face the daunting task not only of examining the substantive areas of the Constitution and related issues, but also surveying and educating the public, and helping to plan and prepare for a Convention, if one is held. The preparatory commissions created for the 1915 and 1938 Conventions, and the one created in the 1957 Convention referendum — all hailed as successful — had the support of sizable research and support staffs, state agencies, good government groups, and leading academics. Nothing less is required today for a preparatory commission to successfully plan and prepare the State for the mandatory referendum in 2017 and a potential Convention in 2019.

Recommendation 4: The preparatory commission and its staff should be supported by adequate appropriations from the State government.

A preparatory constitutional convention commission will require significant appropriations to accomplish its substantial task. As noted, the preparatory commission created for the 1967 Convention received an initial $150,000[80] that grew to approximately one million dollars by the time its work was completed in 1967.[81]

Based on past experience, a preparatory commission will require financial support from the State government in order to hire qualified staff and ensure a high quality work product. Given the substantial governmental expenditure that an actual Constitutional Convention would require, a significant appropriation for a commission's work is a wise investment. Should the voters approve the call for a Constitutional Convention in 2017, additional appropriations will be necessary.

IV. CONCLUSION

In the November 2017 general election, New York voters will decide whether to hold a Constitutional Convention commencing in April 2019. This will be a constitutional choice of profound importance; a rare opportunity to debate fundamental principles of governance. Absent a legislative initiative, the State will not have this opportunity for another twenty years.

Whatever the outcome of the referendum, the public should be educated about the relevant issues. The establishment of a preparatory com-

80 L. 1965, ch. 443 § 11.

81 Van den Heuvel, *Reflections*, *supra* note 54, at 263.

mission is a first step in beginning the "deliberative process that could result in our later being offered either an entirely new Constitution or a series of amendments to the existing Constitution."[82] The 1957 and 1997 mandatory Convention votes were preceded by such commissions. The need for a commission today is even greater than those past cycles. There are few living delegates from the last Convention in 1967, and little, if any, institutional memory on how to hold one. The hard, complex work of preparing for a vote and Convention cannot begin too soon.

82 DELEGATE SELECTION PROCESS, *supra* note 66, at 1.

CHAPTER ONE

NEW YORK STATE BEGINS: THE FIRST STATE CONSTITUTION, 1777

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* This article is reprinted from Bruce W. Dearstyne, *The Spirit of New York: Defining Events in the Empire State's History,* published by SUNY Press in 2015. It is included here with permission of the author and SUNY Press.

APRIL 22, 1777

New York State Begins

New York State asserted itself into existence as a self-proclaimed geopolitical entity on April 22, 1777. Two days earlier, the Convention of Representatives of the State of New York, an ad hoc revolutionary group elected the previous summer, had completed work on New York's first constitution. The convention had done its work on the fly, scurrying from White Plains to Fishkill to Kingston ahead of advancing British military forces. Delegates voted approval of a final draft that still had strikeouts and marginal corrections; there was no time to waste making a clean copy. The document declared that the convention, acting "in the name and by the authority of the good people of this State, doth ordain, determine and declare that no authority shall on any pretence whatever be exercised over the people or members of this State, but such as shall be derived from and granted by them."[1] In 1777, a document purporting to represent the consensus and will of the people was a startling, radical departure from the past. The men who drafted the constitution tempered their soaring new ideas with pragmatic realism. Given the perils the new state faced, it just wasn't practical to give "the people" a chance to vote on the new document that established "their" government. The convention simply proclaimed it in effect.

New York's birth was a rushed, improbable political miracle. Seldom has a government been established in such forlorn circumstances with such seemingly dim prospects. The previous summer, British army and naval forces had easily conquered Long Island, New York City and the rest of Manhattan Island, and lower Westchester County. As the new constitution was being proclaimed, the British were planning three invasions—south from the British colony of Canada, north from occupied New York City, and west across Lake Ontario from Canada via Oswego and the Mohawk River—to rendezvous at Albany and split and subdue the fledgling state. New York's northeastern boundary was in dispute with separatist Vermonters, uneasy allies against the British who were openly determined to wrest their independence from New York. Even in the areas the newly proclaimed government controlled, there were large numbers of loyalists who resisted calls to join the militia and harbored spies and criminals. Many more people were indifferent or opportunistic, ready to ally

1 New York State Constitution, 1777, http://en.wikisource.org/wiki/New_York_Constitution_of_1777.

with the newly minted state or swing their allegiance back to British colonial authorities, depending on the exigencies of the war.

New York had gradually drifted from proud allegiance to the British Empire to a status of armed rebellion in the late 1760s and early 1770s. British taxes, trade restrictions, and regulations tightened London's control over colonial trade and commerce and violated the colonists' rights as Englishmen. Philip Schuyler, a member of the colonial assembly who held large tracts of land near Albany and in Saratoga County, was typical of the shift in sentiment. In July 1775, he wrote that the British "may be induced to give up their odious claims, and pursue measures tending to reconciliation instead of the nefarious and hostile ones they had adopted." By early 1776, however, enraged by British intransigence, he despaired of reconciliation and accepted an appointment as a major general in the new rebel army. He cautioned about the work ahead: "[I]ndependence and happiness are not synonymous."[2] New Yorkers elected three "provincial congresses" in 1775 and 1776 to deliberate on the growing crisis and what New York should do. The third one met only briefly in the early summer of 1776, its sole accomplishment to arrange for quick election of a fourth provincial congress to take up the issue of independence. By the time the fourth provincial council met at White Plains on July 9, the issue of independence had to be addressed. The Continental Congress had drawn up a declaration of independence on July 2, but New York's delegates, lacking instructions, sent home for direction. The new provincial council quickly took three steps. It changed its name to the Convention of Representatives of the State of New York, as noted previously. This was an audacious leap of faith, since "the State of New York" technically did not exist yet. It instructed New York's delegates to vote for the Declaration of Independence with a resolution that said convention members "will at the risk of our lives and fortunes join with the other Colonies in supporting it." It appointed a committee of fourteen members to draft a constitution for the "state" with the implicit understanding that the constitution itself would call the state into existence.

New York had cast its lot for independence. But the drafting committee seemed unhurried, almost leisurely. The convention was serving as the de facto government of New York, and all its members were busy with other things, including raising money, dealing with loyalists, investigating conspiracies, overseeing the state militia, and supporting continental army forces under General Washington's command. General Philip Schuyler

2 Don R. Gerlach, *Philip Schuyler and the American Revolution in New York, 1733–1777* (Lincoln: University of Nebraska Press, 1964), 293–294.

wrote on December 6, 1776, "I am very apprehensive that much Evil will arise if a Government is not soon established for this State. The longer it is delayed, the more difficult it will be to bring the unprincipled and licentious to a proper Sense of their Duty and we have too many such amongst us."[3] Drafting did not begin in earnest until early 1777. Three extraordinarily capable delegates did most of the work: John Jay (1745–1829), Gouverneur Morris (1734–1806), and Robert R. Livingston (1746–1813). They were all among the educated elite, graduates of Kings College, the predecessor of Columbia University. They embodied and reflected traits that would later be associated with the spirit of New York: energetic, tempering idealism with pragmatism and a get-it-done determination, putting the public interest above their own welfare. Relatively young in 1777, they all went on to positions of service and leadership in the state and national governments.

From Reluctant Rebels to Constitutional Statesmen

John Jay, a brilliant, capable, articulate New York City attorney, did most of the actual writing. Jay had been elected a delegate to the first Continental Congress in 1774. He was, in the words of historian Richard B. Morris, a "prudent revolutionary" who at first counseled reconciliation and compromise. He disapproved of parties to the dispute who "observe no medium and are either all flame or all frost." Hoping for a change in British policy, Jay drafted an "Address to the People of Great Britain," which the Continental Congress adopted on September 5, 1774. Americans demanded restoration of their rights as Englishman, he asserted. "No power on earth has the right to take our property from us without our consent. . . . we will never submit to be hewers of wood or drawers of water for any ministry or nation in the world." British intransigence and punitive policies transformed Jay into a revolutionary, and by April 1776 he confided to a friend that "the sword must decide the controversy." Elected to the fourth New York provincial congress, Jay quickly assumed a leadership role, drafting the resolution approving the Declaration of Independence.[4]

The second major constitutional architect was Gouverneur Morris, another astute New York City lawyer. Born in an affluent, well-connected

3 Ibid., 297.

4 Richard B. Morris, *John Jay, the Nation and the Court* (Boston: Boston University Press, 1967), 6; Walter Stahr, *John Jay: Founding Father* (New York: Hambledon and London, 2005), 57; Milton M. Klein, "John Jay and the Revolution," *New York History* 81 (January 2000), 23.

family, Morris built up comfortable wealth through a lucrative law practice and land speculation. He sometimes struck people as arrogant and headstrong, but friends insisted he was a "witty, genteel, polite, sensible, and a judicious young man." As pressure for independence built, Morris at first stood aloof. He referred to the rebel group known as the Sons of Liberty in 1774 as "poor reptiles" and sneered that "the mob begin to think and reason." But his reputation for fairness and his legal abilities led to his election to the first New York provincial congress in 1775 and its successors. Morris was appalled by tyrannical British policies and believed that Americans had the right to control their own internal trade and taxes. He worried that unless men of learning and substance took control of the revolutionary movement, it could fall into the hands of radicals and degenerate into mob rule. On May 24, 1776, he delivered a three-hour "Oration on Necessity for Declaring Independence from Britain" before the third provincial congress. British arrogance and blundering had brought on this crisis, turning back was unthinkable, and now "an independence is absolutely necessary." The British might relent on some coercive measures temporarily but only to buy time to build up their military forces. They were already bringing in ruthless Hessian soldiers ready to brutally subdue the colonists. "Trust Crocodiles, trust the hungry wolf in your flock or a rattlesnake nigh your bosom. . . . But trust the King, his Ministers, his commissioners, it is madness in the extreme! . . . there is no redress but by arms."[5]

The third principal author was Robert R. Livingston, member of a prominent family with extensive real estate holdings along the Hudson River in Columbia County. Livingston was also a lawyer and had been a law partner with John Jay. As a member of an old family, he inherited a prominent social position but also "a certain kind of self-consciousness, at once proud and sensitive, accepting respect as a matter of course. . . . He was a prototype of the Hudson River squires, an individual who did not believe that there could be a better way of life than his own and who borrowed from other ways of life only what happened to suit his fancy."[6]

As problems with Britain mounted, Livingston was at first a voice for compromise and reconciliation. Elected to the first Continental Congress, he moved toward the same conclusion that his friends John Jay and Gou-

5 James J. Kirschke, *Gouverneur Morris: Author, Statesman, and Man of the World* (New York: St. Martin's Press, 2005), 40–42.

6 George Dangerfield, *Chancellor Robert R. Livingston of New York, 1746–1813* (New York: Harcourt Brace and Company, 1960), 7, 190.

verneur Morris reached: Wrongheaded British policies made revolution inevitable. As a member of the second Continental Congress, he served on the committee to draft the Declaration of Independence but contributed little of substance and left for home before the vote for independence was taken. Like Morris, he feared mob rule, which might take a particularly menacing form on his manor: rent strikes or land seizures by tenants. He was elected to the fourth provincial congress and to the committee to draft the new constitution. But by the fall of 1776, he was already expressing disdain for the new political groups represented among the delegates: mechanics, small farmers, and country lawyers whom he characterized as "unimproved by education and unrefined by honor." "I am sick of politics and power," he grumbled on October 10. "I long for more refined pleasures, conversation and friendship. I am weary of crowds and pine for solitude nor would in my present humour give one scene of Shakespeare for one thousand Harringstons, Lockes, Sidneys and Adams to boot."[7]

But Livingston stayed and contributed substantially to the document.

Livingston's list of political philosophers who were making him weary including three Europeans and one American, the irrepressible Massachusetts rebel leader John Adams. In April 1776, Adams wrote a pamphlet entitled *Thoughts on Government*, a concise distillation of the best thoughts about the purpose and structure of republican government.[8]

John Jay brought back copies from his time as a member of the Continental Congress, used it in his New York constitution drafting work, and prevailed on other delegates to read it. Republican government requires "the common people brave and enterprising. . . . sober, industrious, and frugal," said Adams. A republican government should reflect the people it represents. The first principle, Adams said, is "to depute power from the many to a few of the most wise and good." The lawmaking body should have two houses, to check and balance each other. The larger house, which Adams called the assembly, "should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them." Elections should be frequent. Rotation in office will teach "the great political virtues of humility, patience, and moderation without which every man in power becomes a ravenous

7 Clare Brandt, *An American Aristocracy: The Livingstons* (Garden City, NY: Doubleday, 1986), 120; Dangerfield, *Chancellor Robert R. Livingston*, 86.

8 John Adams, *Thoughts on Government*, April 1776, http://www.teachingamericanhistory.org/library/index.asp?documentprint=37.

beast of prey." Executive power should be vested in a governor, but gubernatorial power should be checked by annual elections. Many of the ideas distilled in *Thoughts on Government* can be found in the philosophy, and sometimes in the structure, of New York's constitution.

The New York constitutional statesmen drew on summary writings like Adams's pamphlet, European writers, and their own experience with colonial governors, assemblies, and local governments. Members of the provincial convention divided roughly into four groups. A small number counseled delay, hoping that British concessions would make revolution unnecessary. Another small group wanted to wait until New York and continental army forces controlled more territory. The convention needed to secure the state to govern before devising a means of governing it, they argued. A few delegates hoped to use the constitution-writing process to effect substantial political and social change such as radically broadening the suffrage or breaking up large estates and distributing their lands as individual farms. The majority of delegates wanted to move ahead expeditiously but in a way that did not upset the economic or social order in their new state. They held an unwritten consensus that the constitution should have several features.

A written document. New York leaders had seen firsthand the limitations of the unwritten "British constitution," a hybrid that included the Magna Carta, laws, judicial decisions, and precedents. That "constitution" had proven too vague to protect colonists' rights. The New York constitutional statesmen wanted something concrete.

Clear, readable, and understandable text. The constitution would be read by the literate, read to the illiterate, and broadly discussed by the citizens of the new state. It would help wavering New Yorkers decide which side to support in the great struggle. It needed to be written in language that people could readily understand.

Acknowledgment of derivation from the people. The document would specify that all governmental authority derived from consent of the governed. Everyone understood, though, that over half of "the people" would not actually have political rights: Women were not included in the convention and would not be able to vote; and slavery, which had taken root during Dutch colonial days over a century earlier, would continue.

Suffrage by men with a stake in society. Males of full age who held property or paid taxes should have the vote.

Strong executive, but with limitations. The new state would need a strong governor to win the war, create state government, collect taxes, secure the state's borders, execute the laws, and hold the new state together. At the same time, experience with a tyrannical king and overreaching colonial governors required that the governor's power would be subject to checks.

Two-house legislature. There was a rough consensus on the desirability of a bicameral legislature. One house, with larger membership, elected by a sizeable part of the electorate, would represent all citizens. The second, smaller and elected by men with more substantial property holdings, would be more representative of the upper levels of society.

An independent judiciary. The framers envisioned a tripartite government, with the legal system related to the other two but also insulated from the political considerations that might affect the governor and the legislature.

Protection of citizens' rights. The constitution's architects were determined to protect civil rights, and in fact the drafting committee was given a specific charge to include a bill of rights.

"A Choice of Dishes"

Most of the drafting work fell to the three most capable, educated, and thoughtful members of the drafting committee, Jay, Morris, and Livingston. "We have a government . . . to form and [no one] knows what it will resemble," Jay wrote in July 1776. "Our politicians, like some guests at a feast, are perplexed and undetermined to which dish to prefer."[9] The committee labored through five drafts and finally reported on March 12, 1777. The convention met in a small room above the local jail in Kingston, and its members smoked heavily to dispel the "disagreeable effluvia" in the air from the jail below, overcrowded with loyalist prisoners. The debates sometimes focused on principles, other times on the minutiae of word choices. Some were heated and divisive, and Jay, Morris, and Livingston sometimes had to work behind the scenes to bring people together. The document approved on April 20 represented a blend of principles and pragmatic compromises. It had the following features.

A strong executive but with novel constraints. Morris, apprehensive about radical democratic threats, proposed a strong governor with total

9 Stahr, *John Jay*, 74.

power over appointments and a qualified veto as being "necessary for the preservation of society."[10] Livingston and others counseled limiting the governor's veto power. The final version of the constitution declared that "the supreme executive power and authority of this State shall be vested in a governor" who shall "take care that the laws are faithfully executed." The governor, elected to a three-year term, was also made commander of the state militia, assigned power to convene the legislature in extraordinary sessions, and charged to inform the legislature annually about "the condition of the State" and "recommend such matters to their consideration as shall appear to him to concern its good government, welfare and prosperity." Men who held property worth at least one hundred pounds could vote for governors, the same as the requirement for voting for senators, effectively limiting the franchise to the upper middle class and above.

Colonial governors had possessed the power to veto bills passed by colonial assemblies and virtually unlimited power of appointment. They had sometimes used both powers to thwart the popular will. The framers of the New York constitution restricted their governor's prerogatives through creation of two novel, unprecedented review/approval groups to share power with the governor. Jay, Morris, and Livingston were decisive in shaping both of them. Livingston developed the notion of a "Council of Revision" consisting of the governor, chancellor, and judges of the supreme court. This group could veto bills by a majority vote and return them to the originating house with an explanation. But its veto could be overridden by a two-thirds vote of both houses of the legislature. A "Council of Appointment," mostly Jay's handiwork, was established, consisting of the governor and four senators, chosen annually by the assembly. The governor could nominate appointments for state offices, but the council had to approve and the governor could only vote to break a tie. This "allowed indirectly for the interplay of *vox populi* and . . . the evolution of a patronage system." The two councils blurred the boundaries among the executive, legislative, and judicial branches, but they represented a pragmatic compromise between those who favored a strong governor and those who feared too much executive power. "The entire structure comprised an intricate web of powers and functions with something for almost everyone."[11]

10 Melanie R. Miller, *An Incautious Man: The Life of Gouverneur Morris* (Wilmington, DE: ISI Books, 2008), 29.

11 Richard B. Morris, "New York's First Constitution," in John H. G. Pell, ed., *Essays on the Genesis of the Empire State* (Albany: New York State American Revolution Bicentennial Commission, 1979), 26–27.

A balanced bicameral legislature. The convention wanted to create a two-house legislature, one house broadly representative of the people, the other smaller and more attuned to the interests of business and property. It created an assembly, elected annually; set the number of members at a minimum of seventy; and provided for periodic censuses to keep the number of members growing as the population grew. Voter eligibility was the subject of one of the most complicated compromises of the constitution. Three groups were included: men with freeholds of at least forty pounds, land-renting tenants who paid at least two pounds per year rent, and "freemen" of Albany and New York City (the term "freemen" referred to men who were legally permitted to vote by their municipal governments; by the time of the Revolution, that would have included almost any man who worked or engaged in a trade in the cities). That opened the suffrage broadly among white males. There was a rough model for the new assembly: the previous colonial assembly. But there was no model for the second house, called the senate. The closest approximation was the provincial council, but it had been appointed by the crown on recommendation of the governors. The senate was intended to be smaller, more reflective of the upper class, deliberative, safe from the tumult of the crowd. Senators were to be elected for four years, insulating them from popular clamor and demands. Voting for senators was restricted to men with one hundred pounds or more of property, five times the requirement for the assembly. Four senatorial districts consisting of specified groups of counties were established, and the number of senators to be chosen in each district was specified. The initial number was established at twenty-four. There would be adjustments in the size of delegations and additional members added, as the state's population shifted and the state expanded, as measured by the periodic censuses. Either house could initiate legislation; approval of both was required to enact it into law.[12]

An independent judiciary. The constitution said little about the courts, essentially continuing the colonial system but under the authority of the new state. The local courts of colonial days were adopted with little change but a new "supreme court" was added at the top. The constitution continued a separate court of chancery, which had powers to adjudicate commercial disputes, appoint and supervise trustees of people needing judicial protection such as orphans and widows, foreclose mortgages, and settle disputes where there was no clear legal guidance or common law precedent. The colonial governor had formerly acted as head of the court of chancery; the constitution created a new position, chancellor, to head

12 William A. Polf, *1777: The Political Revolution and New York's First Constitution* (Albany: New York State American Revolution Bicentennial Commission, 1977), 13–20.

the court. Over both courts was placed a special appeals court or "court of errors" consisting of the senate, the supreme court justices, and the chancellor, but with the provision that neither the chancellor nor the supreme court justices could vote on appeals from their respective branches. The assembly was given power to impeach, and a special court for the trial of impeachments was established. The constitution also legalized those portions of the common law in effect on April 19, 1775, the date of the battles of Lexington and Concord. That gave the new judicial system a body of precedent and judge-made law to use as a basis for making rulings.

A secret ballot. Balloting in colonial New York had been *viva voce*: Men declared their preferences in an open meeting. The system opened voting to influence and coercion. For instance, landlords knew how their tenants voted, and tenants, not wishing to displease them, might vote as the landlord desired rather than as conscience dictated. The draft included provision for a secret ballot, but Morris spoke against it during the debate as being too great a departure from precedent and he carried the day. Jay happened to be absent for that debate. Just before the final vote, in one of the rare disagreements among the triumvirate, Jay proposed a compromise: Keep voice vote during the war but institute the secret ballot after the war's end. Morris protested, but the convention reversed itself and endorsed Jay's proposal, which was included in the final document.

No bill of rights. The charge to the drafting committee included a provision for a bill of rights but none was included. The constitution included the entire Declaration of Independence as a preamble, but that listed rights violated by the British rather than rights to be protected in New York. The constitution guaranteed the right to trial by jury, but other rights are not mentioned. The most plausible explanation for the absence of a bill of rights is that the framers decided that it might inhibit the new government's flexibility in dealing with loyalists. The legislature enacted a bill of rights in 1787.[13]

Freedom of religion. The document declared that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind." John Jay was suspicious of Catholics because he felt they owed allegiance to the Pope rather than state or nation. He proposed a provision to exclude Catholics from guarantee of religious toleration unless they abjured the authority of the Pope. Few delegates agreed with

13 Bernard Mason, "New York's First State Constitution," in Pell, ed., *Essays on the Genesis of the Empire State*, 31.

that. But Jay was persistent, and in the end the constitution included three provisions bearing directly or indirectly on religion. First, after the provision quoted earlier about freedom of religion, the convention added another clause: "provided, that the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state." That was a warning against using religion as an excuse to break the law, but it had little impact on New York jurisprudence. Second, a phrase was included barring ministers and priests from holding civil or military offices. Third, naturalized citizens were required to renounce "all allegiance" to "every foreign king, prince, potentate, and state, in all matters, ecclesiastical as well as civil."[14]

The scourge of slavery. The institution of slavery was not compatible with the lofty pronouncements about the sovereignty of the people. John Jay wanted to include a clause to abolish slavery, but most delegates considered that too preemptive. Gouverneur Morris came up with a gradualist approach. He proposed that the constitution should urge "future legislatures" to abolish slavery "so that in future ages, every human being who breathes the air of this state, shall enjoy the privileges of a freeman. . . . The rights of human nature and the principles of our holy religion call upon us to dispense the blessings of freedom to all mankind." But too many New Yorkers owned slaves or were engaged in the slave trade, and Morris's amendment failed. New York did not move to end slavery until 1799, when John Jay, who was by then governor, signed a law that gradually abolished it.[15]

The final version was approved on April 20 by a vote of 33 to 1; Peter Livingston, a distant relative of Robert Livingston, felt it was too radical. The convention declared the constitution to be in effect two days later. Thoughtful observers found it impressive. Alexander Hamilton, General George Washington's military aide and an up-and-coming political leader, pronounced it "happy, regular, and durable." But it showed signs of having been drawn up in haste: "split-the-difference" compromises and, in the councils of revision and appointment, untested mechanisms. No one was totally satisfied with it. "That there are faults in it is not to be wondered at," wrote Gouverneur Morris, explaining with irritation that the

14 Morris, *John Jay, the Nation, and the Court*, 11–13; Patricia Bonomi, "John Jay, Religion and the State," *New York History* 81 (January 2000), 8–18.

15 Richard Brookhiser, *Gentleman Revolutionary: Gouverneur Morris—The Rake Who Wrote the Constitution* (New York: Free Press, 2003), 34.

process had necessitated the disagreeable act of compromising with men who did not entirely agree with him.[16]

Jay, Livingston, and Morris, and others who allied with them, had come to see the revolution and independence as inevitable, but they had sought to head off social upheaval. In June 1777, Livingston said he was convinced of "the propriety of Swimming with a Stream which it is impossible to stem" and in fact helping to channel and direct it.[17] George Dangerfield, Livingston's biographer, gives him and his colleagues even more credit. Through skillful leadership, persuasive arguments, and patient consensus-building, "the New York conservatives had managed the radical Revolution so that, while it rid them of Parliament, it did not deprive them of privilege."[18] The document featured many compromises and balances. For instance, the governor was popularly elected and given broad executive power. But the privilege of voting for the governor was restricted to men with a stake in the economy and society, and two of the governor's key powers—veto and appointments—were shared with others. Historian Bernard Mason, emphasizing the property qualifications for voting and the senate as a check for the propertied class on the popular assembly, said the constitution represented a "moderate-conservative consensus."[19]

The New State in Action

New York had proclaimed itself into existence. The convention arranged for election of a governor and legislators in June, to take office in September, but remained the de facto government in the interim. It designated a council of safety from among its membership to handle security and military matters. It set up the judicial branch of the new government on its own authority, building on the basic outline in the new constitution. The convention selected John Jay as chief justice and Robert Livingston as chancellor, thereby placing at the head of the judicial branch two of the constitution's most influential authors. Jay served for two years, promulgating legal procedures and deciding key cases. He went on to serve as Minister to Spain and Secretary for Foreign Affairs under the Articles of

16 Ibid.

17 Alfred Young, *Democratic Republicans of New York: The Origins, 1763–1797* (Chapel Hill: University of North Carolina Press, 1967), 15.

18 Dangerfield, *Chancellor Robert R. Livingston*, 92.

19 Bernard Mason, *The Road to Independence: The Revolutionary Movement in New York, 1773–1777* (Lexington: University of Kentucky Press, 1966), 248.

Confederation, first Chief Justice of the U.S. Supreme Court, and governor of New York, 1795–1801. Livingston presided over the court of chancery until 1801. He also served as Secretary of Foreign Affairs under the Articles of Confederation from 1781 to 1783 and as U.S. Minister to France, 1801 to 1804. His work included negotiating the Louisiana Purchase in 1803.

John Jay wrote in July 1777 that "unless the government be committed to proper hands, it will be weak and unstable at home, and contemptible abroad."[20] The conservative-minded revolutionaries who had written the constitution, two of whom had been quickly elevated to the new state's top judicial offices, expected to engineer the election of the governor. Their preferred candidate was General Philip Schuyler, a substantial landholder who could be relied on to protect business and landed interests. He could count on the votes of his tenants in the Albany region, but he was widely regarded as arrogant and overbearing. General George Clinton, an Ulster County native who had built a solid if not stellar military record as commander of rebel forces in the lower Hudson region, was endorsed by local political leaders in his region. He was regarded as reliable, strong, and honest, but he had not been involved in drafting the new constitution and his political views were unknown. Clinton was well liked by just about everyone who knew him. He was popular in the mid-Hudson region, and the sheriff of Dutchess County—a Clinton supporter—allowed any man who showed up to vote, not bothering to check for residency or whether the one hundred pound freeholder qualification imposed by the new constitution was being met. Soldiers were also permitted to vote in the forts where they were stationed with few or no checks on whether they met the qualification. That helped Clinton, who was popular among the troops, but not Schuyler, who was regarded as an overbearing commander. Voter turnout was light. Clinton received 1,828 votes, Schuyler 1,199, other candidates a few hundred each. Schuyler grumbled to Jay that Clinton's "family and Connections do not intitle [sic] him to so distinguished a predominance" but that he had "played his Cards better than Expected." The new legislature included some well-known men who had served on the various provincial councils but also many who were new to politics. Like the new governor, they had no affiliation to the prudent revolutionaries who had prevailed at the convention. To men like Jay, Morris, and Livingston, who had dominated the constitution-writing process and

20 John Jay to Leonard Gansevoort, June 5, 1777, in Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay*, I, 1763–1781 (New York: Putnam, 1891), 141.

the establishment of the judiciary, New York's political future suddenly seemed uncertain.[21]

Military responsibilities prevented the new governor from reporting to Kingston for his inauguration until September 10. In his inaugural speech, Clinton described the state's dire military situation but emphasized the positive. General Nicholas Herkimer and the Tryon County militia had stopped the British invasion from the west at the Battle of Oriskany on August 6. Work was continuing to obstruct the Hudson to prevent the British sailing up to Albany. The state militia law needed revision because many more troops were needed. "The state of our finances likewise claims your serious attention," he told the legislature. "The want of an organized government" had meant that "we have . . . accumulated a debt, which if neglected, will not only prove burthensome [sic] to the state, but [also] strike at the credit of our currency." A government with "vigour and dignity" will also help discourage loyalists and outlaws from making trouble. How did the new governor perceive his own role? He praised the convention for the constitutional provisions that marked "the line between the executive, legislative and judicial powers" and explained, "[I]t shall always be my strenuous endeavor on the one hand to retain and exercise for the advantage of the people the powers with which they have invested me; on the other, carefully to avoid the invasion of those rights which the constitution has placed in other persons." It was a modest and unassuming description of gubernatorial power.

Three days later, the new assembly sent a response to the new governor:

> We thoroughly approve your Excellency's intention to retain and exercise all the powers with which you are invested, and we trust that you will exert yourself vigorously to execute the laws, for the restoration of good order and the suppression and punishment of vice and immorality—while as faithful guardians of the rights of our constituents, we are determined neither to encroach upon the privileges of others, nor suffer our own to be invaded; we shall heartily concur in all things for the advantage of the people over whom you have been chosen to preside.

21 Gerlach, *Philip Schuyler*, 303–310; Young, *Democratic Republicans*, 22–23.

Sensing a tone of concern, Clinton realized he might have understated his intention to use executive power. He replied the same day, reassuring the legislature that he would "execute the laws, maintain the peace and freedom, and support the honor, independence, and dignity of the people of this State."[22] The new legislature responded to the governor's plea for funds by levying a tax on real and personal property. Funds began to flow into the state's nearly empty treasury.

Chief Justice John Jay assumed his official duties on September 9, 1777, when he delivered a charge to the first grand jury of the supreme court held at Kingston. He used the occasion to instruct them on the principles upon which the Revolution was being fought and enlighten them about the new constitution. The "charge" took on the status of an important state paper and was reprinted and widely distributed: "[A]ll the calamities incident to this war will be amply compensated by the many blessings flowing from this glorious constitution," said the new chief justice. The constitution came from the people through their elected representatives. "From the people it must receive its spirit, and by them be quickened. Let virtue, honor, the love of liberty and of science be, and remain, the soul of this constitution . . ." The constitution protected "great and equal rights of human nature" including liberty of conscience and equal protection by the laws. It organized the government so "as to promise permanence to the constitution, and give energy and impartiality to the distribution of justice."[23] Jay turned his attention to getting the court system up and running and presiding at cases. "I am now engaged in the most disagreeable part of my duty, trying criminals," he wrote Gouverneur Morris on April 29, 1778. "They multiply exceedingly. Robberies become frequent; the woods afford them shelter, and the tories [give them] food. Punishments must of course become certain, and mercy dormant—a harsh system, repugnant to my feelings, but nevertheless necessary."[24]

New York's prospects, dim in 1777, were much brighter by the beginning of the next year. General Horatio Gates continued and intensified the strategies initiated by his predecessor, Philip Schuyler: obstruction of trails and limited attacks that wore down the enemy. On October 17, 1777,

22 Governor George Clinton, "Opening Speech," September 10, 1777; Assembly Address to the Governor, September 13, 1777; Governor's response, September 13, 1777, in Charles Z. Lincoln, ed., *Messages from the Governors*, II, 1777–1822 (Albany: J. B. Lyon, 1909), 7–12.

23 John Jay, *To the Grand Jury of Ulster County*, September 9, 1777, in Johnston, ed., *The Correspondence and Public Papers of John Jay*, I, 158–163.

24 John Jay to Gouverneur Morris, April 29, 1778, in Johnston, ed., *The Correspondence and Public Papers of John Jay*, I, 179–180.

British general John Burgoyne, low on supplies, his way forward and retreat backward both blocked, surrendered to Gates near Saratoga in what was arguably the turning point of the war. General Nicholas Herkimer fought the British and Indians invading from the west to a draw at the battle of Oriskany on August 6. A third British invasion force began moving up the Hudson from New York City in October 1777. Washington asked Governor Clinton, who was also still serving as a continental army general, to take charge of defending two forts near West Point that guarded a chain the rebels had strung across the Hudson to impede the British fleet. The new governor of New York could have refused; the Americans had only a few hundred poorly armed defenders in the forts, and the British were expected to assault them with warships and some four thousand troops. Instead, he took personal command of one and his brother, General James Clinton, assumed command of the other one. The British assault on October 6 overwhelmed both forts, but stout resistance organized by the Clintons inflicted unexpected casualties on the enemy. As the British were breaching the front of his fort, Governor Clinton retreated out the back and descended a steep cliff to the Hudson in the darkness. As the British searched, Clinton hailed a boat that had just arrived from the opposite shore to rescue survivors. Seeing that the boat was full to capacity, the governor prepared to swim across the river. The officer in charge, recognizing the governor, insisted on giving up his own spot. Clinton refused. With the British closing in, the new governor made an executive decision: He jumped into the already full boat, and, very slowly, the overloaded vessel was rowed across the Hudson to safety. The new governor had not been able to hold the forts, but he had demonstrated personal courage, a skill in rallying outnumbered forces, and an ability to inflict substantial losses on an overconfident enemy. "The Post [fort] was lost for want of Men to defend it," Gouverneur Morris wrote Robert Livingston after the battle. "The Militia behaved as well as they could do. We shall beat them. We should do so soon if we have as good Officers as our Governor."[25]

The British proceeded up the river to the New York rebel capital of Kingston. The legislature had plenty of advance warning, delegated its responsibilities temporarily to a committee of safety, and evacuated. They did not meet again until February 1778. Troops led by British general John Vaughn landed on October 15, silenced the shore battery, and marched into town. "Esopus [Kingston] being a nursery for almost every villain in the Country," he wrote, "I judged it to be necessary to proceed to

25 John P. Kaminski, *George Clinton: Yeoman Politician of the New Republic* (Madison: Madison House, 1993), 25–33.

the town. On our approach, [defenders] were drawn up with cannon, which we took and drove them out of the place." Firing continued from the houses, and so "I reduced the place to ashes . . . not leaving a House." A few days later, Vaughn's troops burned Robert Livingston's mansion and other buildings on his land in what seemed like a needlessly vindictive move and one that cost the British among many New Yorkers whose allegiance had been hitherto undecided.[26] By then, Burgoyne had been defeated at Saratoga and was under house arrest at Philip Schuyler's mansion in Albany. The grand plan to link with him at Albany was in shambles. The British sailed back down the river to New York City. It was to be their last major incursion into the territory under the authority of the new state government.

The government reconvened in February 1778, this time in Poughkeepsie, and got down to work in earnest. New York's security was assured after the British defeat at Yorktown; the new state got its biggest city back on November 25, 1783, when the last British troops departed from Manhattan. General George Washington, accompanied by Governor George Clinton, triumphantly led the victorious continental army through the city. Clinton proved to be a popular, effective governor, serving until 1795, returning for another term in 1801–1804, and then serving as vice president under both Thomas Jefferson and James Madison. Morris moved to Pennsylvania, but Jay, Livingston, Hamilton, and Schuyler all stayed in New York and grew apprehensive of Clinton's policies, including taxation of land, harsh treatment of loyalists and sale of their confiscated lands, and issuance of the paper money that promoted inflation. They were alarmed by his ability to appeal directly to the public. In part to counter the growing popular appeal of Clinton—and other popular governors like him in some of the other states who seemed like threats to the established social and economic order—the prudent New York revolutionaries who wrote the state constitution became strong supporters of the movement to create a strong national government. The trio who were most influential in drafting the state constitution in 1777 were soon identified as "federalists," men who supported the proposed U.S. constitution, the move to a strong federal government, and conservative fiscal policies. Morris, a delegate to the constitutional convention from Pennsylvania, drafted much of the document. Livingston was a prominent proponent in New York. Jay was its most important advocate in the state. Along with Alexander Hamilton and James Madison, he wrote The Federalist Papers, a comprehensive treatise on the proposed constitution.

26 Dangerfield, *Chancellor Robert R. Livingston*, 103–105.

New York's first constitution endured without major revisions until 1821, and even then the changes were modest. The Council of Appointment was abolished and state offices were thereafter filled by the legislature, the governor, or the governor with the consent of the senate. The Council of Revision, which had sometimes proved obstructionist and other times seemed overly politicized over the years, was abolished. The governor was given the power to veto bills, subject to reversal by the legislature. Specific civil rights such as freedom of speech and habeas corpus— left out of the 1777 constitution, covered by 1787 legislation, and firmly embedded in the common law and state court decisions—were specifically protected in the 1821 revision.

John Jay noted in his speech to the Ulster County grand jury in September 1777 that "the Americans are the first people whom Heaven has favoured with an opportunity of deliberating upon and choosing the forms of government under which they should live."[27] By just about any measure, the first New York State constitution was a fulfillment of that opportunity.

27 John Jay, *To the Grand Jury of Ulster County*, September 9, 1777, in Johnston, ed., *The Correspondence and Public Papers of John Jay*, I, 161.

CHAPTER TWO

WE THE PEOPLE

Henrik N. Dullea, Ph.D.

The mandatory referendum on whether to call a New York State Constitutional Convention will soon be with us. When this question was last presented to the voters in 1977 and 1997, it was rejected.[1] Whether that same decision will be made in 2017 is anybody's guess, but it is essential that the decision be as informed as possible.

Let's face it. Most residents of the Empire State pay scant attention to the United States Constitution, let alone the document that sets the stage for governmental activity and individual freedom here in the Empire State. When asked to recall from their high school civics courses provisions of the federal Constitution, many people will tell you something about three branches of government and a bill of rights. Journalists may specifically reference something to do with freedom of the press, gun owners will testify to their rights under the Second Amendment and a few women may mention their right to vote. Beyond that, however, it's a pretty blank page.

When it comes to the New York State Constitution, most people aren't aware of its existence. Even the hundreds of thousands of public employees who, when taking their oaths of office, swear or affirm that they "will support the constitution of the United States, and the constitution of the State of New York" generally have absolutely no idea as to what they are promising to uphold.[2]

We need to shed a bright light on this living document. It is a "living document," because it has been frequently amended and is highly detailed.[3] It has often been referred to as one of the longest state constitutions in the United States.

And in its own way it is a radical document. Its most important words can be found in its Preamble: "We The People . . . Do Establish This Constitution."[4] From the very beginning of our state's history, the state Constitution affirms that its source is not the legislature, not the governor, not the judges, but the people themselves.

I. EARLY HISTORY

There have been many constitutional conventions throughout New York's history, reflecting the Jeffersonian belief that the people must and should have the right to revise their fundamental charters from time to time.[5] The most important constitutional convention for New York, of course, was not that which wrote or amended our first state Constitution in 1777, but rather that which in 1788 ratified the federal Constitution and

thereby added New York to the tally of the founding states of the Union. That deliberative body included John Jay, Alexander Hamilton and Chancellor Robert Livingston as prominent downstate supporters of the new federal Constitution, while Governor George Clinton, Albany Mayor John Lansing, Jr. and Congressman Malancton Smith of Dutchess County were widely considered to lead the upstate delegate majority as Anti-Federalist/Republicans. While the New York convention was in session, Virginia and New Hampshire became the ninth and tenth states to ratify the Constitution. Those approvals made it clear that the new United States government would come into existence and that New York's choice was whether to join or be left out.[6]

We can thank the members of the 1846 constitutional convention for including the mandatory 20-year referendum on whether to call a convention "to revise the constitution and amend the same."[7] This was adopted in the period we think of as the "Jacksonian Democracy," when many states were expanding their initiatives for popular participation, whether through the expansion of the number of elective offices or the opportunities for referenda on political issues. Such conventions were empowered to write totally new constitutions as well as to amend existing documents, subject to approval by the voters.

Our present Constitution was adopted in 1894, a new document once again responding to the pressures of the times, some of which remain significant today. The reform movement secured the adoption of a "merit and fitness" provision governing appointments to the civil service. Concern over the expansion of Catholic parochial schools, not only in New York but throughout the nation and particularly in the Northeastern states, led to the adoption of the so-called Blaine Amendment in the Education Article, prohibiting the appropriation of financial aid to schools in which a denominational tenet was taught. This provision would later become a major focus of attention in the conventions of 1938 and 1967.

On the eve of the First World War, the voters rejected a proposed new constitution from the 1915 convention that, among other things, would have accomplished a major reorganization of the executive branch and in the process strengthened the governor's responsibility as a public administrator and his role in the budget process. This objective was finally achieved a decade later through the legislative amendment process, coming on the heels of similar decisions at the federal level. The 1915 convention also authorized women's suffrage and expanded home rule for the state's cities. All of its recommendations, including four separate amend-

ments for women's suffrage, legislative apportionment, taxation and debt for canal improvements, were defeated at the polls.

The external factors were again significant when, at the height of the Great Depression, the state's voters called into being the 1938 constitutional convention. Not surprisingly, the economic well-being of the state's residents was a major concern, with new provisions dealing with social welfare, the transportation of nonpublic school students, the protection of public pensions and the rights of organized labor submitted to the public as nine separate amendments to the 1894 Constitution. All but two of the proposed amendments were accepted by the voters.

Throughout the first half of the 20th century, the most contentious constitutional issue dividing Democrats and Republicans was that of apportionment and redistricting. Governor Al Smith was widely quoted for his assertion that New York State was "constitutionally Republican."[8] The complex apportionment formulas for both the Assembly and the Senate guaranteed geographic representation in the state legislature without regard to relative population. Democrats saw that they could win statewide elections but felt they had no chance of securing legislative majorities. The Democratic Party platforms regularly included calls for constitutional conventions to redress this perceived inequity.

II. THE PATH TO 1967

The path to New York's last constitutional convention in 1967 really began a decade earlier, in the preparations for the mandatory 20-year referendum in 1957. The Democrats were, of course, in favor of holding a new convention for the principal reason of revising the legislative apportionment sections of the Constitution and also for securing the possibility of increased financial support for New York City and the other urban centers of the state. Democratic Governor Averell Harriman and the Republican-controlled legislature appointed a temporary state commission to examine the issues that might be considered by such a convention, and the governor and legislative leaders named Nelson A. Rockefeller as its chair. Rockefeller undertook this assignment seriously and traveled throughout the state to secure input, becoming well known in the process. Voter turnout in New York City was insufficient to carry the day for the Democrats on the constitutional convention issue in 1957, and Harriman soon found Rockefeller as his successful reelection opponent in 1958.[9]

The decade that preceded the 1967 convention was turbulent indeed. The civil rights movement was spreading throughout the nation; the first

Catholic was elected as president of the United States; the Cuban Missile Crisis threatened our national security; the president was assassinated in Dallas; his successor as president signed path-breaking civil rights legislation; urban social conflict was on the rise; our armed forces' commitment in Vietnam escalated; and Lyndon Johnson defeated Barry Goldwater in the 1964 presidential election. The Johnson victory in New York was a landslide that produced the unthinkable: a Democratic majority in both the Senate and the Assembly.

National events played a key role in setting the stage for constitutional revision in New York, with the most significant developments taking place in the courts. In 1962, the United States Supreme Court ruled in a case challenging the Tennessee apportionment of Congressional districts that the case presented a justiciable cause of action entitling the plaintiffs to relief. Soon thereafter, the Court extended the same consideration to state legislative districts and in the same spirit to the state of New York.[10] The New York case had been brought by R. Peter Straus, an heir to the Macy's department store fortune and the owner of a Manhattan-based radio station, WMCA. The station's talk show hosts had for some time railed against the malapportionment of the state legislature and its resultant deleterious impact on the residents of New York City.

The 1964 *WMCA* decision applying the "one man, one vote" standard to New York was a bombshell.[11] The Democrats were jubilant. The Republicans were nevertheless determined to act quickly before the Democrats could take over when the legislature convened in January 1965. Governor Rockefeller called the now lame-duck legislature into special session in December, and both houses quickly adopted four alternative reapportionment plans, each more favorable to the Republicans than the other. (The plans were referred to by letter—A, B, C and D—with D the most favorable to the Republicans and A the least so. They were written in such a fashion that D would go into effect first, but if that plan were to fail to secure judicial acceptance, C would become effective, and so on.)

The normal course of business when a new legislature convenes is the adoption of its rules and the election of its officers. Such was not the case in January 1965. The Democrats had been in the minority since the Great Depression. Their ability to organize the Senate and Assembly was impeded by intra-party conflicts in New York City, conflicts that produced competing Democratic candidates for the positions of Speaker of the Assembly and Temporary President and Majority Leader of the Senate. The previous minority leaders of the two chambers, Assemblyman Anthony J. Travia of Brooklyn and Senator Joseph Zaretzki of Manhattan,

were nominated for the majority leadership positions and were supported by Mayor Robert Wagner of New York City, but they could only secure a minority of the votes in their Democratic conferences. The Democratic Party leaders of the several boroughs in the city, with whom the mayor was presently at odds, supported alternative candidates, including Assemblyman Stanley Steingut of Brooklyn and Senator Jack Bronston of Queens, who received the majority of the votes of their respective conferences. The Republicans, of course, voted for their own candidates, George Ingalls from Binghamton in the Assembly and Earl Brydges from Niagara Falls in the Senate. The result was that no candidate could command the absolute majority of the members in each chamber required for election.

This situation continued throughout the month of January, with the Republicans trumpeting their evidence that the Democrats were incapable of governing. Ultimately, however, it began to tarnish the image of the Republicans as well. A delegation of senior Republican senators sought a meeting with Governor Rockefeller, at which they informed him that the impasse needed to be broken and that they were prepared to swing their votes to Senator Zaretzki. A similar outcome was to be accomplished in the Assembly. Rockefeller acknowledged the wisdom of the proposed plan, and Travia and Zaretzki were elected the next day. Rockefeller now had two Democratic leaders with whom he could deal.

The new legislative leaders proceeded to do what they could to secure adoption of policy positions that had long been advocated in their party platforms. Faculty from the Maxwell School at Syracuse University and the Eagleton Institute at Rutgers University were secured as staff or consultants to help draft the necessary legislation. Included on that list was the proposition of putting before the voters in November 1965, the question of calling a constitutional convention. The seeming chaos surrounding the legislature continued throughout the 1965 session, as both federal and state courts considered the alternative apportionment plans that had been adopted by the lame-duck legislature in December. Ultimately the federal courts rejected Plans D, C and B but accepted Plan A and ordered that it be implemented immediately, that is, at the next general election in November. The state's highest court, the Court of Appeals, also rejected Plan A, but the federal courts intervened and directed the state court to get out of the way. Members of both houses of the legislature who had been elected for two-year terms would now serve for only one year and would have to run again in November under the newly drawn Plan A district lines.

It was in this chaotic environment that the legislature went forward with the proposal to put the question of calling a constitutional convention on the ballot in November 1965, and Governor Rockefeller signed the legislation. A number of groups joined in the call for a convention, including the Committee on Constitutional Issues, led by Howard J. Samuels, a wealthy Canandaigua businessman who had sought the Democratic gubernatorial nomination in 1962. Samuels crisscrossed the state, calling for adoption of the question in November on the grounds that an effective and efficient state government could not be achieved under the antiquated provisions of the 1894 Constitution. He urged editorial boards and the public to support a new constitution for a new century.

Editorial support from major newspapers across the state was mixed; Democratic office holders generally supported it, while Republicans were opposed; Rockefeller, having signed the legislation placing the question on the ballot, provided a mild endorsement; good government groups were split. When the votes were counted, the question had been adopted, but the Plan A legislative majorities were now divided, with the Democrats retaining control of the Assembly while the Republicans recaptured control of the Senate. Increased support from the New York City suburbs and upstate cities had made the difference when compared with the previous referendum in 1957.[12]

The stage was now set for the election of convention delegates in November 1966. The 1894 Constitution set forth the election rules: 15 delegates would be elected statewide and three delegates would be elected from each of the then existing 57 senatorial districts, for a total of 186. This was a gubernatorial election year, and the public's attention was focused more on the contest between Nelson Rockefeller and Frank O'Connor than on the issues associated with the state Constitution. The rallying cry of "one man, one vote" that had produced support from Democrats for convening a constitutional convention had, for all practical purposes, been settled by the courts. The way was open for new issues to emerge, and one did so under the leadership of the Catholic Church.

For many years the Church's substantial network of parochial schools had operated under the restrictions imposed by Article XI, § 3 of the state Constitution, the so-called Blaine Amendment.[13] The Church had been successful in securing support at the 1938 convention for an amendment that authorized public transportation services for parochial school students, and that amendment had been approved by the voters. Now the Church was looking at developments at the federal level which offered the possibility of additional public financial support going forward. The Ele-

mentary and Secondary Education Act adopted by Congress offered the possibility of federal funds for low-income students attending parochial schools, if that support could pass the No Establishment clause of the federal First Amendment. The Church leadership feared that such funding might be authorized at the national level, only to have it denied in New York due to the Blaine Amendment. Their proposed constitutional solution was the repeal of the Blaine Amendment and its replacement by the language of the federal First Amendment.

While many organizations used the 1966 campaign period to develop initial positions on matters that might come before the forthcoming constitutional convention, the proposed repeal of the Blaine Amendment was the only one that many delegates recalled as generating significant public discussion in their districts. This was especially true in upstate cities, New York City and downstate suburban districts. Candidates were urged to pledge their support for the repeal of Blaine, and many did so. While the proposal received support from the Orthodox Jewish community, it was opposed by civil libertarians and representatives of many Protestant denominations. The issue would ultimately become a significant point of contention in the convention.

For those relatively few observers focused on the election of convention delegates, the prognosis of a Republican majority appeared increasingly probable as Election Day neared. Nelson Rockefeller had a comfortable lead in the gubernatorial race, incumbent Republican senators seemed satisfied with their Plan A districts, and the popular United States Senator Jacob K. Javits led the Republican slate of candidates for the 15 at-large seats. Neither Governor Rockefeller nor Senator Robert F. Kennedy had chosen to run, but it was widely assumed that they had surrogates among the candidates. Howard Samuels, who had spearheaded much of the conversation on constitutional reform, chose not to run since he was on the statewide ticket for lieutenant governor.

When the votes were finally tallied, the outcome concerning the constitutional convention was something of a surprise. Rockefeller had been reelected, the Senate remained in Republican hands, the Assembly retained its Democratic majority, and the Democrats had secured a majority of the constitutional convention delegates. Ten Democrats with Liberal Party endorsements and three Liberal Party leaders had been elected on the at-large slate, as were two Republicans with Conservative Party endorsements. Senator Javits and New York City Corporation Counsel J. Lee Rankin, who had received Liberal Party endorsements, were defeated,

as were the remaining Republican at-large candidates who had run without third-party endorsement.

The Democratic victory was not solely due to their at-large slate. They also won a majority of the 171 district delegates. They did so by winning one or occasionally two seats in senatorial districts that were otherwise sending a Republican senator back to Albany. Voters at the local level had made individual choices, splitting their votes among the three candidates from each party in their senatorial district.

So, who were these 186 delegates? They came from every corner of the state's political arena.[14] The most underrepresented segment of the population was women—only 11/186 or 5.9 percent of the delegates, roughly comparable to the percentage of women in the Assembly in the same period. As expected, the most overrepresented occupational group was that of attorneys, comprising 124/186 or 66.7 percent of the total. A significant portion of these attorneys were former or sitting judges, 28/124 or 22.6 percent, a fact that caused some concern throughout the convention for those lawyers who had to practice before the judges serving as delegates. Three sitting members of the Court of Appeals (Francis Bergan, John Scileppi and Charles Desmond) were elected as district delegates, although Desmond was scheduled to retire as Chief Judge at the end of 1966.

Thirteen members of the state legislature were elected as delegates, seven Republicans and six Democrats. If former legislators are added to the mix, a total of 45 of the 186 delegates had legislative experience, 24 percent of the total (31 percent of the Republicans and 18 percent of the Democrats). No sitting member of the legislature who had campaigned as a district delegate had been defeated, although the powerful Senator Edward Speno from Nassau County had been defeated as a member of the Republican at-large slate. Key to the future of the convention was the election of the legislature's leadership on both sides of the aisle as convention delegates: Assembly Speaker Anthony Travia, Assembly Majority Leader Moses Weinstein, Assembly Minority Leader Perry Duryea, and Senate Majority Leader Earl Brydges.

Local government leaders were well represented. The former mayor of the City of New York, Robert F. Wagner, had been elected on the at-large slate, and future mayors Abraham D. Beame and David N. Dinkins were among the district delegates. Upstate officials included Mayor Erastus Corning II from Albany, Mayor Frank Lamb of Rochester and Monroe County Executive Gordon Howe. Rockefeller's Director of the Office for

Local Government, John J. Burns, was elected as a district delegate from Nassau County. Former State Comptroller and Lieutenant Governor Frank C. Moore was one of the two Republicans elected on the at-large slate thanks to Conservative Party endorsement.

Immediately after the election results were in, Speaker Travia moved quickly to secure the leadership of the Democratic delegates and the role of president of the convention. This came as quite a shock to Chief Judge Desmond, who many assumed would be elected as president, following the precedent of the 1938 convention that had elected Chief Judge Frederick Crane for the task. Surprised as well was Senator Kennedy, who had assumed Desmond would get the position. Travia had locked up the commitments he needed, arguing that he had the experience necessary to get the convention off to a fast and efficient start. Once it was clear that Travia would lead the Democrats, the Republicans saw the necessity of countering with their own legislative leader, Earl Brydges as minority leader. Moses Weinstein was named majority leader, and vice presidential titles were accorded to Mayor Wagner, Perry Duryea, Charles Desmond and Senator Kennedy's former senior aide, William vanden Heuvel. One thing was very clear: the legislative leaders were in charge.

III. THE CONVENTION IN ACTION

The 1967 constitutional convention was called to order on Tuesday, April 4, in the Assembly chamber of the State Capitol in Albany. Present on the rostrum were Governor Rockefeller, Senators Javits and Kennedy, Chief Judge of the Court of Appeals Stanley H. Fuld and the leaders of the legislature, Speaker Travia and Senator Brydges. The principal address would be given by the Chief Justice of the United States Supreme Court, Earl Warren. Divine assistance was invoked by leaders of the state's major religious communities.

The constitutional crisis over legislative apportionment that had led to the calling of the convention had for the moment at least been dealt with by the courts and was no longer central to the convention's agenda. Chief Justice Warren, the former governor of California, pointed to the need for strong state governments if the people were not to turn to the federal government to satisfy their needs. Senator Javits called for a state Constitution "of fundamental rights and relationships which thereafter leaves the State free to seek and implement . . . imaginative solutions to our major problems. . . ."[15] Senator Kennedy urged the convention to develop a "document of trust."[16] Recalling John Marshall's opposition to encumbering the basic charter with either detailed restrictions or commands, Ken-

nedy noted: "If we ignore this wise admonition, and allow our Constitution to again become a code of laws, embodying the concerns and projects of the moment, or the apprehensions and greed of special interests, that document will also reflect an insolent suspicion of our democratic institutions, cripple our ability to meet human needs with new instruments of policy, and impose the defects of the present on the future."[17] Reiterating the traditional litany on the proper subject matter for constitutions, Kennedy concluded: "It is principle and process, not program and policy, which is the concern of constitutions."[18]

The basic theme of the Democratic majority was articulated by Speaker Travia in his acceptance speech upon his election as president of the convention. Travia saw the essential challenge facing the convention as that of drafting "a new and simple Constitution that will permit our state and localities to solve their problems in a working partnership with the federal government."[19] He said that the restrictions of the state constitutions were in large part responsible for the growing involvement of the federal government in domestic programs: "Shackled as they are, is it any wonder that the states of this nation have sometimes been characterized as laggard in meeting the needs of the people?"[20] The brief comments of Senator Brydges on his election as minority leader and the remarks of Governor Rockefeller stressing preservation, not innovation, gave little indication that the majority's approach was shared on the other side of the aisle.

State constitutions have four principal functions:

- To establish the structure of state government and its subsidiary entities, such as local governments and public authorities;
- To establish the framework for the relationship between and among these governmental units;
- To affirmatively state the responsibility of government to perform certain activities on behalf of the people; and
- To set limits on the power of government and the actions of public officials.

This would be a political convention. The delegates had run as partisans; they organized themselves by party; their seating arrangements in the State Capitol's Assembly chamber reflected their party affiliation. Their debates would often reflect partisan division, and this was entirely to be expected. The convention would grapple with real, substantive polit-

ical issues. The convention would confront many of the thorniest political issues of the day. No subject was theoretically out of bounds, except of course for all the rights and privileges afforded by the United States Constitution. Realistically, the political history of New York placed hundreds of practical restrictions on the delegates. In this sense, the newly elected Republican and Democrat delegates were and would be "conservative."

IV. STRUCTURAL CHANGE

Changing a constitution creates uncertainty and risk. For many participants, even those who acknowledge the need for change, when their specific interests are engaged: the devil they know is preferable to the devil they don't. From this derives the First Law of Constitutional Revision Dynamics: "For every group passionately committed to the reform of a particular constitutional provision, there is an equal and opposite group fiercely determined to preserve that same provision, which has provided it with either an important benefit or protection over the years."[21] Proposals for structural change regularly experienced this principle.

A. The Executive

Recognizing that it would be important for the public and the media to see that the convention was making progress, Travia as chairman of the Rules Committee determined to have the Committee on the executive branch bring to the floor its recommendation to increase the governor's ability to reorganize his departments and agencies. The proposition would repeal the constitution's limitation of "twenty civil departments" and allow the governor to submit periodic reorganization plans subject to legislative veto by either chamber within sixty days of submission.[22] The committee, chaired by the Presiding Judge of the First Department, Bernard Botein, had adopted the proposition unanimously. It increased the power of the governor but retained the ability of each house to stop the plan in its tracks. The convention approved the proposition by a vote of 173-1.

Judge Botein was less successful in securing support for the creation of a Department of Criminal Justice reporting to the governor and charged with the "power to assist, coordinate and supervise district attorneys, sheriffs, police and other law enforcement officers."[23] The proposal had the support of the governor, Senator Kennedy and Queens District Attorney Frank O'Connor who had been the Democratic standard-bearer in the previous year's gubernatorial election. A proposed amendment to shift this responsibility from the governor to the attorney general secured only 45

votes. Interestingly, when it came time for the final floor vote on the committee's proposal, it was the minority leader, Earl Brydges, who spoke in favor and the majority leader, Moses Weinstein, who was opposed. The original proposition received a relatively rare bipartisan majority in support, 85-74, but failed by falling short of the absolute majority (94) required to move the proposition forward to third reading. Three-fourths of the votes in favor came from Republicans with a majority of Democrats opposed.

The final major structural proposal for the executive branch involved the Public Service Commission, the state agency responsible for regulating the state's utilities. In the closing days of the convention, long after the Committee on the Executive Branch had ceased to function, William vanden Heuvel offered a proposal to restructure the agency, reducing the length of terms of the commission members, with three of them to be elected by joint session of the legislature and four appointed by the governor. The proposal was immediately seen as an attack on both the governor and the Senate, and was opposed by all the Republican delegates. Only Judge Nathan Sobel, former counsel to Governor Herbert Lehman, voiced objection among the Democrats, and he was joined only by Judge Russell Hunt and former Congressman Eugene Keogh in defecting from the Democratic majority supporting vanden Heuvel. The amendment was narrowly adopted by a vote of 95-79.

B. The Judiciary

Proposals to reorganize the judiciary were equally contentious. A new Judiciary Article had been approved by the voters in 1961, the first such modification since 1925. It produced a significant consolidation by establishing the statewide Family Court and the civil and criminal courts in New York City, while abolishing the Children's Court, the Domestic Relations Court in the City of New York, the individual county courts in New York City, and the city's magistrates' courts, Court of Special Sessions, and Municipal Court. The main proposals now before the convention generally involved the merger of the current specialized courts—the Court of Claims, Surrogate's Court, Family Court, and the New York City Criminal and Civil Courts—into Supreme Court.

Judges Desmond and Botein, supported by Judge William Lawless of Buffalo, pressed for the merger plan. It was widely said that Travia had not appointed Desmond and Botein to the Judiciary Committee, chaired by his good friend from Brooklyn, the Presiding Judge of the Second Department, Henry Ughetta, precisely so that their views would not be

able to prevail in that group. The Judiciary Committee voted 22-3 against merger. The proposal had been supported by the Special Committee on the Constitutional Convention of the Association of the Bar of the City of New York and the League of Women Voters, among others. Concerned that the defeat in committee of such a highly visible proposal without the benefit of floor debate would be widely criticized by the media, Travia urged Ughetta to report the proposition to the floor, accompanied by the committee's adverse recommendation. The debate that ensued, principally among the judicial delegates, was heated and at times disrespectful, giving the public a new perspective on many of the state's judicial leaders. The result was not surprising; the proposition was defeated by a vote of 137-33. Almost 90 percent of the Republican delegates were opposed to most of the merger proposals, but they were accompanied by a slim majority of the Democrats. The legislative delegates had no interest in mergers; only President Travia and Assemblyman Joseph St. Lawrence voted in favor. The core structural reform group consisted of 12 of the 13 Democratic at-large delegates.

Large-scale court merger may have been defeated, but there were many other issues to be examined. The Judiciary Article adopted by the voters in 1961 now constituted 25 percent of the length of the entire Constitution. It was essentially a detailed statute for the administration of the courts. Despite the changes it had made, congestion in court calendars, particularly downstate, had reached crisis proportions. The Committee on the Judiciary, afflicted in part by the illness and then death of its chairman, Judge Ughetta, had failed to report a complete, comprehensive revision of the Article. Travia appointed a four-member subcommittee of rules to take over the drafting. The subcommittee's report was not completed until September 12, just two weeks away from the final day scheduled for the convention. Its recommendations were controversial. Judges would continue to be elected, but judicial nominating conventions would be replaced by direct primaries. Local contributions to the cost of maintaining the Supreme Court and its Appellate Divisions, the Surrogate's Court, the County Court, the Family Court, and the civil and criminal courts in New York City would be frozen at their current levels and assumed by the state in 10 percent increments over the next 10 years. The state would bear the increased costs of these courts in the future, as well as the full costs of the Court of Appeals, the Court of Claims and the proposed district court system of any county or part-county outside the City of New York.

The subcommittee recommended many other changes that generated what could only be considered as a mini-revolt by the backbenchers. Over the course of the next 10 days, multiple amendments to the subcommittee report were considered and many were adopted despite the leadership's opposition. Ultimately, administrative responsibility for the entire court system was placed in the Court of Appeals. Amendments to empower the governor to appoint members of the Court of Appeals were handily rejected. Judicial nominating conventions were retained instead of the proposed initiation of direct primaries. A new district court system was created, with the legislature authorized to review the specific circumstances in a given county and transfer the existing county court judge to the most appropriate court.

Judge Desmond praised the revised article that emerged from the Committee on Style and Arrangement on third reading and Judge Botein agreed. They noted many of the improvements it contained including: centralized administration by the Court of Appeals; statewide financing of all courts; the institution of district courts, with flexibility retained for sparsely populated rural areas; more modern treatment of religious considerations in the adoption of children; a new process for providing drastically needed additional judges; improvement in the method for disciplining or removing judges who are no longer competent or errant; legislative authority to establish administrative tribunals for traffic violations and other administrative offenses; Court of Appeals original jurisdiction in cases involving the constitutionality of state reapportionment questions; reduction in the number of appeals automatically forwarded to the Court of Appeals; additional authority to the Court of Claims to handle all aspects of cases in their jurisdiction in connection with the same controversy; and legislative authority to abolish county courts where necessary and proper.

The final Judiciary Article was a product of bipartisan compromise. It was not a perfect document, but it reflected the engaged debate of the entire delegate body. It passed in a vote of 144-35.

C. The Legislature

With the leaders of the Assembly and Senate at the helm of the convention, the prospects for fundamental structural change in the Legislature Article were not bright. The most radical proposal submitted to the Committee on the Legislature came from Howard Samuels. In testimony before the committee, Samuels recommended the creation of a single chamber, 150-member Representative Assembly, comprised of well-com-

pensated full-time legislators supported by talented professional staff. Samuels recommended that one-third of the membership of the legislature should be able to discharge a bill to the floor, and he urged the creation of a campaign finance reform program involving both public regulation and public funds in legislative races. To no one's surprise, the Samuels' proposals were quickly dismissed in the committee. Delegates otherwise interested in structural change were not about to tilt at this windmill.[24]

Most of the committee's attention focused on the process for legislative and Congressional redistricting. The committee initially recommended that the redistricting function remain with the legislature, subject to its referral to a five-member commission comprised of four members appointed by the legislative leaders and the fifth by the Court of Appeals in the event that the legislature failed to produce a redistricting plan within one year of the release of the federal census. The majority and minority leaders of the convention were comfortable with this arrangement, but the backbenchers were not. Another mini-revolt occurred in both the Democratic and Republican ranks, demanding that the proposed commission be given exclusive and final decision-making on the redistricting plan, and it prevailed.

As long ago as 1927, Governor Alfred E. Smith had campaigned unsuccessfully to change the length of legislative terms to four years in the Senate and two years in the Assembly. More recently, the voters in 1965 had rejected a proposed amendment that would have extended the terms of both houses to four years. The committee reported without recommendation the continuation of the current two-year terms in each chamber. Former Republican Assembly Speaker Joseph Carlino proposed an amendment on the floor of the convention to increase the term of senators to four years; the amendment was defeated by a margin of 80-100, with Republicans overwhelmingly in favor and Democrats opposed.

The proposed Legislative Article contained this straightforward statement: "Gerrymandering for any purpose is prohibited."[25] Committee chairman Judge Irwin Shapiro had successfully argued against the inclusion of specific standards, arguing that they would ultimately restrict the ability of the courts to strike down unfair plans of any type. Shapiro explained: "The meaning is to be not the old meaning of partisan political gerrymandering, but the present . . . latter-day 20th century meaning of gerrymandering, as meaning unfair districting aimed at any particular group, political, racial, religious, economic or any other."[26] The convention agreed.

The process for considering future constitutional amendments was also part of the committee's charge. Former Republican Lieutenant Governor Frank Moore recommended that the legislature be given a faster method of submitting proposed amendments to the voters. The committee endorsed his recommendation that amendments approved by three-fourths of the members of both houses of the legislature be submitted to the people at the next general election. Objections to the fast-track proposal were voiced by several organizations, particularly conservationists. When the proposal was considered on the floor of the convention, Judge Shapiro's amendment restoring the existing requirement of adoption by two separately elected legislatures prior to submittal to the voters was accepted by voice vote.

Proposals to authorize amendments via an initiative process were rejected by voice votes, as were propositions to prohibit public officials from serving in future conventions. An exception was made, however, for members of the Court of Appeals, with the delegates noting that the Court of Appeals had a special responsibility as the final authority on constitutional matters. Proposals to create a permanent Constitutional Revision Commission received a plurality but fell short of the absolute majority required for adoption. The legislature would continue to be in charge of the process.

D. Local Governments and the State

Recommendations for significant structural changes in the relationship between the state and its local governments fared no better than those that would have made major changes in the structure of state government. The chair of the Committee on Local Government and Home Rule was Dr. Alan K. Campbell of the Maxwell Graduate School of Citizenship and Public Affairs at Syracuse University. Campbell hoped to secure major changes that would strengthen the capacity of local governments throughout the state to deliver high quality services to their residents. He directed the committee staff to prepare a comprehensive plan that included the creation of a powerful State Department of Local Affairs:

> a broad general grant of powers to local governments by the state, closely following what had become widely known as the "Fordham approach"; the consolidation of existing county, city and village tax and debt limits at the county level; . . . increased flexibility in structuring the office of local district attorney and elimination of constitutional references to the offices of sheriff, county clerk,

> and registrar; and language to encourage inter-local cooperation through the transfer of functions from municipalities to the county under a single, county-level referendum rather than multiple referenda involving each affected governmental unit affected.[27]

The staff proposals were major in scope, but Campbell was unable to secure the support of the members of his committee. The Republican members of the committee, led by their vice chairman, former Lieutenant Governor Moore, saw no need for substantial changes, and they were joined by leading Democratic mayors and New York City officials who preferred to take their chances in court over the "express powers" language in the constitution rather than put their faith in the goodwill of the legislature.[28] When State Comptroller Arthur Levitt stated that the language of the existing constitution provided more than adequate opportunity for intergovernmental cooperation and consolidation, the death of structural revision was confirmed. Proposals to allow localities to adopt local non-property taxes not otherwise prohibited by the legislature in general law, similarly went down to defeat.

Campbell and his supporters came to the conclusion that increased financial support from the state would have to take the place of structural changes. This theme would play itself out in subsequent initiatives from the convention leadership in the areas of education, housing, social welfare and economic development.

V. THE REPEAL OF BLAINE

No other issue generated as much public controversy as the proposed repeal of § 3 of Article XI, the Education Article. The debate had dominated such public discussion as occurred during the delegates' election campaigns. Despite the fact that a clear majority of the delegates had announced their support for repeal prior to the start of the convention, public expressions of both support and opposition were intense. Recent decisions by the United States Supreme Court and the New York Court of Appeals had raised substantial questions as to the effect of the existing provision, with particular attention to the possibility that educational services to students in parochial schools authorized by the federal Elementary and Secondary Education Act of 1965 might be permitted under the United States Constitution but precluded under the state Constitution.

The details of the debate have been extensively described elsewhere.[29] The eventual outcome was well known in advance, but the repeated

debates on amendments and final passage were among the most gripping of the convention. The proposed substitute was taken almost verbatim from the federal Constitution: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances."[30] Citizen suits to ascertain whether any state expenditure was a violation of the state or federal Constitution were authorized as part of the repeal package. The leadership of the Liberal Party led the effort to retain the existing language, and that effort failed by a wide margin, 48 in favor to 130 opposed. Fourteen other alternative or compromise amendments would be debated and defeated before the final vote was taken and the original proposition adopted, 132-49.

VI. POLICY DIRECTIVES

A. Education

Public attention to the Education Article had focused on the repeal of the Blaine Amendment. The Democratic leadership determined to shift attention to a major policy commitment by calling for a mandate that "the Legislature shall establish and define a system of free higher education for the benefit of all the people of the State, encompassing both public and nonpublic institutions."[31] If the Democrats had been split over the Blaine Amendment repeal, they were united in support of this initiative. The immediate reaction was intense. For both fiscal and policy reasons, objections came from Governor Rockefeller, the Board of Regents, the state's higher education leadership, fiscal watchdog groups and editorial boards. The Republicans lacked the votes to stop the initiative, but the bond market did not. When the Housing Finance Agency found itself without buyers for a scheduled sale of bond anticipation notes in support of the State University Construction Fund, the system's capital construction program was stopped dead in its tracks. The Democrats quickly amended their proposal to read: "define a system of higher education . . . by programs which may include free tuition, grants, fellowships and scholarships."[32] The substitute amendment eliminating the specific reference to "free higher education" was overwhelmingly approved by voice vote.

Elementary and secondary education policy had received relatively little attention until Campbell offered an amendment to the Education Committee's proposed article that had the potential for a dramatic shift in school finance:

> In any statute apportioning State aid to school districts, the basis for computing the number of pupils shall be the registration thereof and shall also take into account both the special educational needs, if any, of the students in each district and the local tax burden of the taxpayers of each district.[33]

By shifting the basis for the allocation of state aid from attendance to enrollment, and by shifting the focus of attention from the district's full value of real property per pupil to the district's total tax burden, Campbell hoped to redirect much more state aid to urban districts throughout the state. Campbell's amendment eventually survived on a vote of 94-75, with the Republicans almost unanimous in their opposition.

B. Welfare and Other Social Services

If the convention was not prepared to support additional non-property taxing authority for its local governments, other devices to provide assistance would be found. Travia appointed Campbell to chair a special task force examining the state's response to local welfare costs, then amounting to $528 million statewide. Campbell's group proposed state assumption of the administration of welfare within one year of the adoption of the Constitution and directed the legislature to phase out the existing local share of welfare costs over not more than 10 years. The Republicans objected that the convention was becoming an irresponsible unicameral legislature without benefit of a governor's veto. The Democrats were unanimous in support of the takeover and the Campbell amendment passed by a vote of 104-71.

C. Housing, Community Development and State Debt

In the first of his two messages to the convention, Governor Rockefeller began with the words: "The human problems centered on city life are the number one domestic problems of our time."[34] He termed the existing Housing Article unnecessarily detailed and unduly restrictive and called for a number of changes. The Democrats perceived his proposals as inadequate to the crises that were then happening across the nation and here in New York, and they were particularly concerned about the restrictions placed on the issuance of state debt. Referenda on debt issues for low-income housing had been rejected by the voters three times since 1956, and the majority looked to new devices to respond to the urban crisis. They did so through a proposal to eliminate the referendum requirement and substitute for it a requirement that debt issues be approved by two

separately elected legislatures and that the state's debt service be limited to 12 percent of the state's general revenue, averaged over the two preceding years. Republic opposition was adamant, as was that of Comptroller Levitt. With only one week remaining in the convention, the proposal was adopted at 2:40 a.m. on September 19, by a one vote margin, 95-72, with only one Republican in support, Frank Weissberg of Manhattan. The referendum repeal decision quickly joined that of the Blaine Amendment repeal as the focus of calls for separate submission to the voters as part of the ratification process.

New forms of partnerships between and among the state, localities, the federal government and the private sector seemed to be required to meet the revitalization demands of communities across the state. The Democrats proposed a new Community Development Article designed to authorize the most comprehensive array of programs possible to accomplish the goal of economic and community development. "Programs and facilities for 'residences, industry, manufacturing, commerce, culture, education, transportation, physical, mental and environmental health, recreation, social services and urban and community renewal, or any combination thereof' were [initially] defined as community and economic development."[35] The inclusion of "education" in the list led to a last minute battle that revived the Blaine Amendment debate, only to be resolved in the final hours of the convention by the conciliation skills of Judge Charles Froessel who proposed the elimination of the list of separate programs and a revised definition of development:

> Wherever used in this constitution, economic and community development purposes shall include the renewal and rebuilding of communities, the development of new communities, and programs and facilities to enhance the physical environment, health and social well-being of, and to encourage the expansion of economic opportunity for, the people of the state.[36]

The final vote on the State Finance Article was 137-42, with the Democrats unanimously in support.

D. Labor, Civil Service and Pensions

The skillful hand of Peter J. Crotty, the chair of the Committee on Labor, Civil Service and Public Pensions, produced a rare consensus on virtually every significant issue before the committee. Bipartisan consensus was quickly reached on the common understanding that the existing

rights of employees in both the public and private sectors would be neither diminished nor impaired, including the contractual status of the public pension systems. Longstanding provisions of the constitution were retained, and the Labor Article began with a totally new general welfare clause: "It shall be the policy of the state to foster and promote the general welfare and to establish a firm basis of economic security for the people of the state."[37] The committee added references to sex, age and handicap in its anti-discrimination section, and these provisions were ultimately incorporated in the general civil rights section of the Bill of Rights. Both the new Labor Article and the Civil Service proposition were adopted unanimously by the convention, 177-0.

E. Conservation and Natural Resources

The "forever wild" status of the Forest Preserve and the adoption of a Conservation Bill of Rights dominated the work of this committee.[38] The Forest Preserve had originally been established statutorily in 1885 as part of the state's efforts to protect the watersheds that supplied New York City. The "forever wild" language was inserted in the Constitution by the convention of 1894: "The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."[39] Subsequent constitutional amendments had authorized the building of ski trails, foot trails and horseback rider trails; public campsites had been constructed and open-faced shelters provided along the trails.

Further development within the Forest Preserve was generally supported by the Republicans who represented these areas, but the Democrats were not going to let anyone charge them with having weakened its "forever wild" protection. However, the most radical proposal to modify the provision actually came from an Albany Democrat, Judge Francis Bergan of the Court of Appeals. He proposed the creation of a Forest Preserve board of trustees charged with developing recreational facilities, laying out trails and roads, instituting sound conservation and reforestation procedures, providing for the development of wildlife habitat, and protecting the lands from fire. While the proposal had the support of many conservation professionals, it was overwhelmingly rejected by the Convention, 18-152. The only amendment that ultimately secured adoption was Judge Froessel's proposal to affirm the legitimacy of the existing form of campsites and shelters.

A major achievement of the convention was the adoption of Arthur Levitt, Jr.'s "Conservation Bill of Rights."[40] It declared that the conservation and protection of the natural resources and scenic beauty of the state were public policies, and the legislature was charged with making provision for programs that included "abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources."[41] Included in the Article was the creation of the State Nature and Historical Preserve. The entire Article was adopted unanimously, 175-0.

F. The Bill of Rights

The convention's leadership provided significant direction to the debates over structural changes in state government and big ticket initiatives such as the creation of a system of free higher education and the transfer to the state of the costs of welfare and the courts. When the convention finally began to focus on the Bill of Rights, individual delegates played a highly significant role. More than any other article, the Bill of Rights was written by the full convention.

The range of subjects generating debate was substantial: bans and/or restrictions on wiretapping and electronic eavesdropping; guarantees of a trial by jury in certain criminal cases; affirmation of the presumption of innocence for persons accused of crimes; limitations on the use of bail; assurance of the right to just compensation for private property taken, damaged or injured by governmental agencies; rights to the inspection of grand jury minutes; the right to bear arms; tension between the freedom of the press and the right to a fair trial; possible repeal of the entire section on gambling; a ban on school busing for the purpose of integration; prohibitions on group libel; a new section on consumer protection; a ban on public employment for persons advocating anarchy or the unlawful overthrow of the government or belonging to organizations advocating such objectives; and defining "person" as meaning from the moment of conception. Individual delegates played key roles in the debates on these and other related subjects. Their suggested amendments to the report of the Committee on the Bill of Rights and Suffrage were extensively debated with relatively few party line votes in favor or opposed. When all the amendments had been considered and either accepted or rejected, the final article was overwhelmingly approved by a vote of 177-2.

VII. PRESENTING THE DOCUMENT

If the results of the convention were to be considered by the voters at the November general election, its deliberations had to conclude no later than September 26. On that final day, the delegates were exhausted. The debate on the Community Development and Judiciary Articles had lasted throughout the previous night, and it was well past midnight that the Judiciary Article in final form was presented to the convention and adopted by a vote of 144-35.

One final question remained. Would any portion of the document be separately submitted to the voters? President Travia urged his Democratic Conference to support the submission of the proposed constitution as a single document. He pleaded for party unity, citing the progressive policies embedded in the new constitution as a once-in-a-lifetime opportunity to enable the state to deal effectively with society's many challenges. They had been true to their promise to produce a new, simplified and radically shortened constitution. He appealed to the three Liberal Party delegates who were opposed to the repeal of the Blaine Amendment not to play the role of "spoilers," as many Democrats felt they had been in the 1966 gubernatorial election when they ran Franklin D. Roosevelt, Jr., for governor.

The Republican delegates called for the submission of five separate questions to the voters: an omnibus amendment; the repeal of Article XI, § 3 (the Blaine Amendment); the elimination of the debt referendum; the transfer of welfare programs to the state; and the approval of the new Judiciary Article. The Republican package failed by a vote of 85-92. Former Speaker of the Assembly Joseph Carlino, a major advocate of the repeal of the Blaine Amendment, proposed that it alone be submitted separately, but that too failed to secure a majority, 88-88, with the unanimous Republican delegates joined by five Democrats and the three Liberals. Mayor Erastus Corning II of Albany, one of the five Democrats in opposition to their party's position, had voiced unalterable opposition to the single package: "I believe that it means the defeat of the constitution, and I believe that there are many good things that we should have in our constitution that we can only have by not voting in a single package, but by voting in separate parcels."[42]

When the final vote was taken on submitting the Constitution as a single package, the three Liberal Party members and two of the five Democrats reversed course and joined with Travia to provide the 94 votes required for adoption. The Liberals announced that they would not be

held responsible for deadlock in the final hour. The Democrats had made their decision. It would be a very costly decision.

VIII. REJECTION BY THE VOTERS

The decision to submit the Constitution as a single package led to its demise. Editorial writers of every major newspaper across the state condemned the decision and urged their readers to reject the document. Only the Catholic diocesan papers were in support. Good government groups such as the League of Women Voters bemoaned the lack of structural changes, particularly in the area of court reform. Civil liberties advocates continued to oppose the repeal of Blaine. Civil rights groups joined the opposition despite the progress they had seen in the Bill of Rights and Community Development articles. Mayors who had hoped for additional freedom looked askance at the increased role of the state legislature in local affairs. Fiscal conservatives were aghast at the cost estimates provided by the Governor's Division of the Budget for increased spending for the state takeover of welfare, school aid, court costs and higher education. When the votes were counted on Election Day, the proposed Constitution had received only 27.9 percent of the votes cast. It had been rejected in all 62 counties of the state and had received only 36.6 percent of the vote in New York City.[43]

The magnitude of its rejection cast a pall over the very idea of holding a constitutional convention going forward. New York voters had repeatedly approved the call for a constitutional convention throughout the 19th century and the first half of the 20th century. More recently the regularly scheduled referenda in 1977 and 1997 went down to defeat, with opponents pointing to the failure in 1967 as a significant reason for their opposition. The same is likely to occur in 2017.

IX. GOING FORWARD

I have reviewed in considerable detail the history of the 1967 constitutional convention, hoping to illustrate a few of the important subjects that are likely to be reviewed in any such setting going forward. While much of the media's attention is directed to political events at the national level, the states remain "laboratories of democracy" with extraordinary impacts on the daily lives of their residents. The constitutional convention is, of course, not the only vehicle for constitutional revision. The legislature is fully capable of initiating proposed constitutional amendments, but these invariably are piecemeal in nature. Nor should we look to the legislative leadership to initiate fundamental reforms in its own operations.

When it comes to constitutional change, both ends of the ideological spectrum become conservative pretty quickly. Traditional conservatives are hesitant about structural change of any type, while liberals and progressives fear that hard-won protections of the past may be swept away by a Tea Party-like majority. My own view is that fundamental reform of the structures of state government, particularly of the legislature and the political process itself, can only come from the work of a constitutional convention.

A. Executive Branch Reorganization

The Constitution contains a limit on the number of state departments and agencies, setting the limit at 20. It is a theoretical limit only, since the omnibus "Executive Department" has been used to house dozens of agencies, large and small, each created with a separate commissioner or agency head and, of course, each with distinct legislative and public constituencies. Nelson Rockefeller sought broad gubernatorial reorganization authority, but had to settle for specific changes. Governors who are held accountable for the operations of the executive branch should have the authority to manage the executive branch efficiently and effectively, and to that end they should have the ability to reorganize state agencies subject to legislative veto. Governors should be authorized to submit comprehensive reorganization plans to the legislature which will take effect if not rejected by a two-thirds margin in each house of the legislature. Opposition to such broad-based reorganization and consolidation will be fierce, especially from the special interests and public sector employee organizations affected by the changes.

A new convention would in all likelihood take another look at the roles of the state comptroller and the attorney general. Serious consideration might also be given to eliminating the position of lieutenant governor. Bills considered by the legislature under "messages of necessity" from the governor might be required to have a super-majority of some level in order to be exempted from the rule that they be available in some format for at least three days prior to passage. Bills passed by the legislature might be required to be sent to the governor not more than sixty days after their adoption.

B. Legislative Branch Reorganization

The public's respect for the New York State legislature is at an all-time low. The vast majority of members of the Senate and Assembly are honest, well-intentioned and generally hard-working individuals, but some-

thing is wrong in a system where legislative leaders and rank-and-file members alike on both sides of the aisle and in both chambers are indicted and convicted year in and year out for violations of the public's trust. It should be emphasized, of course, that the legislature has no monopoly on the presence of scandal; in recent memory Governor Eliot Spitzer resigned from office in disgrace and State Comptroller Alan Hevesi was sentenced to jail on charges of corruption.

Ever since the reapportionment cases of the 1960s required that legislative bodies be comprised of members elected on the basis of population rather than area, questions have arisen as to why New York and the other 48 states excepting Nebraska have retained a two-house or bicameral model for their legislative structure. While it can be argued that having a two-house structure provides opportunities for greater scrutiny of pending legislation by virtue of the delays typically inherent in their separate debate and consideration, the most frequently heard comment in New York is that the Upstate-Downstate split in perceived political interest is best reflected with Republican control of the Senate and Democrat control of the Assembly. The arrangement has a certain symmetry: "One for Us and One for Them."

No other governmental unit in New York State has a bifurcated, two-chamber legislative body. Counties function with either a single county legislature or board of representatives, towns have town boards, villages have village boards, cities have city councils, school districts have school boards, and special districts have single boards as well. These bodies legislate, make or confirm appointments to office, set policies, approve budgets, and authorize appropriations. To the best of my knowledge, no one in or out of state government is suggesting that bicameral bodies be established locally.

Why do we continue to have this duplication of function at the state level? For the last 50 years in New York, with the exception of the six years from the elections of 1968 until 1974, the objective has been to assure that each major political party has control of at least one house of the legislature no matter who is in control of the executive branch. This practice vastly complicates the budget-making process in Albany, with the majority party in the Assembly championing higher spending while the majority in the Senate presses for greater tax cuts. Governors have been known to find some comfort in the present arrangement. Nelson Rockefeller found it useful to have some of his spending proposals initiated by the Democrats in the Assembly, while Democratic governors have been

known to occasionally exhibit relief that fiscal brakes were being applied in the Senate.

To streamline state government, improve transparency and accountability, and ultimately save billions of dollars for the taxpayer, radical surgery is required. It will never happen through the piecemeal constitutional amendment process controlled by the legislature itself. What might a new legislature look like? The Constitution should be amended to create a single, 100-member House of Delegates, elected on an equal population basis from compact, contiguous, and coterminous districts drawn by an independent redistricting commission.

A permanent legislative and Congressional redistricting commission would be established, comprised of members appointed by the governor, the legislature and the Court of Appeals, with the chair named by the Court of Appeals. Gerrymandering in all its forms would be prohibited, and the incumbent protection system would be diminished. The redistricting plans initially proposed by the commission would be made public, submitted to scrutiny by all interested parties, amended as necessary and approved in final and binding form by the commission.

Delegates would serve for four-year terms, with one-half of the seats up for election every two years. The delegates would be paid an initial starting salary of $125,000 per annum and would be expected to conduct their legislative business throughout the course of the entire calendar year. No longer would members of the legislature arrive in Albany at the start of January and essentially do nothing until the negotiations over the budget have concluded. Nor would they adjourn in June to go home for summer plantings and fall harvests. Rules of the new legislative body would preclude the legislative leader from single-handedly appointing all committee members and removing them at will, and legislation could be brought to the floor of the house by petition. These and other reforms would increase the individual rights and responsibilities of the individual delegates.

Even with a suggested increase in legislative salaries, from a base of $79,500 to a new level of $125,000, the state would immediately see a savings of more than $4.4 million due to the reduced number of members, and a further consolidation of legislative staff would bring major savings as well. The most significant savings, however, would be the result of greater fiscal transparency and accountability. Strict limits need to be

placed on the practice of including "member items" in the appropriation bills, since they have risen in size to become mini-foundations, primarily for legislators in the majority party, to dole out taxpayer dollars at will in furtherance of their legislative careers as well as for the good of their respective communities. There is an appropriate role for such appropriations, but only when they are equitably allocated and appropriately monitored to prevent malfeasance. No longer would there be "one-house bills," approved in one chamber with the full knowledge that the measure would never see the light of day in the other.

C. Judicial Branch Reorganization

When it comes to the judiciary, former Chief Judge of the Court of Appeals, the late Judith Kaye, and her successor, former Chief Judge Jonathan Lippman, joined by a host of professional and civic organizations, have repeatedly called upon the legislature to streamline the state's court system. While some progress has been made over the last decades, fundamental reform is likely to be considered only at a constitutional convention. "New York State has the most archaic and bizarrely convoluted court structure in the country. Antiquated provisions in our state Constitution create a confusing amalgam of trial courts: an inefficient and wasteful system that causes harm and heartache to all manner of litigants, and costs businesses, municipalities, and taxpayers in excess of half a billion dollars per year."[44]

The current system is costly to the taxpayer, with savings in excess of $59 million per year estimated from the Special Commission on Court Reform's consolidation proposal.[45] More dramatically, the savings to litigants and the affected businesses and individuals touched by the legal system may amount to more than $450 million annually.[46] The Judiciary Article is the longest and some would say the most complicated in the constitution. This is not the place to review the judicial system's potential for reorganization in detail, but the repeated failure of the legislature to deal with this inefficiency is both a terrible financial burden for the state and a threat to the provision of fair and impartial justice.

D. Other Potential Subjects

I have touched on several structural changes, in greater and lesser detail, that could be the subjects of public debate going forward as we approach the mandatory referendum on the call of a constitutional convention in 2017. Many others cry out for consideration: campaign finance reform in the light of the *Citizens United* decision;[47] the balance of public

safety and personal privacy in the world of the internet and unparalleled electronic eavesdropping; increasing the deplorable lack of voter participation in both general and special elections; guaranteeing equality of educational opportunity for all residents of the state; permanently prohibiting capital punishment; reducing or eliminating bail as a condition for release of persons charged with nonviolent offenses; facilitating the opportunities for local government and school district consolidation; expanding the provisions for local government home rule; updating the state's commitment to environmental protection; reviewing the pros and cons of term limits for elected officials; and examining the use of initiative and referenda in the consideration of legislation and constitutional amendments.

E. Next Steps

The natural tendency of voters in 2017 will be to be skeptical of the call for a new constitutional convention. Fiscal conservatives will decry the extra expense of paying for the salaries and staff of such a body. Legislators will object that they are fully capable of handling the need for any constitutional revision through the existing legislative amendment process. Public employees will express concern that the contractual protection of their pensions may be repealed. Progressives will fear that conservatives will dominate, and conservatives will be sure that a liberal majority will abandon important fiscal and social protections. The failure of the 1967 convention reflected in the rejection of its single package revised document will be pointed to as evidence that the constitutional convention is an institution that cannot be trusted in our complex, modern society.

Governor Andrew Cuomo has the opportunity to follow in the footsteps of his father and appoint a broad-based, nonpartisan temporary state commission to examine potential constitutional revision issues well in advance of the mandatory referendum. The commission should solicit analyses and recommendations from a wide cross-section of the state's communities with a view toward identifying a range of high-priority issues that could likely be the subjects of debate and public discussion if a new convention were to be called. The time for putting such a commission to work is now.

The upcoming question on the ballot ultimately challenges our faith in the ability of the citizenry to engage in a periodic, fundamental review of the workings of our state and local institutions and of the rights and protections provided to individuals by the constitution. Will there be a popular movement calling for reform? Will our political, legal, social, business

and labor leaders be willing to step out of their normal comfort zones and champion the opportunity for serious and simultaneous dialogue on a wide range of substantial issues? A New York City mayoral election has the potential to increase voter turnout in 2017, and it will come on the heels of a presidential election in the prior year. Will events on the national scene or scandals at the state and local level produce a demand for reform? Will they generate a positive response to the mandatory question: "Shall there be a convention to revise the constitution and amend the same?"[48] The answer will rest with We the People, the true source of the Constitution.

1 *New York State Constitutional Conventions and Constitutional History*, N.Y. STATE LIBRARY, http://www.nysl.nysed.gov/scandocs/nyconstitution.htm (last updated Sept. 21, 2015).

2 N.Y. CONST. art. XIII, § 1.

3 Brian M. Kolb, "*New York's Last, Best Hope for Real Reform" The Case for Convening a State Constitutional Convention*, 4 ALB. GOV'T L. REV. 601, 603 (2011).

4 N.Y. CONST. pmbl.

5 Written amidst the battles of the Revolutionary War, the state's first Constitution was adopted in Kingston on April 20, 1777. Its principal authors were three young lawyers—John Jay, age 30; Robert Livingston, 29; and Gouverneur Morris, 24. Less than one-third of the 104 delegates voted on the document and it was not submitted to the people for ratification. STATE OF NEW YORK, TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION: INTRODUCTORY REPORT: 1967 CONVENTION ISSUES 15 (1966).

6 *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 320–400 (2010) (describing the fascinating story of New York's heated debate over whether to ratify the proposed United States Constitution).

7 N.Y. CONST. art. XIX, § 2; STATE OF NEW YORK, *supra* note 5, at 17.

8 Gerald Benjamin, *Reform in New York: The Budget, the Legislature, and the Governance Process*, 67 ALB. L. REV. 1021, 1052 (2004).

9 *See* HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 38–40 (1997) (including details on the1957 vote).

10 *See* Baker v. Carr, 369 U.S. 186, 231 (1962); Reynolds v. Sims, 377 U.S. 533, 558 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653–54 (1964).

11 *WMCA, Inc.*, 377 U.S. at 653–54. *See, e.g.,* Symposium, Nathaniel Persily et al., *One Person, One Vote: A Theoretical and Practical Examination: The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C.L. Rev. 1299 , 1351–52 (2002).

12 DULLEA, *supra* note 9, at 71–73.

13 N.Y. CONST. art. XI, § 3.

14 DULLEA, *supra* note 9, at 115–27 (discussing the occupational and personal backgrounds of the elected delegates).

15 *Id.* at 153.

16 *Id.*

17 *Id.*

18 STATE OF NEW YORK, 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, pt. 1, at 20 [Hereinafter *Record, I*]; DULLEA, *supra* note 9, at 153.

19 *Record, I*, at 13; DULLEA, *supra* note 9, at 152.

20 *Record, I*, at 13; DULLEA, *supra* note 9, at 152.

21 Henrik N. Dullea, *Constitutional Revision in 1967: Learning the Right Lessons from the Magnificent Failure*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 368 (Gerald Benjamin & Henrik N. Dullea eds., 1997).

22 DULLEA, *supra* note 9, at 175.

23 *Id.* at 196.

24 *Id.* at 201–04.

25 *Id.* at 210.

26 *Id.* at 210–11.

27 *Id.* at 272 (internal citation omitted).

28 *Id.* at 272–73.

29 *Id.* at 217–40.

30 *Id.* at 223.

31 *Id.* at 282.

32 *Id.* at 286.

33 *Id.* at 288.

34 *Id.* at 292.

35 *Id.* at 236.

36 *Id.* at 240.

37 *Id.* at 242.

38 *Id.* at 247.

39 N.Y. CONST. art. XIV, § 1; Stacey Lauren Stump, *"Forever Wild" A Legislative Update on New York's Adirondack Park*, 4 ALB. GOV'T L. REV. 684, 691 (2011).

40 DULLEA, *supra* note 9, at 249.

41 N.Y. CONST. art. XIV, § 4; DULLEA, *supra* note 9, at 249.

42 DULLEA, *supra* note 9, at 326.

43 *Id.* at 339–44.

44 SPECIAL COMM'N ON THE FUTURE OF THE NEW YORK STATE COURTS, A COURT SYSTEM FOR THE FUTURE: THE PROMISE OF COURT RESTRUCTURING IN NEW YORK STATE 9 (2007).

45 *Id.* at 12.

46 *Id.*

47 *See* Citizens United v. FEC, 558 U.S. 310 (2010).

48 N.Y. CONST. art. XIX, § 2.

CHAPTER THREE

CONSTITUTIONAL CHANGE IN NEW YORK STATE: PROCESS AND ISSUES

Gerald Benjamin

On November 7, 2017 New Yorkers will go to the polls to answer this question: "Shall there be a constitutional convention to revise the constitution or amend the same."[1] We will have this opportunity because in 1846, more than a century and a half ago, the delegates who gave us our third state constitution thought it essential for the preservation of popular government that there be a statewide referendum on this question every 20 years.

Ansel Bascom, later an Assemblyman from Seneca County, argued at New York's 1846 constitutional convention that this new referendum provision for constitutional change "asserted a great principle that all power was inherent to the people and that once in 20 years they might take the matter [of how they are governed] into their own hands."[2] Former Assembly member and Congressman (and later state Supreme Court and Court of Appeals Judge) Richard Marvin of Chautauqua County, who chaired the convention's Committee on Future Amendment and Revision of the Constitution, emphasized that the people of the state had to have this opportunity "without the intervention of any other body."[3] Embracing this view, the 1846 convention explicitly rejected amendments reserving the means to change the New York Constitution to the legislature alone and/or giving the governor a role in the process. Marvin also made it clear that mandating a review of the Constitution generationally did not mean that change would be required every 20 years. "[I]f they were dissatisfied with the constitution, the people could say so and act accordingly," he said, "and if not, the existing constitution would be continued."[4]

This 170-year-old process, substantially modified (as detailed below) in response to problems with its use encountered in New York hyper-partisan late 19th century political atmosphere, worked in accord with its intent until the mid-20th century. Then it stopped working.

I. THE PROCESS LEGACY OF 1846

Five major aspects of the manner in which our choice on whether or not to hold a constitutional convention were defined for us in in the mid-19th century (and sometimes later slightly modified). Several have unexpected 21st century implications.

A. The Use of the Referendum to Call a Convention

New York is not among the 26 states that employ an initiative and referendum process to bypass their legislatures, either for constitutional amendment or revision or ordinary lawmaking.[5] In the Empire State the

use of statewide referenda is limited to two purposes: approval of constitutional changes—initiated in the legislature or offered by a constitutional convention—or consideration of borrowing backed by the state government's full faith and credit.

The potential effectiveness of the mandatory statewide referendum for initiating constitutional change in New York is mitigated by New Yorkers' unfamiliarity with high-stakes referendum politics. Techniques developed to bypass this second referendum requirement to borrow have made full-faith-and-credit borrowing infrequent in recent years. Amendments proposed by the legislature have rarely been of great policy significance.[6] Voters in the states in which the popular initiative is used to prioritize and decide high-profile matters are accustomed to mobilizing in response to hard-fought multi-million dollar campaigns focused on referendum voting. New York voters are not; our referenda are almost always quiet affairs, with much of the electorate paying them little or no attention.

There were 4,202,593 voters who came to the polls on Election Day in 1997; of these 2,508,805 (59.7 percent) were recorded on the constitutional convention question.[7] In 2013, with six propositions on the ballot, the number of eligible voters was larger, but there were 22 percent fewer New Yorkers who voted (3,278,423) than there were in 1997.[8] The drop-off was 512,393 (15.6 percent of voters) on the highest visibility referendum question, an amendment to the constitution to permit additional casino gambling in the state. The voter drop-off was highest—879,776 voters (26.8 percent)—on an amendment concerning a land exchange in the Adirondacks.

As a result of the combined effect of ever lower turnout and drop-off, a good guess is that—without a major campaign—the size of the referendum electorate for the 2017 convention question will be about 2,750,000 voters. About one third of these will be in New York City. There were 10,936,271 active voters in New York in November 2015.[9] Assuming that this number remains about the same, it will take 12.6 percent of these New Yorkers to call a convention, or to block one.

B. The Year of the Vote

Between 1846 and 1936 the mandatory ballot question was offered in even years, simultaneous with elections for statewide or national offices and the state legislature. The 1938 constitutional convention switched the next mandatory vote to 1957 to assure that, if called, the convention itself would be held in an odd-numbered year. Delegate Francis Martin

explained: "most of the delegates here are anxious to have this Convention held in an odd year, so that the delegates may give their time to rewriting the Constitution and not be compelled to listen to speeches for political purposes . . . ."[10] One study published in 2002 noted that "New York's mandatory convention question was the only one offered in the last three decades that was voted upon in an odd-numbered year."[11] No state convention vote since has been held in an odd numbered year.[12] Years with statewide and national elections in New York State attract higher voter turnout than do years with local elections only. Moreover a convention vote that is simultaneous with the vote to select key state or national officials would have the effect of making the question of whether to hold a convention an issue in these candidate races, raising its visibility. This little noticed change in timing has resulted in New York's periodic mandatory opportunity to consider constitutional change being less known to voters.

C. The 20-year Cycle

The length of 20-year cycle for mandatory consideration of the convention question mitigates the effectiveness of the process; it reinforces the low visibility of this opportunity for constitutional change already resulting from the relatively rare use of referenda in New York's governance.[13] In 2012, the average life expectancy in the United States was just under 79 years. Life-long New Yorkers (and most of us are not) can expect to see the mandatory convention question on the ballot three or four times during their adulthood. No wonder, as noted below, so few people for whom government and politics is not a major concern are aware that our constitution affords them a regular opportunity to express their satisfaction or dissatisfaction with it.

D. Automaticity

Moreover the automatic scheduling of the convention question results in it coming up without regard to the current condition of the state's political system, or popular satisfaction with it. This allows support of calling a convention to be described as akin to endorsing a remedy without a problem, or the wrong remedy for whatever is the problem or are the problems of the moment.

Additionally, the predictability of the presence of the mandatory convention question on the ballot may provide an incentive for the legislature to be preemptive. On the rare occasion of their capturing legislative control in 1913, Democrats scheduled a convention question vote two years

earlier than required by the mandatory provision, on the assumption that they were more likely to win control in a non-presidential year. They were wrong.

E. The Unlimited Question

The required referendum question for calling a constitutional convention—"Shall there be a convention to revise the constitution or amend the same"[14]—makes no provision for a limited agenda. If a convention is called, every provision in the current Constitution may be revised, or removed. This is troubling for those with a stake in the document-in-force. For each voter or group of voters, risk must be measured against reward.[15]

F. The Knowledge Gap

To properly strike this balance New Yorkers would have to know what the state Constitution is and what it contains. Direct evidence for New York is scanty, but there is reason to believe that most Americans, New Yorkers among them, don't even know that there are state constitutions, let alone the nature of their function in a federal system, what is in them and why.[16]

G. A Limiting Not Empowering Document

An initial error in understanding the risk of calling a convention is to assume that because they have the same name—"Constitution"—the national and state documents are functionally equivalent. At least from the point of view of legal theory, this is not so. The national Constitution was adopted with state constitutions already in place; its drafters wrote in this context. States were incorporated in the fundamentals of the design of the national constitutional system. As Richard Briffault has explained, "In principle, the United States government is a government of limited powers. It has only those powers granted to it by the federal Constitution. By contrast, state governments acting through their state legislatures are presumed to have broad, residual, almost plenary governmental power. Thus, state constitutions are seen not as conferring powers on state legislatures but, rather, as limiting those powers the states inherently possess."[17]

H. Limiting Function Requires Detail, but Not All This Detail

Notwithstanding several centuries of growth in national power the distinction between "limiting" and "empowering" retains a certain practical

significance. State constitutions are frequently condemned for being insufficiently limited to essential governmental structures and processes, for containing too much matter that is essentially statutory, and as a result for being far longer than the national document. For example, noted Federal Judge J. Harvey Wilkinson III wrote that "[M]any state constitutions [are] baroque collections of essentially statutory material."[18] At 44,397 words, New York's Constitution was the 12th longest in the country in 2014.[19] One scholar found that about a third of the substance of the New York Constitution was statutory in nature.[20] Much of this "super legislation" was added at conventions to respond to crises of the day, or to put the priorities of temporarily powerful interests beyond the easy reach of the legislature.

This difference in length is, at least in part, the result of the difference in function of state constitutions. Detail is needed to limit state legislatures both substantively and procedurally, and also to direct them to take action in key areas of policy. A different, richer concept of rights also adds to the length of state constitutions. Rights in the national Constitution limit government in its relationship to citizens; rights in state constitutions do this, but also include positive rights, citizen entitlements from the state, for example the right to an education. But as Galie and Bopst have shown, some of our state Constitution's length is simply the result of dead letter law that has never been removed.[21]

I. Change Resistance

The U.S. Constitution is important for more than its substantive provisions; it is a symbol of national unity. One result is reverence for the national Constitution, and reluctance to change it. This attitude has not traditionally extended to state constitutions. New York is not atypical; we have had nine state constitutional conventions and four Constitutions. But lately the national reluctance for constitutional change seems to have reached the state level; no state's voters have called a convention for three decades; New Yorkers rejected the opportunity the last two times they were asked.

J. Disapproval of State Government

Certainly, there is persistent evidence among New Yorkers of unease with state government. A fall 2015 Marist College/*Wall Street Journal* poll showed that New York registered voters believe corruption in Albany is widespread. Also, after a period of improvement, the view of most of us has returned to agreement that the state is "going in the wrong direction."

Only one in five of those polled in late 2015 thought that the Assembly was doing an "excellent or good" job; for the Senate it was about one in four. Approval of gubernatorial performance, though respectable, was also in decline.[22]

K. Disagreement on Agenda

In sum, we think that the New York polity is ill, but ambulatory. There are a lot of potential remedies in our governance medicine cabinet. Campaign finance reform. Further redistricting reform. Election administration reform. Strengthened local home rule. Terms limits. Tax limits. A state constitutional bill of rights for women. A state constitutional right to bear arms. There is no agreed convention agenda. Moreover, with regard to the current Constitution, one person's unneeded statute-like detail—e.g., civil service guarantee, bipartisan election administration, public pension guarantees—is another's crucial constitutional protection.

L. Risk vs. Benefit

Taking the right steps at an unlimited constitutional convention may make New York's government better; taking the wrong ones may make things worse. Moreover, there is no agreement on what may be "better" and what "worse." With the vote two years out on a constitutional convention, New Yorkers appear to be starting to think about the chance to get better government that a convention offers, but also feeling the need to read the fine print. An October Siena poll showed 60 percent supported holding a constitutional convention, down a bit (from 67 percent) from an earlier poll. However, fewer than one in 10 had heard a good deal (2 percent) or some (5 percent) about the prospect of the 2017 vote to call one. Is a convention good medicine for our political system, or is it snake oil, or—even worse—is it poison?

II. THE LEGACY OF 1894: CONVENTION STRUCTURE AND PROCESS

Using the automatic referendum provision in 1894, 40 years after its passage, New Yorkers concerned about corruption in government voted overwhelmingly to hold a constitutional convention. But partisan deadlock blocked the passage of legislation setting out the districts from which delegates were to be elected. Governor David T. Hill, a Democrat, advocated usage of the state's Congressional Districts, not incidentally adopted by a Democrat legislative majority in 1883. Republicans who controlled the legislature passed a bill in 1891 that sought to employ for

delegate selection the Assembly Districts drawn by a GOP majority in 1879. The deadlock was not broken until Democrats gained control of the governorship and both legislative houses in 1892. They enacted legislation in 1893 that provided for five delegates to be elected from each state Senate District with 15 chosen at-large.[23]

Surprisingly, this Democrat-devised districting system produced a Republican convention majority. At the 1894 convention, to avoid future partisan deadlocks in delegate election if a convention was called, delegates sought to make the process "self-executing."[24] They included in the Constitution a districting provision for delegate election and timeline for holding this election, convening a convention and considering its results at the polls. Additionally, based upon their immediate experience, they provided for the compensation of delegates; specified in the Constitution a quorum requirement; set out a decision rule for recommendations by future conventions; empowered the convention to judge the qualifications of its own members; provided for a method to fill vacancies; assured the availability of state resources to support the convention's work; and reinforced the authority for the convention to select its leaders and set its own rules.[25]

Again, detail in 19th century remedies added to the Constitution created potential barriers in the 21st century to using the convention process.

A. Unicameralism

With the single exception of Nebraska, all American state legislatures are bicameral. This assures that constitutional change through the legislature, or calling a convention by this route, must be the result of a process of inter-house negotiation. In contrast, and rarely explicitly noted, all constitutional conventions in the United States have been unicameral. The specification in 1894 of the delegate selection process for a single-house constitutional convention cemented in the New York Constitution the premise that any convention called will be unicameral, with an intra-institutional (but not inter-house) political dynamic.

B. Timing and Location

In 1892, legislative Republicans passed a law requiring delegate election to the convention authorized in 1886 at a special election to be held in November 1893.[26] This was vetoed by Governor David B. Hill, a Democrat. In the next year a Democrat legislature specified that delegates be elected at the 1893 general election.[27] Convention delegates included a

constitutional provision that if a convention is called, delegates be chosen at the "next ensuing general election."[28] A "yes" vote in November of 2017 on calling a convention would thus produce delegate elections on November 6, 2018.

The Constitution further provides that 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."[29] Thus a convention authorized in 2017 would begin on April 2, 2019.

The duration of the 1967 convention was just under six months. The 1938 convention lasted just under five months.[30] Though it is nowhere required, we would expect a convention authorized in 2017 to meet for about half a year.

In 1894, the state legislature adjourned well before April 1; now it commonly sits well into the spring. If a convention is called, and the legislature continues to sit, a decision will be required regarding which institution will have priority use of the capitol building.

C. Delegate Election from Senate Districts—Partisan Bias

Because they expected Democrat control of the of 1894 convention, Republican state party leaders were less defining of their party's nominees for convention delegate than might otherwise have been the case.[31] Thus those elected included such nationally prominent figures as Elihu Root (late Secretary of War and Nobel Prize winner) and New York City reformer Joseph H. Choate (a future ambassador to Great Britain), who served as convention chair. At the Republican-controlled convention these men advanced a major governmental reform agenda. But the interests of the Republican Party organization in key areas were not neglected. In specific, the provisions for reapportionment of the Senate and Assembly were carefully designed to assure future Republican control. And the Senate Districts determined by this process were entrenched in the Constitution for the selection of delegates to any future constitutional convention.

With the use of Senate Districts in place, Republicans won control of the 1915 and 1938 conventions. But Republican dominance in convention decision-making was mitigated by an ideological split in party ranks; downstate reformers were very influential in the 1915 and 1938 conventions. Democrats prevailed in the 1966 delegate elections and therefore at the 1967 convention; the Senate districts used to select delegates for it

were defined in the courts, in the midst of the one person–one vote controversy. Nonetheless, a Republican state Senate majority was elected on the same day from the same districts as a Democrat convention majority.

In November of 2015 the number of registered Democrats exceeded the number of registered Republicans by more than two million. Even though the Senate district lines that will be used to elect delegates if a convention is called in 2017 were drawn by Senate Republicans, Republican control is not assured. These same districts produced a Democrat Senate majority in 2012. (However, intra-party differences blocked Democratic organization of the Senate.)

D. Delegate Election At-Large: Senate Districts as Multi-member Districts

The use of multi-member districts for legislative elections is a "red flag" practice under the federal Voting Rights Act, as this structure may bar members of minority group members from effective choice at the polls.[32] The use of multi-member districts for delegate selection is required by the 1894 Constitution: 15 convention delegates chosen must be statewide and three from each of the 63 Senate Districts.[33]

If New Yorkers authorize calling a constitutional convention, there almost certainly will be litigation in federal court challenging the use of multi-member districts for delegate election. Though districting for electing delegates is constitutionally specified, electoral procedures are not. The commission preparing for the 1997 convention vote proposed that any negative effect on effective choice by minority group voters of using Senate Districts for at-large election of delegates might be mitigated by allowing each voter one (not three) votes.[34] Under a system of "single-candidate" voting (also known as limited voting), the commission reasoned, minority group members, if they voted as a block, would be able to concentrate their power and therefore be far more likely to be able to choose their preferred delegate. The commission's approach to electing delegates is captured in draft legislation introduced by Democrat Lizabeth Kruger of Manhattan, in the Senate, and Democrat Dona Lupardo of the Southern Tier, in the Assembly. [35]

After careful consideration, the 1997 commission decided to recommend retaining statewide at-large election of 15 delegates largely because of the value of "the presentation of a statewide perspective by persons of statewide stature and reputation."[36] It thought the risk of a Voting Rights Act violation from retaining this method for electing only 7.6 percent (15

of 196) of convention delegates minimal, if done "in conjunction with changing the electoral system for the selection of convention delegates in (multimember) Senate districts."[37] With the Senate now expanded to 63 members, statewide convention delegates would comprise 7.3 percent of the total number of delegates (204) elected to a convention if one were called in 2017, a smaller percentage than would have been the case in 1997.

Other election procedure remedies are possible. But any changes would require state legislative action, and the legislature has been consistently hostile to creating favorable conditions for calling a convention. This might change, however, if the alternative was the imposition of a process by a federal judge.

E. Legislators as Delegates

At the 1967 constitutional convention, the last one held prior to the 1997 vote, 13 delegates were sitting state legislators. One was a congressman. Another 32 were former legislators. Nineteen delegates were sitting judges. Henrik N. Dullea, the preeminent student of the 1967 constitutional convention, counted a total 90 current or former elected officials as delegates. Others were deeply experienced as political appointees. Moreover, convention leadership was drawn from the legislative leadership. This caused many to wonder then, and to still wonder now, whether the prospect for achieving one fundamental purpose of such a convening was illusory: undoing elements of the status quo in governance that were problematic but advantaged those in office.[38]

Former Governor Malcolm Wilson, when a member of the commission preparing for the mandatory 1997 constitutional convention vote, argued that sitting state legislators should not be eligible for election as delegates.[39] This was because, he said, state lawmakers already controlled the alternative path to changing the state Constitution. In the ensuing years bills were introduced to bar sitting legislators from the delegate selection ballot, and others too seen as a part of the "government industry."[40] In response it was argued that such a step would be akin to "barring physicians from the operating room." Additionally, it would likely be a violation of the equal protection clause of the national Constitution.

A bill sponsored by Democrat Assembly Member Sandra Galef of Westchester would bar all state and local elected officials from running for constitutional convention delegate.[41] A constitutional amendment introduced by Democrat Assembly Member Brian Kavanaugh of Manhat-

tan goes further. It would exclude from candidacy for convention delegate persons (except those in higher education or military service)

> acting as a political party chairperson, an elected public officer, a person appointed by the governor, an individual who is subject to the lobbying rules established by 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, association or corporation, other than an entity designated as tax exempt under section 501(c)(3) of the United States internal revenue code, that receives public funding . . . .[42]

Assembly Minority Leader Brian Kolb has proposed that whenever any state or local party or elected officer "is elected and sworn as a delegate to a state constitutional convention, such official will be deemed to have vacated his or her state or local office and the said office will be deemed vacant for purposes of the nomination and appointment of a successor." It also would require registration for lobbyists who seek to influence convention processes, and bars simultaneous work as a lobbyist and convention delegate.[43]

F. "Double Dipping"

In 1969, the combined effect of the constitutional provisions that legislators' (Article III, § 6) and judges' (Article VI, § 25) pay not be increased or diminished while in office and that delegates be compensated at the level of Assembly members (Article XIX, § 2) resulted in all incumbents who were convention delegates getting double or near-double pay for the year. Additionally, statutes passed for both the 1938 and 1967 conventions allowed additional pension credits to accrue as a result of public officials serving as delegates, a practice condemned then and since as an indefensible boondoggle. An effective barrier to service by incumbents would address the double dipping problem.

G. Quorum Rule and Decision Rule

The 1894 legislation providing for a convention specified that a majority of those elected be a quorum, but no decision rule for the convention was specified in law.[44] There were differences at the 1894 convention as to whether decisions should be made by the majority of delegates present and voting or a majority of those elected. In reaction to this experience,

drafters in that year entered the requirement in the Constitution that any recommended amendment or revision be approved by a majority elected to serve in the body.

H. Filling Vacancies

The discussion on the decision rule was exacerbated because of difficulty with filling delegated vacancies; by statute this was to be done by special election, either in the Senate district or statewide "if the convention so direct."[45] As a practical matter, the brevity of the convention and the expense of special elections caused delegate vacancies to be left unfilled.[46] There was concern expressed at the convention too, that a process be found to fill vacancies with a co-partisan of the person who had originally won the seat at the polls.

The result was the constitutional provision that each vacancy be filled by the delegation (Senate district or statewide) in which it occurred. New York's is the only extant state constitutional provision for filling delegate vacancies. It includes no detail (e.g., consistency in partisanship) and is, of course, untested in conjunction with a "single candidate" mode of election.

I. Convention Length

The 1893 law also specified that the convention would begin on the first Tuesday in May, and that delegates would not be paid for their service beyond September 15, 1894. This placed a practical limit on the convention's length. A five-month constitutional limit on the duration of any convention was proposed in 1894, but failed.[47] Ultimately, as noted, the matter of convention length was left to the body's discretion.

J. Leadership and Rules

A dispute resulting in the removal of Democrat delegates Herman F. Trapper and Charles Beckwith because of widespread election fraud in Senate District 30 in Buffalo and the seating instead of Republicans Harvey W. Putnam and Thomas A. Sullivan reinforced for delegates the need for a constitutional provision that "[t]he 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."[48] This did not include specification of who would initially call a convention into order and preside until permanent officers were elected. Historically, this was done by the Secretary of State. Following long practice, the state legisla-

ture in 1938 and 1965 passed enabling legislation that detailed some convention procedure, including specifying that the Secretary of State act as convention chair/president pro-tem to preside over the election of the permanent president. With much procedural detail now in the Constitution, the authority to do this is not fully clear.[49]

In 1967, the Democrat Speaker of the Assembly, Anthony Travia, was elected to preside at the constitutional convention. The convention adopted the rules of the Assembly as its rules, and organized in a partisan fashion. These choices nurtured the perception that its business was dominated by legislators, and that the legislature's priorities were its priorities.

K. Staff, Resources and Cost

The Constitution provides that: "The convention shall have the power to appoint such officers, employees and assistants as it may deem necessary, and fix their compensation and provide for the printing of its documents, journal and proceedings."[50] The cost has been offered as an argument against holding a convention. In 1967, convention expenses totaled $15 million, or $108 million in 2015 dollars.[51] In response, proponents of a convention argue that its one-time cost should be considered relative to the size of the annual all-funds budget of state government, $137.7 billion in 2015.

L. Presentation and Ratification

Louis Marshall of Syracuse, later a great human rights lawyer, then chair of the 1894 convention's Committee on Future Amendments, noted that though the 1846 Constitution provided for popular ratification of constitutional changes proposed through the legislature, it was not explicit on this point for those originating with a convention called by the automatic referendum question vote. This was the origin of the current requirement that the convention submit its work to a statewide referendum.

Marshall also thought "upon examining the history of constitutional amendments which have been adopted in this State since the Constitution of 1846 was passed upon by the people, . . that some important amendments . . . [were] . . . passed by a ridiculously small number of voters."[52] He tried but failed to have the convention require a more substantial vote for future amendment or revision. The Constitution finally provided that ratification be by a majority voting on the question.

In 1821, 1846 and 1867, convention recommendations for constitutional change were presented to the voters as a single question. In 1893, the legislation passed by Democrats to prepare for the convention gave it authority to present its proposals either as a single question or in multiple questions. In 1894, Republicans recaptured the legislature, and sought to authorize presentation of the convention results in parts, at the general election in two separate years, 1894 and 1895. Their bill was vetoed by Democrat Governor Roswell P. Flower.[53] As with a number of other process changes, the convention removed future involvement of the legislature by including in its new amending clause presentation at "an election which shall be held not less than six weeks after the adjournment of such convention" (presumably to avoid railroading, and allow for deliberation) with convention discretion in specifying the form for presenting results.[54]

The choice of the manner in which change is presented is crucial. The 1967 convention submitted its results in a single question. When it suffered defeat at the polls, all its work was lost. The 1938 convention submitted nine questions to the voters; six passed.

M. Effective Date

Once passed, constitutional revisions or amendments take effect "on the first day of January next after such approval."[55]

III. OTHER PROCESS ISSUES

A. Delegate Election Rules and Processes

General election law has been used to govern the election process for convention delegates. Suggestions were made prior to the 1997 vote, and recently reiterated, that proposed reforms in the election process may be tested in these elections without direct consequence for politicians currently in office. These include proposals for non-partisan balloting, eased ballot access requirements and public financing of elections. All would require legislative action. Assembly Minority Leader Brian Kolb and a number of his Republican colleagues would employ nonpartisan election of delegates, and bar parties and party officials from involvement in campaign financing for delegate seats.[56]

B. Election Technology and the Presentation of Choice to the Voter

With the use of conventional mechanical voting machines, pragmatic alternatives to straight ticket voting for the election of 15 statewide con-

vention delegates were quite limited. Current voting technology makes ticket splitting and the consideration of independent candidacies far more possible, if provision is made in law for offering a greater range of delegate choice.

C. Preparatory Commission

Research shows that serious preparation increases the possibility that a constitutional convention will be called.[57] Over the course of New York's modern history, commissions to prepare for the possibility of a constitutional convention have been among the most important sources of systematic study and ideas for reform of New York government. However, creation of such commissions is not required by the Constitution or by statute. None was established, for example, in anticipation of the consideration of the mandatory convention question in 1977. Commissions are most legitimate and effective when they are bipartisan, representative of the state's diversity, properly funded and staffed and supported by both the legislative and executive branches. Though it had many of these characteristics, the commission appointed to prepare for the 1997 vote was appointed by the governor alone. In November 2015, a committee of the New York State Bar Association called for the creation of a commission to prepare for the mandatory 2017 convention call referendum.[58]

D. Gubernatorial Leadership

Comparative research has shown that vigorous gubernatorial leadership makes more possible an affirmative vote to call a constitutional convention.[59] In his campaign for governor in 2010, Andrew Cuomo called for a "People's Constitutional Convention." The necessary first step, he said, was to address existing process flaws. Seven years before the scheduled mandatory convention question, Cuomo wrote in his *New New York Agenda* that "prior to the constitutional convention it is widely agreed that 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."[60]

"Through relaxed ballot access requirements," he continued, "public campaign financing, limitations on legislators, lobbyists, and party officials from serving as delegates, and other reforms, the convention delegate selection process must be improved. Once that has occurred, we should convene a constitutional convention to address the many areas of reform that cannot be addressed by statutes alone."[61]

In January of 2016, Governor Andrew Cuomo proposed a $1 million appropriation in the executive budget to support the creation of a commission to prepare for the possibility of a "yes" vote on calling a convention in 2017. The item was removed by the legislature.

IV. THE CATCH-22

Legislators are winners in the political system as it is, especially those in the two houses' partisan majorities. System change is potentially disrupting of careers and ambition. Those in power may propose change to the state Constitution whenever they wish, and sometimes do. But they rarely call a convention, a potential wild card to be held by unknown hands.

The 20-year mandatory question provision is in the Constitution to—when necessary—bypass self-interested power holders to make desired reforms. But New Yorkers failed to call a convention in response to the periodic question in 1957, 1977 and 1997.

Interested in reform but fearful of constitutional changes they may oppose, some reformers have conditioned their support on the antecedent passage of changes in the processes described above for delegate selection and doing a convention's work, dating to 1946 and 1894. But these changes must be made by statute or constitutional amendment, both of which require timely legislative action. Thus the "Catch 22"—the very politicians this provision was created to bypass can keep it from working, simply by doing . . . nothing.

And as again evidenced by their defunding of a commission to prepare for a possible convention, this passive aggression through non-action is what the state legislature has been practicing on the run-up to the 2017 referendum vote on whether to hold a constitutional convention in New York.

1 N.Y. Const. art. XIX, § 2.

2 S. CROSWELL & R. SUTTON, DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION 794 (1846).

3 *Id.*

4 *Id.*

5 *See State I&R*, INITIATIVE & REFERENDUM INST. (2014), http://www.iandrinstitute.org/statewide_i&r.htm.

6 *See* Gerald Benjamin & Melissa Cusa, *Constitutional Amendment Through the Legislature in New York*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 67, 68 (G. Alan Tarr ed., 1996).

7 Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, 65 ALB. L. REV. 1017, 1041 (2002).

8 *NYS Board of Elections Proposal Elections Returns Nov. 5, 2013*: *Proposal Number One, an Amendment Authorizing Casino Gaming*, NYS BOARD OF ELECS. 2 (2013), www.elections.ny.gov/NYSBOE/elections/2013/proposals/2013GeneralElection-Prop1.pdf.

9 *NYS Voter Enrollment by County, Party Affiliation and Status*, NYS BOARD OF ELECS. 10 (2015), http://www.elections.ny.gov/NYSBOE/enrollment/county/county_nov15.pdf.

10 New York State Constitutional Convention of 1938. REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK APRIL FIFTH TO AUGUST TWENTY-SIXTH 1938, at 2527. I am grateful to my colleague Chris Bopst for providing me with this information.

11 Benjamin, *supra* note 7, at 1023.

12 *Periodic Constitutional Convention Elections Results from 1965 to Present*, STATE CONSTITUTIONAL CONVENTION CLEARINGHOUSE, http://concon.info/state-data/u-s-election-results/ (last visited Mar. 12, 2016).

13 New York is among the eight states that offer their mandatory convention question on a 20-year cycle. Five use a 10-year cycle. Michigan's cycle is 16 years.

14 N.Y. CONST. art XIX, § 2.

15 Notwithstanding the unlimited nature of the specified language in the constitution for calling a convention, Senator Ken LaValle has proposed a convention limited to two purposes: filling a vacancy in the Lieutenant Governorship and achieving property tax limitation. S.B. 1288, 236th Leg., Reg. Sess. (N.Y. 2013). Others have proposed a constitutional convention to create the opportunity for addressing a broader range of changes that they see as needed by advocating a constitutional convention limited in scope. Assembly member Donna Lupardo and Democrat colleagues seek a convention to rebalance the governor's and legislature's powers in budgeting and to achieve "institutional reform of the executive and legislative branches with respect to government integrity, swift and effective legislative action, redistricting, ballot access, campaign finance reform, the end of abuses by the authority system, and a mechanism for the people to exercise their right of petition and response." A.B. 3670, 236th Leg., Reg. Sess. (N.Y. 2013). A parallel Assembly Republican bill calling for an immediate convention advanced a far different substantive agenda, and is less limiting in scope. A.B. 1558, 236th Leg., 2013 Sess. (N.Y. 2013).

16 *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 1–2 (1998).

17 Richard Briffault, *State Constitutions in the Federal System*, *in* THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK 8 (Gerald Benjamin ed., 1994).

18 J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's a Constitution For?*, 56 DUKE L.J. 545, 573 (2006).

19 *Table 1.1, General Information on State Constitutions*, COUNCIL OF STATE GOV'TS KNOWLEDGE CTR. 10 (2014), knowledgecenter.csg.org/kc/system/files/1.1%202014.pdf.

20 Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions*, 93 AM. POL. SCI. REV. 837, 840 (1999).

21 Peter J. Galie & Christopher Bopst, *Constitutional "Stuff": House Cleaning and the New York Constitution-Part I*, 77 ALB. L. REV. 1385, 1389–90 (2014).

22 MARIST COLL. INST. FOR PUB. OP., *The Wall Street Journal/NBC 4 New York/Marist Poll* 1, 7, 9 (May 12, 2015), https://maristpoll.marist.edu/wp-content/misc/nyspolls/NY150504/Cuomo/Complete%20WSJ_NBC%204%20NY__Marist%20Poll%20New%20York%20State%20Release%20and%20Tables_May%202015.pdf.

23 PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 159 (1996); *see also* SAMUEL T. MCSEVENEY, THE POLITICS OF DEPRESSION: POLITICAL BEHAVIOR IN THE NORTHEAST 1893–1896 at 86 (1972).

24 GALIE, *supra* note 22, at 179.

25 The language in the New York State Constitution of 1894, Article XIV, § 2 states:

> 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 at which members of the Assembly shall be chosen, 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 services the same compensation and the same mileage as shall then be annually payable to the members of the Assembly. 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 yeas and nays 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 and proceedings. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualification 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.

26 Act of Apr. 30, 1892, ch. 398, § 1, 1892 N.Y. Laws 809.

27 J. HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 345, 346 (2nd ed. 1915).

28 Act of Jan. 27, 1892, ch. 8, § 1, 1893 N.Y. Laws 12.

29 N.Y. CONST. of 1894, art. XIV, § 2.

30 *In the Words of the Delegates: Records of the 1938 New York State Constitutional Convention*, UNIV. STATE N.Y. (1988), http://www.archives.nysed.gov/common/archives/files/res_topics_legal_constitution.pdf.

31 RICHARD L. MCCORMICK, FROM REALIGNMENT TO REFORM: POLITICAL CHANGE IN NEW YORK STATE, 1893–1910 at 52 (1981).

32 *See History of Federal Voting Rights Laws: The Voting Rights Act of 1965*, DEP'T OF JUSTICE, http://www.justice.gov/crt/history-federal-voting-rights-laws (last updated Aug. 8, 2015).

33 The convention sought an outcome that would make the number of delegates about the same as that authorized by law 1894. The convention also considered having 4 delegates from each Senate district. REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, Vol. 2, at 11 (1990) [hereinafter REVISED RECORD VOL. 2]. In 1892 Republicans passed a law, vetoed by Governor Hill, that allowed the Governor to appoint eight delegates, three from the Prohibition Party and five from labor organizations. No provision was made for special representation of organized feminists. Though women could not yet vote in New York State, the law passed by Democrats in 1893 to organize the convention explicitly provided that women might be elected to be convention delegates. None were. *See* Act of Jan. 27, 1892, ch. 8, § 7, 1893 N.Y. Laws 14.

34 Temp. State Comm'n on Const. Revision, *The Delegate Selection Process*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 407, 413 (Benjamin & Dullea eds., 1997) [hereinafter *The Delegate Selection Process*].

35 S.B. 3253, 200th Leg., Reg. Sess. (N.Y. 2013); A.B. 3672, 200th Leg., Reg. Sess. (N.Y. 2013).

36 *The Delegation Selection Process*, *supra* note 33, at 412.

37 *Id.* at 413 (emphasis omitted).

38 For an analysis of the characteristics of the delegates of the 1997 convention, including occupation status and government experience, see HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 116–27 (1997). For a discussion of the concerns regarding convention delegate selection, see Gerald Benjamin, *Constitutional Convention for New York*, EMPIRE ST. REP., May–June 2013, at 16–20.

39 *The Delegation Selection Process*, *supra* note 33, at 434.

40 Term is from NYS Commission on Constitutional Revision. *Id.* at 431.

41 A.B. 921, 200th Leg., Reg. Sess. (N.Y. 2013).

42 A.B. 214, 200th Leg., Reg. Sess. (N.Y. 2013).

43 A.B 531, 201th Leg., Reg. Sess. (N.Y. 2015); A.B 4674, 201th Leg., Reg. Sess. (N.Y. 2015).

44 THE CONVENTION MANUAL OF PROCEDURE, FORMS AND RULES FOR THE REGULATION OF BUSINESS IN THE SIXTH NEW YORK STATE CONSTITUTIONAL CONVENTION, Vol. 1, at 47 (1894).

45 *Filling Vacancies in the Constitutional Convention*, ALB. L. J., July-Dec. 1893, at 458.

46 *See* REVISED RECORD VOL. 2, *supra* note 32, at 21; REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, Vol. 4, at 828–29 (1900) [hereinafter REVISED RECORD Vol. 4].

47 REVISED RECORD Vol. 4, *supra* note 45, at 829.

48 *Id.* at 828.

49 Communication to the author by Professor Peter Galie October 19, 2015.

50 REVISED RECORD Vol. 4, *supra* note 45, at 828.

51 "Steps to a Convention," presentation by Henrik Dullea at the Albany Law School, April 5, 2016. The budget of the NY State Assembly in 2015 was about $100 million.

52 REVISED RECORD Vol. 2, *supra* note 32, at 8.

53 *Roswell P. Flowers*, *in* Vol. 9, MESSAGES FROM THE GOVERNORS 480–81 (Charles Z. Lincoln ed., 1909).

54 N.Y. CONST. art. XIX, § 2.

55 N.Y. CONST. of 1894, art. XIV, § 2.

56 A.B. 1558, 200th Leg., Reg. Sess. (N.Y. 2013).

57 John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to their Passage*, 71 MONT. L. REV. 395, 425 (2010).

58 HENRY M. GREENBERG ET AL., REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMMISSION ON A CONSTITUTIONAL CONVENTION 1 (2015).

59 Dinan, *supra* note 56, at 426.

60 ANDREW CUOMO, THE NEW NY AGENDA: A PLAN FOR ACTION 29 (2010).

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CHAPTER FOUR

CONSTITUTIONAL REVISION IN THE EMPIRE STATE: A BRIEF HISTORY AND LOOK AHEAD

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From its inception, New York State has relied on two methods of amending its constitution: the legislatively initiated amendment and the constitutional convention. For the first 200 years of statehood, these methods worked reasonably well. The state convened nine constitutional conventions, six of which proposed revisions that ultimately became the law of the land. Significant reform also emanated from the legislature: the executive budget, the Home Rule Article, and the current Judiciary Article are a few of the major accomplishments that originated in that branch.

The last 40 years, however, have seen a dearth of meaningful constitutional reform through either method. Between 1977 and 2015, voters rejected two calls for a constitutional convention, and the legislatively initiated amendments adopted since 1978 have effected few changes in the operation of the state. Two of the legislature's more substantive proposals during that time, an attempt to reform the debt practices of the state and an overhaul of the budget process, were criticized by reform groups as self-serving and inadequate, and were ultimately rejected by the voters. Even a successful redistricting commission amendment in 2014 was thought by many editorialists and reform groups (including some that endorsed it) to be a palliative measure.

Has the state constitution become functionally unamendable on issues of significance to citizens? Will the legislature, left to its own devices, propose reforms that directly or indirectly threaten its prerogatives and institutional status? Do the current procedures provide real opportunities for amendment? Have other states that use devices such as limited constitutional conventions, constitutional initiatives (in varied forms), or appointive constitutional commissions fared better? Should New York adopt any of these methods? These questions have particular relevance in light of the upcoming 2017 vote on whether to convene a constitutional convention. This chapter does not offer *a* solution; rather, its purpose is to provide voters in New York with an understanding of the complexity of the issues and the available alternatives.

I. HISTORY OF CONSTITUTIONAL REVISION AND THE AMENDMENT PROCESS IN NEW YORK

The first New York State Constitution, adopted in 1777 by the Fourth Provincial Congress serving as a constitutional convention,[1] contained no amendment procedure. The lack of a procedure did not obviate the need for constitutional reform, as the disputes during the 1790s between the governor and the council of appointment over which of them possessed the power to nominate candidates for office demonstrate.[2] On April 6,

1801, the legislature passed an act "recommending a convention" to consider two matters: the construction of the article concerning appointments and the number of senators and assemblymen.[3] Although the act was worded as a recommendation (as opposed to a directive) that such a convention be called, the people were not given the opportunity to vote on whether to convene the convention: an early assembly amendment to the bill giving them this power had been dropped.[4] Popular participation in the process was limited to electing delegates, or perhaps, for those opposed to the convention, refusing to vote for delegates. The act provided that the delegates were to have "no other power or authority whatsoever" beyond those issues which the convention had been authorized to consider, but the legislature was in uncharted waters as to what would happen if the delegates exceeded their authority.[5] Fortunately, this issue never arose, as the convention stayed true to its mandate by adopting two amendments concerning the issues with which it was tasked, both of which became law without submission to the voters. This would be the only example in New York of a "limited convention."[6]

No amendments were adopted in the two decades following the 1801 convention. However, problems emerged with the recently strengthened council of appointment and the council of revision, with its power to approve or veto legislation. Both had come under attack. An 1820 bill calling for a constitutional convention passed the legislature but was vetoed by the council of revision on the grounds that it did not allow a popular vote on the issue. In attempting to distinguish the successful 1801 convention bill,[7] the council expressed support for the principle that the constitution, as an expression of the will of the people, cannot be changed without the expression of that same will. Can a legislature, the council wrote,

> [c]hosen only to make laws in pursuance of the provisions of the existing Constitution . . . call a Convention, in the first instance, to revise, alter and perhaps remodel the whole fabric of the government, and before they have received a legitimate and full expression of the will of the people that such changes should be made.[8]

Lacking the votes to override the council's veto,[9] the legislature submitted the question to the people, who overwhelmingly approved the convention.

The convention of 1821 submitted an entirely new Constitution to the voters, the first time a convention's work was subject to popular approval.

The Constitution included the following provision for constitutional amendment by the legislature:

> Any amendment or amendments to this Constitution may be proposed in the senate or assembly, and if the same 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, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen; and shall be published for three months previous to the time of making such choice; and, if in the legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two thirds of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment, or amendments to the people, in such manner, and at such time, as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments shall become part of the Constitution.[10]

The 1821 convention left unanswered the questions of how, when and by whom a future convention should be convened, omitting any reference to the device in the document proposed to the voters. The Constitution was adopted by a vote of 74,732 to 41,402.

The period between 1822 and 1845 saw the first legislatively initiated amendments in New York. Eight amendments were proposed, all of which were approved. The level of support for these amendments was overwhelming: the *narrowest* margin of approval any of the proposals received was almost 60,000 votes out of 77,000 cast, and another had over 99.5 percent of the votes in its favor. None of the amendments concerned the amendment process itself.

Notwithstanding the willingness of voters to alter the constitution through piecemeal amendments, fundamental flaws in the 1821 constitution became apparent. Persistent complaints and growing discontent over the failure of the legislature to address serious problems led to popular sentiment for placing more control of the government in the hands of the people. In 1837, the Convention of Friends of Constitutional Reform convened in Utica, and drew up a new state constitution.[11] Despite yearly

calls for a convention from various legislative leaders, newspapers, and other sources, partisan division and conservative fears of a convention prevented a vote on the issue.[12] In 1844, twenty-four counties presented petitions to the legislature calling for a law authorizing a popular vote on a constitutional convention.[13] In 1845, the issue was finally placed before the voters, who approved the convention by a six to one margin.

The Constitution proposed by the 1846 convention and approved by the voters[14] made several changes to the amendment process. First, the convention eliminated the supermajority required for second passage of a constitutional amendment. The 1821 Constitution had required a two-thirds majority of the elected members of each house to present a proposal to the voters; the 1846 document reduced this to a simple majority of the elected members.[15] Second, the Constitution adopted the constitutional convention as a method of reform:

> At the general election, to be held in the year eighteen hundred and sixty-six, and in each twentieth year thereafter, and also at such time as the legislature may by law provide, the question "shall there be a convention to revise the constitution, and amend the same?" shall be decided by the electors qualified to vote for members of the legislature; and in case a majority of the electors so qualified, voting at such election, shall decide in favor of a convention for such purpose, the legislature at its next session shall provide by law for the election of delegates to such convention.[16]

This section accomplished several things. By requiring that the question of whether to hold a constitutional convention be placed on the ballot every 20 years, the convention ensured that needed constitutional reform could not be held hostage to a reluctant legislature. By providing that any convention call, whether initiated by the legislature or the automatic call provision, had to be approved by the people, the convention constitutionalized a practice previously governed by statute. Intentionally or not, the specific language of the question that would be placed on the ballot may have ruled out the possibility of a limited convention, although this question has never been decided.

A number of firsts took place during the half century following the 1846 convention. In 1858, voters for the first time rejected a call for a constitutional convention. In 1866, the first automatic convention call was placed on the ballot, and was approved. The Constitution proposed by the

constitutional convention of 1867-68 was the first to be rejected by the state's voters; the only proposals approved were a separately submitted judiciary article and a proposal *retaining* a discriminatory property qualification for African American suffrage. During this period, a new mechanism for constitutional reform was introduced, the constitutional commission. Created by statute in 1872, the commission was made up of 32 members appointed by the governor with the consent of the senate. Initially, the commission was directed to propose amendments to any article of the constitution except the recently adopted judiciary article; this limitation was subsequently removed. Since the commission was not specifically authorized by the constitution, it could not propose amendments directly to the voters. Rather, its recommendations needed to be acted on by the legislature (i.e., adopted by two sessions of that body before being submitted to the voters).

The 1872 commission proved successful. Amendments proposed by the commission in the areas of suffrage (removing the property requirements for African Americans that had thrice been rejected by the voters), electoral corruption, the legislative process, local debt, gifts, and loans of state and local credit, corporations, and the canals were all adopted by the legislature and approved by the voters. The commission proved so successful that two other commissions, a commission on municipal reform in 1875 and a judiciary commission of 1890, were also created. The resort to constitutional commissions to deal with persistent problems plaguing the state lent credence to the notion that significant constitutional reform could be achieved with the assistance of a specialized body.[17]

In 1886, the automatic convention question was placed on the ballot and won approval by a margin of 574,993 to 30,766, but the 95 percent who voted "yes" would have to wait until 1894 for the convention to be held. Partisan disputes concerning the delegate selection process were the cause of the delay. Democratic Governor David B. Hill proposed the election of convention delegates from the state's congressional districts, which had been redistricted by the Democrats in 1883; the Republican-controlled state legislature wanted the delegates chosen from the state's assembly districts, which had been redistricted in 1879 when the legislature was in its control. In 1892, the Democrats gained control of both the legislature and the governorship, and the decision was made to have five delegates chosen from each of the 32 state Senate districts, and 15 at-large delegates.[18]

The 1894 convention ensured that the state would not have another eight-year wait between approval of a convention and the opening gavel.

The convention placed a provision in the new Constitution which provided:

> [I]n 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 at which members of the Assembly shall be chosen, 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.[19]

In doing so, the convention adopted a delegate selection process similar to the one chosen by the legislature in selecting the delegates to the 1894 convention. The convention also ensured that any convention would be convened no later than 16 months after approval. These provisions remain largely intact.

The 1894 convention retained the mandatory call provision that had been inserted by the 1846 convention, but chose 1916 as the next date, ensuring that all future convention calls would be held during presidential years. The 1938 convention subsequently changed this date to 1957 and every 20 years thereafter, where it remains today.[20]

A. Constitutional Revision in New York, 1916-2015

In 1915, a constitutional convention was held, and three proposals (a new constitution, a new legislative apportionment and a new taxation article) were submitted to the voters; all three were rejected. During the 100 years since that defeat, several developments have occurred in the use and operation of the two methods of constitutional revision available to New Yorkers. First, the constitutional convention has fallen out of favor as a device for constitutional reform in the state. Second, the failure of the voters to convene a constitutional convention for half a century has deprived the state of the reform that has resulted from convention proposals approved by the voters or from subsequent legislative amendments inspired by the work of "unsuccessful" conventions. Third, the number of legislatively proposed amendments has declined and those proposed, beyond the relatively non-controversial like the exchange of modest tracts of land in the forest preserve or increases in civil service credits for veter-

ans, have been tepid and self-serving. Not surprisingly, the latter have been rejected by the voters and criticized as palliative measures. These developments are examined below.

1. The Decline of the Constitutional Convention as a Means of Reform

Constitutional conventions have fallen out of favor in New York. The state has not held a convention since 1967, and that convention was an anomaly, precipitated by a U.S. Supreme Court decision declaring New York's reapportionment scheme unconstitutional.[21] This drought is the longest in the state's history, a score longer than the second-longest period between conventions of 29 years.

Table 1: History of New York's Constitutional Convention Votes

Year	Automatic/ Not Automatic	Vote For Convention	Vote Against Convention	Result
1821	Not Automatic	109,346	34,901	Approved
1845	Not Automatic	213,257	33,860	Approved
1858	Not Automatic	135,166	141,526	Rejected
1866	Automatic	352,854	256,364	Approved
1886	Automatic	574,993	30,766	Approved
1914	Not Automatic	153,322	151,969	Approved
1916	Automatic	506,563	658,269	Rejected
1936	Automatic	1,413,604	1,190,275	Approved
1957	Automatic	1,242,568	1,368,063	Rejected
1965	Not Automatic	1,681,438	1,468,431	Approved
1977	Automatic	1,126,902	1,668,137	Rejected
1997	Automatic	929,415	1,579,390	Rejected

Between 1916 and the present, New Yorkers have been given six opportunities to convene constitutional conventions; they chose to do so only twice.[22] (Table 1). The contrast with the preceding 100 years, when voters chose to convene conventions five of the six times that they were asked, is striking. Evidence of disfavor with this reform method is further manifest in the increasing margins of defeat. Before the 1977 vote, the highest percentage of disapproval for a convention vote was 56.5 percent in 1916. The last two votes had higher disapproval percentages, 59.7 percent in 1977 and 63.0 percent in 1997. Interest in the question has also declined dramatically. The number of votes cast on the question in 1997, just over two-and-a-half million, was the lowest total cast on a convention

call vote post-women's suffrage. The last 100 years have not been kind to the constitutional convention, raising the question: Has the convention outlived its usefulness as a viable method of reform?[23]

2. The Heuristic Function of Conventions

The value of constitutional conventions in New York has extended beyond whether the convention's proposals were approved by the voters. A review of the state's constitutional history demonstrates that conventions, even unsuccessful ones, have aided in the reform process.

New York has convened nine conventions; of these, six had significant portions of their work approved by the voters or approved without submission to the voters. (Table 2).

Table 2: Results of Conventions Whose Work Was Adopted in Whole or in Large Part

Year	Limited/ Unlimited	Convention Proposals	Referenda on Convention Proposals
1777	Unlimited	New constitution	No referendum; constitution approved by convention only
1801	Limited	Five amendments, four concerning composition of senate and assembly and one concerning powers of appointment	No referendum; amendments approved by convention only
1821	Unlimited	New constitution	1822: constitution approved: 74,732-41,402
1846	Unlimited	(1) New constitution; (2) Amendment repealing the property qualification for African-American suffrage	1846: (1) approved: 221,528-92,436; (2) rejected: 85,306-223,834
1894	Unlimited	(1) New constitution; (2) Amendment providing a new legislative apportionment; (3) Amendment providing for the improvement of the canals	1894: (1) approved: 410,697-327,402; (2) approved: 404,335-350,625; (3) approved: 442,998-327,645

1938	Unlimited	(1) General amendments to the existing constitution; (2) Amendment providing a new legislative apportionment and increasing term of senators; (3) Amendment relating to elimination of railroad grade crossings; (4) New article relating to low rent housing and slum clearance; (5) Amendment generally amending judiciary article; (6) Amendment relating to rights of labor and hours/ wages for public works; (7) Amendment prohibiting voting by proportional representation; (8) Amendment permitting use of state money and credit for social welfare; (9) Amendment excluding from New York City's debt limit certain amounts for transit unification.	1938: (1) approved: 1,521,036-1,301,797; (2) rejected: 848,367-1,425,344; (3) approved: 1,561,846-895,382 (4) approved: 1,686,056-936,279; (5) rejected: 641,332-1,550,653; (6) approved: 1,869,883-940,770; (7) rejected: 627,123-1,554,404; (8) approved: 1,902,075-943,296; (9) approved: 1,407,056-935,744

In addition to these successful conventions, there were three "unsuccessful" conventions (i.e., conventions whose work was mostly, if not completely, rejected by the voters). (Table 3).

Table 3: Results of Conventions Whose Work Was Rejected in Whole or in Large Part

Year	Limited/ Unlimited	Convention Proposals	Referenda on Convention Proposals
1867 -68	Unlimited	(1) New constitution; (2) New judiciary article; (3) Amendment creating uniform rule of property assessment and taxation; (4) Amendment *retaining* a property qualification for African-American suffrage	1869: (1) rejected: 223,935-290,456; (2) approved: 247,240-240,442 (3) rejected: 183,812-272,260 (4) approved: 282,403-249,802

1915	Unlimited	(1) New constitution; (2) Amendment providing a new legislative apportionment; (3) New taxation article	1915: (1) rejected: 400,423-910,462; (2) rejected: 371,588-891,337; (3) rejected: 346,922-924,571
1967	Unlimited	New constitution	1967: constitution rejected: 1,327,999-3,487,513

Even though the voters rejected all but two of the proposals submitted by these three conventions, much of what they proposed found its way into the state's constitutional or statutory law in the decades following the conventions. The first "unsuccessful" convention, held in 1867–68, can be seen as a long-term success as most of its significant proposals were eventually incorporated into the constitution.[24] Home rule, certain executive consolidation, prohibitions against illegal searches and seizures, provisions addressing bribery in public office, the court of claims, free public school education and the current structure of the Court of Appeals all were first proposed at the 1867 convention. The 1915 convention also saw much of its work vindicated by subsequent amendments, including executive consolidation, the short ballot (leaving only four officers elected statewide), the executive budget, women's suffrage, and home rule for cities.[25] The 1967 convention also had a long-term impact on state policy. State financing of the entire court system, the conservation bill of rights, an independent redistricting commission and suffrage for those 18 years or older were all proposals made by the 1967 convention. In addition, some of the work of the 1967 convention, such as a prohibition against discrimination on the basis of sex, age or handicap and a consumer protection provision, were implemented by statute.[26]

At a minimum, New York State's conventions have focused attention on the state constitution and have engendered informed discussion and the exchange of ideas for substantive reform. The failure of the voters to approve calls to convene a constitutional convention during the last half century has had the unintended consequence of drying up a major source of meaningful revision opportunities.

3. The Failure of the Legislature to Propose Meaningful Reform

The unwillingness of voters during the last half-century to resort to a constitutional convention has made the legislature, *de facto,* the sole organ for constitutional change in the state. Ironically, the legislature has

become increasingly unwilling to undertake this role, proposing a fraction of the amendments submitted to voters in earlier years.

Table 4 details the number of legislative amendments during the last 100 years, broken down by 10-year periods:

Table 4: Results of Amendments Proposed by Legislature, 1916-2015

Period	Amendments Submitted	Amendments Approved	Amendments Rejected	Ratio of Approved/ Rejected
1916-1925	28	21	7	75.0%/25.0%
1926-1935	28	22	6	78.6%/21.4%
1936-1945	23	18	5	78.3%/21.7%
1946-1955	41	36	5	87.8%/12.2%
1956-1965	46	36	10	78.3%/21.7%
1966-1975	39	21	18	53.8%/46.2%
1976-1985	26	20	6	76.9%/23.1%
1986-1995	13	11	2	84.6%/15.4%
1996-2005	7	4	3	57.1%/42.9%
2006-2015	12	11	1	91.7%/8.3%
TOTALS	263	200	63	76.0%/24.0%

As seen in Table 4, the pace of constitutional amendment by the legislature has slowed significantly during the last half-century, and in particular during the last three decades. During the last 50 years, the legislature proposed 97 amendments, compared with 166 in the preceding half-century.[27] During the last 30 years, the legislature has submitted only 32 amendments to the voters; three of the *10-year periods* under consideration had more than that number. In a period that suffered through an economic recession and a looming financial crisis, the legislature submitted surprisingly few constitutional proposals to address problems that threatened to engulf the state.

Beyond the decline in constitutional propositions submitted, the nature of the amendments offered has changed. Most of the amendments submitted to the voters in the last 30 years have effected minimal changes in the operation of the state. Amendments that have been submitted involved noncontroversial items such as land transfers in the Adirondacks and civil service credits. A breakdown of legislative amendments submitted to the voters by subject area follows:

Table 5: Results by Subject Matter of Amendments Proposed by Legislature, 1916-2015*
(including number of amendments submitted-approved-rejected)

Subject Matter	1916-1940	1941-1965	1966-1990	1991-2015	TOTALS
Bill of Rights	5-5-0	2-2-0	2-1-1	0-0-0	9-8-1
Suffrage and Elections	5-5-0	8-8-0	2-2-0	1-1-0	16-16-0
Legislative Branch	5-2-3	8-5-3	3-2-1	2-2-0	18-11-7
Executive Branch	3-3-0	11-10-1	1-1-0	0-0-0	15-14-1
Judicial Branch	8-3-5	15-11-4	17-9-8	4-1-3	44-24-20
State Finance	7-7-0	10-8-2	6-6-0	3-1-2	26-22-4
Local Finance	4-3-1	14-12-2	8-4-4	5-4-1	31-23-8
Local Government	7-6-1	2-2-0	0-0-0	0-0-0	9-8-1
Public Authorities	0-0-0	4-3-1	7-3-4	1-1-0	12-7-5
Public Officers	1-1-0	1-1-0	4-4-0	0-0-0	6-6-0
Civil Service	3-1-2	2-2-0	1-1-0	3-3-0	9-7-2
Conservation	6-4-2	10-8-2	6-5-1	6-6-0	28-23-5
Canals	4-4-0	1-1-0	0-0-0	1-1-0	6-6-0
Taxation	0-0-0	1-1-0	3-1-2	0-0-0	4-2-2
Social Welfare/ Housing	1-1-0	7-5-2	3-1-2	0-0-0	11-7-4
Gambling	1-1-0	1-1-0	3-3-0	1-1-0	6-6-0
Amendment	0-0-0	2-1-1	1-0-1	0-0-0	3-1-2
General Revision	2-1-1	3-3-0	0-0-0	1-1-0	6-5-1
Miscellaneous	1-1-0	1-1-0	1-1-0	1-1-0	4-4-0
TOTALS	63-48-15	103-85-18	68-44-24	29-23-6	263-200-63

* The precise classification of the amendments could be the subject of much debate, due in no small part to the unusual way in which the state constitution is structured. For example, the gambling provisions of the constitution are in the Bill of Rights; in this chart, they are counted separately. Amendments are included within the most applicable subject area, not their article.

Table 5 demonstrates the decline during the last 50 years in the legislature's willingness to address problems with the institutions of government themselves. The decline is most pronounced in the last quarter-century. There has been only one amendment proposed to the executive branch in the last half-century, local government has been entirely ignored since the 1963 Local Government Article was adopted, and the judiciary, long the

subject of numerous amendments, has seen only four proposals in the last 25 years, one of which was submitted twice.[28] The majority of amendments approved since 1991 have focused on adding new exceptions to the "forever wild" character of the forest preserve (six amendments), adding new civil service preferences for certain veterans' groups (three amendments), and adding more exceptions to the local debt limitations (four amendments).

When the legislature has attempted to address serious constitutional issues, its proposals have been half-hearted and perceived as self-serving. During the last quarter-century, attempts have been made to deal with three issues of substance: the staggering debt load (especially the significant portion of it that has been "back door financed," i.e., not subjected to the constitutional requirement of voter approval);[29] a budget process that had failed to produce an on-time budget for 20 consecutive years and that pits the legislature against the governor (with court decisions tilting the balance significantly in favor of the governor);[30] and the legislative redistricting process. All three of these reforms were greeted with suspicion and criticized as not going far enough; only one was approved by voters.[31]

No small part of the explanation for the electorate's tepid response to these measures was the distrust and low esteem in which the public holds a state legislature that has been immobilized by partisan divisions, wracked by revelations of criminal wrongdoings and mired in a pay for play culture. This cynicism and suspicion is likely to continue coloring the public's reaction to proposals aimed at constitutional reform emanating from the legislature regardless of the merits of those proposals. Voters have come to believe that the legislature on its own is unwilling or unable to provide necessary constitutional reform.

B. Other Methods of Constitution Reform

The record lends support to the conclusions that existing methods of revision provided by the New York Constitution, the constitutional convention and the legislative amendment, have provided incomplete and inadequate reform during the last half-century. These are not, however, the only methods of constitutional revision available. This section describes three methods of revision that have been used in other states with varying degrees of success.

1. Limited Convention

As the name suggests, a limited convention is a constitutional convention that has certain limits on the subjects it may consider. Some limita-

tions are affirmative, in that the specified subjects are the only ones that may be considered; others are prohibitory, i.e., the convention may not consider certain topics. The appeal of a limited convention is that it can eliminate from consideration certain politically charged topics, making the convention more likely to be called and ultimately to be successful. New York has held one limited convention, the convention of 1801, which was limited to considering the composition of the Senate and the Assembly, and the appointment power.

A review of the history of limited conventions shows that voters are more willing to convene a limited convention than they are an unlimited convention.[32] The most recent placement of a limited convention call before the voters was in 1976 in Tennessee (there has been one limited convention since then, held in Louisiana in 1992,[33] the call of which was not submitted to the voters for approval). As seen in Table 6, in the 30 years between 1950 and 1979, the total percentage of convention calls approved was considerably higher for limited conventions than it was for unlimited ones, and in two of those decades, the chance of getting a limited convention approved was more than twice as likely as obtaining approval for an unlimited convention.

Table 6: Results of Constitutional Convention Calls by Decade, 1950-1979

	Unlimited Conventions	Limited Conventions	Total Conventions
Period	*Submitted-Approved-Defeated*	*Submitted-Approved-Defeated*	*Submitted-Approved-Defeated*
1950-1959	9-2-7 (22.2% approved)	6-6-0 (100% approved)	15-8-7 (53.3% approved)
1960-1969	13-9-4 (69.2% approved)	5-3-2 (60.0% approved)	18-12-6 (66.7% approved)
1970-1979	14-6-8 (42.9% approved)	3-3-0 (100% approved)	17-9-8 (52.9% approved)
TOTALS	36-17-19 (47.2% approved)	14-12-2 (85.7% approved)	50-29-21 (58.0% approved)

Limited conventions have been especially successful in states that have been unable to revise their constitutions through other means. In Tennessee, where the amendment process is among the most difficult in the nation,[34] the 1870 Constitution had not been amended for an 83-year period. Because Tennesseans showed no desire for an unlimited convention, the state resorted to limited conventions, with the legislature proposing and the people convening five of them between 1953 and 1977.[35]

Making success more likely was the legislature's use of separate convention calls for specific subject areas, such as in 1968 when the legislature placed five separate subjects for possible consideration on the ballot, and one of them, the classification of property into three categories for tax purposes, was ultimately approved.[36] These five conventions were remarkably successful, submitting a total of 32 proposals, of which 31 were approved, affecting substantial revision of the entire document.

Another example of a limited convention providing constitutional revision when other methods proved unable to do so was in Pennsylvania. In 1953 and 1963, voters in that state defeated proposals for unlimited conventions to revise its 1874 Constitution. Following significant reforms by the legislature, voters approved a limited convention having the power to consider legislative apportionment, judicial administration, organization, selection and tenure, local government, taxation and state finance, and any amendment proposed but not approved at the May 1967 primary election.[37] The convention was also prohibited from considering any proposal which permitted or prohibited the imposition of a graduated income tax or which altered an existing provision making certain taxes uniform.[38] The limited convention was held in 1967-68 and submitted five proposals, all of which were approved by the voters in 1968.

Much debate exists surrounding the legal status of a convention that exceeds its limits and submits work that is ultimately ratified by the voters. Several appellate courts have held that if limitations are approved by the voters before the convention is convened, then those limitations are binding on the convention.[39] If, however, the work of the convention is approved before the issue of the *ultra vires* nature of the convention is raised, a challenge may be moot.[40]

Questions have been raised as to whether the New York legislature could place a proposition on the ballot calling for a limited convention absent express authorization in the Constitution (which the current Constitution does not provide). Because the Constitution specifies the language that must be placed on the ballot for either a legislatively initiated or automatic convention call,[41] some commentators have concluded that "a limited call is clearly barred."[42] The New York Court of Appeals has never been required to weigh in on the issue of whether the specified constitutional language precludes the use of alternative language. This issue could be resolved if New York were to amend its Constitution to resemble those of Tennessee, Kansas, and North Carolina[43] that specifically allow a limited convention.

The ostensible virtue of a convention with limited powers is that such a convention may assuage concerns of a suspicious legislature or electorate and may be convened more readily than an unlimited convention, the most recently approved in any state being Rhode Island in 1984. On the other hand, it has been suggested that "the availability of the limited constitutional convention may be a means of achieving progress but it may also prove effective in keeping some states from making the kind of progress they most need."[44] New Jersey achieved major constitutional revision in 1947 through a limited convention but at the cost of being barred from addressing the subject of reapportionment. It is not difficult to imagine the current New York State legislature authorizing a limited convention while attempting to place off limits areas that could restrict its power, e.g., reapportionment, the legislature itself, selection of judges. Nobody doubts that constitutional reformers must make difficult choices, but would the limits be such that the progress achieved would outweigh the lost opportunities?

2. Popular Initiative

Eighteen states permit constitutional amendments to be placed on the ballot by popular initiative.[45] A product of the Populist and Progressive movements that arose in the United States in the late 19th and early 20th centuries, the initiative was first added as a method for constitutional amendment in Oregon in 1902. In this method, a proposal is placed on the ballot upon receiving a requisite number of signatures usually requiring a certain distribution throughout the state. An initiative cannot be used in any state to either propose a new Constitution or make extensive revisions to an existing one.

Table 7 shows the increase in use of the constitutional initiative during the past 50 years:

Table 7: Results of Constitutional Initiatives by Ten-Year Period, 1964-2013

Period	Initiatives Submitted	Initiatives Approved	Initiatives Rejected	Ratio of Approved/Rejected
1964-1973	47	13	34	27.7%/72.3%
1974-1983	81	25	56	30.9%/69.1%
1984-1993	119	56	63	47.1%/52.9%
1994-2003	148	62	86	41.9%/58.1%
2004-2013	142	60	82	42.3%/57.7%
TOTALS	537	216	321	40.2%/59.8%

All but one of the 10-year periods under consideration experienced an increase in the number of initiatives from the previous 10-year period. Forty percent of initiatives in the last half-century have been successful, significantly lower than the 70 percent approval rate for legislatively proposed amendments during the same period. Use of the initiative varies from state to state. California, Colorado and Oregon each have approved 50 or more initiated constitutional amendments since implementing the process in the early part of the 20th century. Since adding the procedure in 1968, Florida has approved 27 constitutional amendments, making it the most active state in terms of number of approved initiated amendments per year of use. In sharp contrast, Illinois, which added the constitutional initiative two years after Florida (1970) but limits it to the legislative article, has submitted only one initiative to voters. Massachusetts added an indirect initiative to its constitution in 1919, but has managed only two constitutional initiatives—an average of one every 48 years.[46]

Because initiatives take a direct path to the ballot, they tend to track more closely voter sentiments at a particular time, often representing the "hot button" issues of a particular period. While initiatives involving taxes are perennials, during the last two decades some of the more common initiatives on ballots have involved issues such as prohibitions against same-sex marriage, legalization of marijuana, increases in the minimum wage, and bans on smoking in the workplace. Sometimes the most elevated initiatives are juxtaposed with the most absurd. The Florida ballot initiatives of 2002 are a prime example: along with a constitutionally worthy measure such as free pre-kindergarten instruction for 4-year-olds was a proposal that limited the conditions under which pregnant pigs could be confined—a measure, useful though it may be, that is not the type of provision that needs to be placed in the fundamental charter of the state.

There are significant differences among the states as to the number of signatures required for placement on the ballot, most often ranging from 3 to 15 percent of the votes cast for a particular office in the most recent election, with 8 or 10 percent being the most common. Although the most recent gubernatorial election is the most common office, some states use other offices such as presidential electors (Florida) and secretary of state (Colorado). North Dakota requires 4 percent of the population of the state. Nebraska requires 10 percent of the *registered* voters in the state, which currently calculates to 21.5 percent of the voters in the most recent gubernatorial election. Of the 18 states that have a constitutional initiative, eight have some type of distribution requirement for the necessary signatures.

Getting on the ballot is half the challenge of getting an initiative passed; it must also be approved by the voters. In most cases approval is required by a majority of those voting on the question. A few states, however, such as Massachusetts, Mississippi, and Nevada have more rigorous approval requirements for initiative proposals than for legislatively proposed amendments. Nevada, for example, requires initiatives to be approved by the voters in two consecutive elections.[47]

Almost all states limit the use of the initiative to single subjects, and many of them place substantive limits on the device. Illinois, for example, confines its initiative to amending the Legislative Article.[48] Other states place articles or sections off limits to alteration by initiative. The Massachusetts Constitution puts a number of subjects out of the reach of initiatives, including, *inter alia*, measures inconsistent with the bill of rights, measures relating to religion or religious institutions, measures relating to the appointment, removal or compensation of judges, or measures that relate "to the reversal of a judicial decision."[49] In Mississippi, the bill of rights, the public employees' retirement system, right to work, and the initiative process itself are off limits.[50] Some states limit the number of initiatives that can appear on one ballot.[51]

Final voter approval of an initiative does not ensure acceptance by the political branches. The decision of the California attorney general refusing to defend that state's adopted initiative prohibiting same-sex marriage on appeal after a U.S. District Court found that it violated the federal Constitution left the initiative without state support and deprived the federal courts of standing.[52] The lack of standing allowed the district court decision to stand, frustrating those proponents who had successfully navigated the cumbersome process of getting the initiative on the ballot.

Of the initiative itself, broadly speaking, there are two types: the direct initiative, the type found in most states, and the indirect initiative, used only by Massachusetts and Mississippi. A direct initiative, as the name implies, means an initiative that goes directly on the ballot once the requisite number and distribution of signatures is received and validated. An indirect initiative takes a circuitous route to the ballot through the legislature.

In Massachusetts, for example, once an initiative receives the requisite signatures (3 percent of the total votes cast for governor at the preceding biennial state election, and in no case less than 25,000 qualified voters, of which no more than one-fourth can come from any one county), it then goes to a joint session of the general court (the state's legislature) for

review. The general court may amend the proposal by a three-fourths vote.[53] The general court may also choose to adopt its own alternative proposal to be placed alongside the initiated proposal (deemed a "legislative substitute"); to do so requires a majority vote of the general court.[54] If the original initiative receives the support of at least 25 percent of the elected members of the general court, it is referred to the next session of the general court. If in the next session of the general court, an initiative amendment or a "legislative substitute" receives the support of at least one-fourth of all the members elected to the general court, the amendment goes to the people at the next state election.[55] If the general court has exercised its option to amend the initiative, and it has become so divergent from the original version of the initiative as to no longer be the result of the "people's process," then the amendment is treated as legislatively initiated and must receive the approval of a majority of the elected members of the court in order to be placed on the ballot.[56] Once on the ballot, an initiative amendment or a "legislative substitute" requires a majority of the voters on the amendment and a minimum of 30 percent of the total number of ballots cast at the state election.[57]

In contrast to the convoluted procedure in Massachusetts, Mississippi's initiative is straightforward. A proponent of an initiative must obtain signatures numbering 12 percent of the total votes for all candidates for governor in the last election, with no more than 20 percent coming from any one congressional district.[58] An initiative containing the requisite number and distribution of signatures goes to the legislature, which has three alternatives: adoption by a majority vote in each house, amendment or rejection. Upon any action by the legislature or a failure to act for four months, the initiative is placed on the ballot. If the legislature amends the initiative, both versions appear on the ballot, with the one receiving the most votes becoming effective, so long as it receives a majority of the votes on the amendment and a minimum of 40 percent of the total number of ballots cast at the election.[59] If the legislature rejects the initiative and submits an alternative measure, voters are given a ballot with two questions: 1) do they wish to reject both alternatives or do they wish to approve one of the measures; and 2) which of the two measures do they prefer. If a majority of those voting on the first question vote to approve one of the two options, then the option receiving the majority of votes on the second question becomes law (so long as that measure receives not less than 40 percent of the total number of ballots cast at the election).[60] Any person who chooses to approve one of the alternatives but then fails to do so has his or her ballot invalidated; a person who votes in

favor of rejecting both alternatives, however, is still allowed to vote for one of the two alternatives.[61]

Other states have introduced proposals to amend their constitutions to add an indirect initiative. Over the last two decades, the New Jersey legislature entertained several proposals that would have allowed constitutional initiatives to go to the voters if the legislature did not, within 60 days after submission of the initiative proposal to the legislature, "complete action to provide for the submission of the proposed amendment or a substantially similar amendment to the people,"[62] with the determination of substantial similarity determined by the initiative's proponents. Amendments have been introduced in Pennsylvania that would give voters the power to pass initiatives requiring the legislature to take a vote in each house on the proposal in the current or next legislative session, depending on the timing of the initiative submission.[63] During the 2015–16 legislative session, a proposal was introduced in the New York Legislature that would have permitted constitutional and statutory initiatives, with the limit that the proposed statute or constitutional amendment must have been previously introduced during a legislative session of the state.[64]

The *raison d'etre* for the initiative, which is to provide a mechanism to circumvent legislatures in the grip of party machines or special interests, remains the strongest argument for its continued use. Opponents of the initiative process assert that, ironically, it has become the tool of well financed special interests, threatens civil rights, takes deliberation out of the policy process, makes governing effectively more difficult and has spawned an "Amendomania" that threatens our commitment to representative democracy. Although legitimate questions can and should be raised about the use of the initiative, these criticisms, drawn largely from selected examples in states such as Oregon and California, are scattershot. The significant variations among the states in requirements for and limits on their use, noted above, make any one size fits all criticism of the initiative misplaced and unhelpful. Even in California, the "poster child for a failed experiment," the initiative continues to garner significant popular and organizational support. Among four major commissions and one public interest group that have issued reports on the initiative in California, none recommended its abolition, though all recommended changes in the requirements.[65]

The closest New York has come to adopting an initiative was in 1935 when first passage for a constitutional initiative was obtained. The proposal failed to obtain the required second passage, despite the urging of

Governor Herbert Lehman. No constitutional convention in New York has proposed the adoption of an initiative in any form. The 1967 constitutional convention considered and rejected proposals for a constitutional initiative, a permanent constitutional commission and an expedited legislative amendment process.[66] The lack of serious traction for initiatives in New York is due in no small part to the fact that the initiative was introduced in the early part of the 20th century, when New York's electoral process was strongly influenced by, if not in the grip of, political party machines. Moreover the legislature has little incentive to yield its amending power to a procedure it does not control. Given the lack of positive results produced by other revision devices, New Yorkers looking for alternative ways to revise their constitution might give serious thought to some variation of the limited initiative.[67]

3. Constitutional Commission

Constitutional commissions have been a significant part of constitutional revision throughout the country since New York's constitutional commission of 1872. There are two types of constitutional commissions: study commissions, which are charged with studying a state constitution and proposing revisions to it, and preparatory commissions, which are appointed to study a state constitution in preparation for an upcoming constitutional convention or convention vote. Throughout its history, New York has convened 11 commissions, six of which were study commissions. Commissions in New York, as in all but one other state, operate as adjuncts to the legislature that utilizes them. They lack the authority to submit their proposals directly to the voters for approval; instead, they submit their proposals to the legislature, which then takes further action on them. Commission proposals may ultimately be submitted by the legislature to the voters in accordance with the legislative amendment process, but they may also be rejected or modified in a way in which they no longer resemble the work of the commission.

One state, Florida, is unique in that it has two constitutional commissions that are allowed to submit their proposals directly to the voters for approval. The first of these, the Florida Constitution Revision Commission (FCRC), was included when the current Constitution was adopted in 1968. The FCRC is convened every 20 years, with the first year being in 1977 and the next iteration set to convene 30 days before the opening of the 2017 regular session of the legislature. The FCRC consists of 37 members: the attorney general of the state, 15 members chosen by the governor (who also gets to choose the commission chair from among his or her appointees), nine members chosen by each of the speaker of the

state house of representatives and the president of the senate, and three members chosen by the chief justice of the state supreme court, with the advice of the other justices.[68] The jurisdiction of the commission has changed several times since its insertion into the Constitution. Originally endowed with plenary jurisdiction, the FCRC was stripped of its authority to propose matters related to taxation and the state budgetary process in 1988; a 1996 amendment removed this limitation, restoring the FCRC to plenary power. Proposals from the FCRC are filed with the custodian of state records, and are submitted to the voters at the next general election at least 90 days after the commission's report is filed.[69]

Florida's other constitutional commission, the Taxation and Budget Reform Commission (TBRC), was designed as part of a 1988 constitutional amendment. Originally charged to meet in 1990 and every 10 years thereafter, the dates have been amended so the commission last met in 2007 and will meet every 20th year thereafter (meaning that one of the two commissions meets every 10 years). The TBRC has 29 members, of which 25 are voting. Of the 25 voting members, 11 are appointed by the governor, seven by the speaker of the state house and seven by the president of the senate; none of the voting members can be members of the state legislature.[70] In addition to selecting seven voting members, each legislative leader also appoints two nonvoting members, one from each political party. The members elect a chair, who cannot be a member of the legislature. Commission proposals require a two-thirds vote of the commission to be placed on the ballot,[71] and must be filed with the custodian of state records not later than 180 days prior to the general election in the year following the year in which the commission is established. As the name suggests, the authority of this commission concerns matters of taxation, spending and budgeting. The Florida Supreme Court in 2008 struck two of the TBRC's proposals from the ballot, holding that the body had exceeded its jurisdiction. One of the offending proposals would have repealed the constitutional ban on state aid to religious institutions and another would have required at least 65 percent of school funding to be used for classroom instruction and would have reversed a prior court decision prohibiting the use of vouchers.[72]

The commissions got off to a rocky start in Florida. The first eight proposals submitted by the FCRC were all rejected by voters in 1978, and in 1980 the legislature proposed an amendment (that was rejected by voters) which would have abolished the commission. Since then, the commissions have achieved positive results. Table 8 shows the results of the commissions' work:

Table 8: Results of Constitutional Commissions in Florida

Years Active	Body	Number of Proposals Submitted-Removed-Approved-Rejected	Select Proposals Submitted
1977-78	FCRC	8-0-0-8	Gender non-discrimination (rej); merit selection and retention of trial court judges (rej); creation of legislative reapportionment commission (rej.); elimination of elected executive cabinet (rej.)
1990-92	TBRC	4-1-2-1	Authorization for local sales tax (rej.); taxpayers' bill of rights (app.); greater review of public spending and balanced budget (app.)
1997-98	FCRC	9-0-8-1	Public campaign financing (app.); gender and national origin non-discrimination (app.); county options for gun control (app.); local option for judicial selection (app.); strengthening of requirement for education for children (app.)
2007-08	TBRC	7-3-3-1	Tax favorability of wind resistant and energy efficient alterations (app.); tax exemption for conservation easements (app.); authorization for local sales tax to fund community colleges (rej.)
TOTALS		28-4-13-11	

As Table 8 shows, of the amendments that were not removed from the ballot, 54.2 percent were approved by the voters, while 45.8 percent were rejected. The proposals submitted by the last three commissions have had a success rate in excess of 80 percent.

Fifty years after becoming the first state to allow a commission to submit its proposals directly to the voters, Florida remains the only state with such a device in place. Legislatures are loath to cede power, even though there exist numerous means by which a commission can be prevented from abusing its power (e.g., limitations on subjects which a commission may consider, balanced appointing of members to ensure representation from both parties). The commission has enabled Florida to modernize its constitution and, in some cases, adopt reforms that would not have been forthcoming from the legislature. On the whole, Florida's record with its constitutional commissions has been one of success. New York could learn from its southern counterpart.

II. CONCLUSION

Thomas Jefferson famously noted that "[e]very Constitution, then, and every law, naturally expires at the end of thirty-four years. If it be enforced longer, it is an act of force and not of right."[73] By this logic, New York's Constitution has long expired. The failure of the state to achieve significant constitutional reform for almost 80 years raises the question: are our methods of reforming the Constitution adequate? We hope this chapter has provided the reader with sufficient information to give at least a tentative answer to that question and to begin an exploration of the range of alternatives available as New Yorkers struggle to bring their 19th century constitution into the 21st century.

1 Like most early state constitutions, the 1777 constitution was not submitted to the voters for approval.

2 *See* 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 596–603 (1906) (for a thorough history of the disputes over the appointment power).

3 Act of Apr. 6, 1801, ch. 152, 1801 Laws of New York 621.

4 LINCOLN, *supra* note 2, at 606.

5 Act of Apr. 6, 1801, § 1.

6 There was a Judiciary Convention convened in 1921, which was appointed to propose amendments solely to the Judiciary Article. This body, however, lacked the authority to submit its amendments directly to the people, and thus is not considered a constitutional convention in the customary usage of the term.

7 The council's opinion, written by Chancellor James Kent, attempted to distinguish the prior precedent by noting that the 1801 convention was for a limited purpose of two narrowly defined objectives, one of which was merely a clarification of existing articles. *See* ALFRED B. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK 391 (1859).

8 *Id.*

9 A bill that was vetoed by the council of revision would become law upon the approval upon reconsideration by two-thirds of the members of each house. *See* N.Y. CONST. of 1777, art. III.

10 N.Y. CONST. of 1821, art. VIII, § 1.

11 *See* CONVENTION OF FRIENDS OF CONSTITUTIONAL REFORM, THE ADDRESS AND DRAFT OF A PROPOSED CONSTITUTION SUBMITTED TO THE PEOPLE OF THE STATE OF NEW YORK (1837).

12 PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 99 (1996).

13 LINCOLN, *supra* note 2, at 102.

14 The convention also submitted a separate amendment which would have eliminated the property qualification for African-American suffrage. This amendment was handily defeated but it set the precedent of separate submission of amendments thought to be controversial so as not to jeopardize the entire work of the convention. The strategy succeeded in 1894 and 1938, but was not utilized by the 1967 convention, which submitted an entire new constitution that was rejected by voters.

15 N.Y. CONST. of 1846, art. XIII, § 1.

16 N.Y. CONST. of 1846, art. XIII, § 2.

17 *See* Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1289–92 (2001).

18 In an ironic twist, the Depression of 1893, numerous incidents of corruption by Democrats and the decision by Republicans to nominate many distinguished and respected figures resulted in a significant Republican majority of delegates.

19 N.Y. CONST. of 1894, art. XIV, § 2.

20 N.Y. CONST. art. XIX, § 2. A 1972 amendment which would have changed the date of the next automatic vote from 1977 to 1985 was rejected by voters.

21 WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653 (1964). Even the support for that convention was lukewarm at best, as the call passed by a 53.4 to 46.6 percent margin, and no part of the state other than New York City supported the call.

22 One of the convention call votes during the last century was an automatic call in 1916, which came on the heels of the unsuccessful 1915 convention. Not surprisingly, this call was rejected, as the state had just gone through a convention. Notwithstanding these circumstances, the 1916 vote (43.5 percent in favor and 56.5 percent opposed) was closer than the votes against a convention call in 1977 (40.3 percent in favor and 59.7 percent opposed) and 1997 (37.0 percent in favor and 63.0 percent opposed). The fact that voters one year removed from a convention were more willing to try the process again than voters ten and thirty years removed from a convention suggests the decline of both the interest in and support for the convention process.

23 These trends are not seen only in New York. No state has held a constitutional convention since the first Bush Administration. The last thirty automatic convention votes held in thirteen different states have all been unsuccessful. The reasons for this decline are beyond the scope of this article, but suffice to say that the unwillingness to convene a constitutional convention is a national, rather than a New York State, phenomenon.

24 GALIE, *supra* note 12, at 134.

25 *Id*. at 200–01.

26 *Id*. at 327.

27 These numbers are even more striking when one considers that the constitution was substantially revised by a convention in 1938.

28 The twice-submitted, and twice-rejected, amendment would have increased the monetary thresholds for jurisdiction of certain courts.

29 *See* N.Y. CONST. art. VII, § 11.

30 Pataki v. N. Y. State Assembly, 824 N.E.2d 898, 899, 902 (N.Y. 2004). This case was the consolidated name of two separate cases, one involving the 1998 budget and the other involving the 2001 budget year.

31 A 1995 proposal would have: prohibited the "back door" borrowing practice of having public authorities sell bonds for general state purposes; allowed the use of revenue bonds which would not have been subject to the voter approval requirement, and placed a borrowing cap for such bonds that was tied to the state's total personal income; added several exceptions to the requirement that all general obligation debt be approved by the voters; and enacted measures which would have provided more transparency into the state's financing practices. Although supported by several of the major newspapers around the state, it was seen by many as opening up more borrowing opportunities. Governor George Pataki, who voted against the measure as a state senator but supported it as governor, summed it up aptly: "This is the best the State Legislature could do." The public believed the legislature's best was not good enough, and the amendment was defeated handily.

A 2005 proposition attempted to shift budget-making powers from the governor to the legislature, significantly altering the executive budget process which had been in place since 1927. The measure also would have provided that a contingency budget, based on the previous year's spending plan, would automatically take effect if the budget was late. The amendment was opposed by most of the state's major newspaper editorial pages, who claimed it would only lead to more spending. *See, e.g.*, *State Ballot Questions; No on Budget "Reform*", N.Y. TIMES, (Nov. 6, 2005), http://www.nytimes.com/2005/11/06/opinion/nyregion/state-ballot-questions-no-on-budget-reform.html; *Heed Warnings on 'Budget Reform' State Proposal One Is a Power Grab That Will Result in Higher Spending, Taxes*, BUFFALO NEWS, (Nov. 3, 2005, 12:01 AM), http://www.buffalonews.com/Heed_warnings_on_aposbudget_reformapos_____State_Proposal_One_is_a_power_grab_that_will_result_in_higher_spending_taxes.html. The measure obtained less than thirty-five percent support of those who voted on the question.

In 2014, voters approved an amendment that would create a commission to draw state legislative and congressional districts. Although originally branded an independent commission, a court ruled that the commission was not independent and could not be referred to as such in the ballot summary. Moreover, the legislature has the right to reject the commission's work; after two rejections, the legislature is free to substitute its own preferences. The press was highly critical of the measure, even if they recommended a vote in its favor. *See, e.g., Ballot Measures for Nov. 4*, N.Y. TIMES, (Oct. 28, 2014), http://www.nytimes.com/2014/10/29/opinion/ballot-measures-for-nov-4.html (calling the proposal "a phony reform that purports to establish a new system of drawing legislative districts" and contending that "[t]he net result would be to reinforce, not reform, a system that virtually guarantees job security for incumbents and discourages competition"); *State Propositions Redistricting Effort Better than Nothing; School Borrowing Doesn't Fill a Vital Need*, BUFFALO NEWS (Oct. 23, 2014, 12:01 AM), http://www.buffalonews.com/opinion/buffalo-news-editorials/state-propositions-redistricting-effort-better-than-nothing-school-borrowing-doesnt-fill-a-vital-need-20141023 (describing the amendment as "a deceptive and insufficient measure that would change redistricting without requiring lawmakers to give up their pernicious influence over the process").

32 It is somewhat misleading to compare the results of limited conventions to the results of unlimited conventions, as there are many factors that affect whether a convention's work is ultimately approved—e.g. the proposals generated by the convention and the manner in which they are presented to the voters. For this reason, no such comparison is attempted here.

33 Resembling a special legislative session in disguise, this convention consisted of the bicameral Louisiana Legislature called by statute into session as a convention for thirty days.

34 Like New York, Tennessee uses both the constitutional convention and the legislative amendment. Tennessee, however, has no periodic convention call, so any convention question must be placed on the ballot by the legislature and passed by the voters. *See* TENN. CONST. art. XI, § 3. The legislature has the right to submit to the people of the state a call for the reform of either the entire constitution or only specific parts of the constitution by convention.

The amendment process in Tennessee is much more difficult than in New York. An amendment must be agreed to by a majority of all members elected of each of the two houses of one legislature, and then by two-thirds of all members elected of each of the two houses of the next elected legislature. The amendment must then be approved at the next general election in which a governor is to be chosen "*by a majority of the citizens of the State voting for Governor.*" TENN. CONST. art. XI, § 3 (emphasis added).

35 The Tennessee Constitution limits constitutional conventions to no more than one during every six years, so the legislature, by convening five conventions during a twenty-five-year period, utilized the device to the maximum extent allowed.

36 The resulting convention submitted one proposal, which was approved by voters.

37 Act of Mar. 15, 1967, P.L. 2, No. 2, § 7(a) (Pa.).

38 *Id*. at § 7(b).

39 As the Virginia Supreme Court has stated:

> [W]here the legislature, in the performance of its representative function, asks the electors if they desire a convention to amend or revise a certain part of the Constitution but not the whole Constitution, an affirmative vote of the people on such a question would have the binding effect of the people themselves limiting the scope of the convention to the very portion of the Constitution suggested to them by the legislature. The wishes of the people are supreme.

Staples v. Gilmer, 33 S.E.2d 49, 55 (Va. 1945). This position is similar to that taken by the Pennsylvania Supreme Court:

> The people have the same right to limit the powers of their delegates that they have to bound[sic] the power of their representatives. Each are representatives, but only in a different sphere. It is simply evasive to affirm that the legislature cannot limit the right of the people to alter or reform their government. Certainly it cannot. The question is not upon the power of the legislature to restrain the *people*, but upon the right of the people, by the instrumentality of the law, to limit their delegates. . . . When a people act through a law the act is theirs, and the fact that they used the legislature as their instrument to confer their powers makes them the superiors and not the legislature.

Wood's Appeal, 75 Pa. 59, 71−72 (Pa. 1874).

40 *See* Malinou v. Powers, 333 A.2d 420, 421, 422, 424 (R.I. 1975).

41 The constitution provides that the voters are to be asked: "Shall there be a convention to revise the constitution and amend the same?" N.Y. CONST. art. XIX, § 2.

42 Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMP. 53, 73 (1996); *but see* Richard Briffault et al., *Amending the New York State Constitution—Current Reform Issues,* THE PHILIP WEINBERG FORUM 17–19 (Mar. 14, 2005), http://www.rockinst.org/pdf/public_policy_forums/2005-03-14-the_philip_weinberg_forum_amending_the_nys_constitution_current_reform_issues.pdf (arguing that limited convention was not barred by the New York Constitution).

43 *See* KAN. CONST. art. XIV, § 2; N.C. CONST., art. XIII, § 1; TENN. CONST. art. XI, § 3.

44 John P. Keith, *Recent Constitutional Conventions in the Older States*, *in* MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 38, 46 (W. Brooke Graves ed., 1960) (quoting JOHN E. BEBOUT, RECENT DEVELOPMENTS IN THE USE OF THE CONSTITUTIONAL CONVENTION IN THE STATES 7 (1955)).

45 The states are Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota.

46 Described below, the Massachusetts procedure is convoluted and the obstacles to an initiative so imposing that it almost ensures desuetude.

47 *See* NEV. CONST. art. XIX, § 2(4).

48 *See* ILL. CONST. art. XIV, § 3.

49 MASS. CONST. amend. art. XLVIII, The Initiative, II, § 2.

50 *See* MISS. CONST. art. XV, § 273(5).

51 Mississippi, for example, limits the number of initiatives to no more than five per ballot. *See* MISS. CONST. art. XV, § 273(9).

52 Hollingsworth v. Perry, 133 S. Ct. 2652, 2660, 2661, 2668 (2013). In United States v. Windsor, a case involving a challenge to the Defense of Marriage Act, the Bipartisan Legal Advisory Group (BLAG), a standing body of the House of Representatives, was permitted to intervene and defend the statute when the U.S. Attorney General chose not to do so. United States v. Windsor, 133 S. Ct. 2675, 2683, 2684, 2686 (2013). Because the supporters of the California initiative, however, were not an official body of the state, they lacked standing. *Hollingsworth*, 133 S. Ct. at 2660, 2661, 2668. Consequently, a legislative amendment has more of a chance of being defended against federal constitutional attacks than an initiative. Ultimately, in 2015, the U.S. Supreme Court ruled that state laws and constitutional amendments requiring that marriage be between opposite sex couples were unconstitutional. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

53 *See* MASS. CONST. art. amend. XLVIII, The Initiative, IV, § 3.

54 *See* MASS. CONST. art. amend. XLVIII, The Initiative, III, § 2.

55 *See* MASS. CONST. art. XLVIII, The Initiative, IV, § 5.

56 Opinion of Justices to Senate, 436 N.E. 935, 943 (Mass. 1982).

57 *See* MASS. CONST. art. XLVIII, The Initiative, IV, § 5. This differs from legislatively initiated amendments, which require a majority of those voting on the amendment, but have no minimum requirement.

58 *See* MISS. CONST. art. XV, § 273(3).

59 *See* MISS. CONST. art. XV, § 273(7).

60 *See* MISS. CONST. art. XV, § 273(8).

61 *See* MISS. CONST. art. XV, § 273(8).

62 *See, e.g.*, Assemb. Con. Res. 72, 215th Leg., 2012 Sess. (N.J. 2012); Assemb. Con. Res. 83, 2214th Leg., 2010 Sess. (N.J. 2010); Assemb. Con. Res. 169, 213th Leg., 2008 Sess. (N.J. 2008); Assemb. Con. Res. 26, 210th Leg., 2002 Sess. (N.J. 2002); Assemb. Con. Res. 25, 208th Leg., 1998 Sess. (N.J. 1998).

63 *See* S.B. 92, 199th Gen. Assemb., 2015 Sess. (Pa. 2015).

64 See A.B. 3756, 201st Leg., 2015-16 Reg. Sess. (N.Y. 2015).

65 *See* J. FRED SILVA, THE CALIFORNIA INITIATIVE PROCESS: BACKGROUND AND PERSPECTIVE 11–18 (2000). Polls in California consistently show upwards of seventy percent of the voters support the initiative, albeit with some structural changes. Craig B. Holman, *An Assessment of New Jersey's Proposed Limited Initiative Process,* BRENNAN CTR. JUST. N.Y.U. SCH. L. 20, http://www.brennancenter.org/sites/default/files/legacy/d/nj_an_assessment.pdf. The League of Women Voters of California has repeatedly (1984, 1999, and 2013) reaffirmed its support of the initiative process. League of Women Voters of California, *Position on Initiative and Referendum*, (last visited Mar. 2, 2016), https://lwvc.org/position/initiative-and-referendum. Edward L. Lascher Jr., Floyd F. Feeney and Tim Hodson echo this support in their opinion piece. Edward L. Lascher et al., *It's Too Easy to Amend California's Constitution*, L.A. TIMES, (Feb. 4, 2009), http://www.latimes.com/opinion/la-oe-hodson4-2009feb04-story.html. The authors, two political scientists and a law professor, recommend that the requirements be tightened up. *Id.*

The Brennan Center for Justice Report authored by Craig Holman summarized the California experience as follows:

> Public opinion polls show that voters are seldom fooled into voting for an initiative that they later regret. Whether or not one agrees with particularly policy outputs that some initiatives have generated, these policy outputs have more or less been the deliberate choice of the voters. California's 1970s tax revolt—Proposi-

> tion 13—remains widely supported by the public. So, too, are initiatives that protected the environment, increased the minimum wage, and established crime victims' rights, campaign finance reform, term limits and "death with dignity" laws.

Holman, *supra* note 65, at 19–20. Propositions that passed by closer margins include the ban on same-sex marriage and the denial of public services to illegal immigrants. The former was declared a violation of the U.S. Constitution and a subsequent statute repealed those parts of the latter that had been declared unenforceable by the federal courts.

There is an abundance of supportive, critical, analytical and proscriptive literature on the initiative. A number of recommendations and proposals for improving the process have been suggested. *See, e.g.*, NAT'L CONFERENCE OF STATE LEGISLATORS, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY vii, ix (2002), http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/IandR_report.pdf. The National Conference of State Legislators report offers criteria or best practices that the conference's I & R Task Force believes should be applied by states when considering constitutional or statutory initiatives. *Id.* at ix. The California League of Women Voters provides a list of "critical principles" that should be considered when contemplating adoption of the initiative. League of Women Voters of California, *supra* note 65. A reliable source of data, analysis and recommendations on the initiative can be found at the Initiative & Referendum Institute at the University of Southern California's website. INITIATIVE & REFERENDUM INST. U.S.C., (last visited Mar. 2, 2016), www.iandrinstitute.org.

66 *See* HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 400–01 (1997); Gerald Benjamin, *"All or Nothing at All" Changing the Constitution: The Reform Dilemma*, in NEW YORK'S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS (Peter Galie & Christopher Bops eds. publication forthcoming).

67 The Brennan Center's report laid out criteria for effective use of an indirect or limited initiative and gave qualified support for adoption of such an initiative in New Jersey. The Center's report concluded its evaluation of the proposed initiative as follows: drawing as it does on "the problems and benefits experienced by other states" the proposed amendment "will produce an effective yet tempered initiative process." Holman, *supra* note 65, at 26.

68 *See* FLA. CONST. art. XI, § 2(a).

69 *See* FLA. CONST. art. XI, § 5(a).

70 *See* FLA. CONST. art. XI, § 6(a).

71 *See* FLA. CONST. art. XI, § 6(c).

72 Ford v. Browning, 992 So. 2d 132, 140 (Fla. 2008). In a separate opinion, the court also struck a proposal that would have eliminated property taxes required by the legislature to be levied by school districts to qualify for state aid, and would have forced the legislature to make up for the lost revenue by other means. The court struck this proposal on the basis that its ballot language was misleading. Fla. Dep't of State v. Slough, 992 So. 2d 142, 147, 149–50 (Fla. 2008).

73 To James Madison (Sept. 6, 1789), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 492 (Adrienne Koch & William Peden eds.,1944).

CHAPTER FIVE

CONSTITUTIONAL REVISION IN NEW YORK: THE DEMOCRACY AGENDA

Richard Briffault

I. INTRODUCTION

The debate over whether New Yorkers should vote to call for a state constitutional convention has begun. Since the middle of the 19th century the New York Constitution has embodied the Jeffersonian idea that every generation should be able to revise its basic law.[1] As most recently incorporated in Article XIX, § 2, the Constitution provides that every 20 years the question "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to the voters in referendum.[2] The last three times the vicennial question was posed—1957, 1977, and 1997—the voters said "no," and by ever-widening margins.[3] That question is due to be posed in November 2017. It is too soon to tell how that vote will go, but the early and growing interest in the issue suggests that it makes sense to take the possibility of a convention later this decade seriously.

If the vote on the convention call is positive that, I believe, will be due to the sense our state government has grown unaccountable to the people. The combination of low voter turnout, gerrymandered legislative districts, increasingly unrestricted campaign spending, and prominent examples of official misconduct culminating in the virtually simultaneous corruption convictions of the leaders of both houses of the state legislature indicates that our democracy—that is, government by trustworthy representatives answerable to the people through competitive elections—is at risk.[4] Whether and how constitutional revision can strengthen our democracy should be a high on the agenda as the debate over whether to hold a convention unfolds.

Democracy does not seem to have been a major issue when the question of whether to hold a state constitutional convention was last considered by the voters. The issues that were the main focus of discussion in the run up to the vote in 1997 were the state's fiscal integrity, public safety, education, and state-local relations[5] — matters that surely continue to be subjects of constitutional concern. But assuring the accountability of government to the people has long been a central focus of constitution-making. Virtually every past constitutional convention has given at least some attention to such basic democratic questions as eligibility to vote, the role of the voters in selecting officials, the apportionment of legislative seats, and the integrity of the political process.[6] What is striking is that these basic issues are once again at the forefront of public concern.

In this chapter, I will focus on four areas that are central to the democracy agenda—voting and the electoral process; legislative districting;

campaign finance; and government ethics—and consider what role the Constitution and a constitutional convention can play in addressing shortcomings and advancing desirable reforms in these areas. Each of these areas is important to the vitality of our democratic system and in each our practices have fallen short of our democratic ideals. To be sure, not all of these concerns can be addressed by legal change, or by change at the state level. Reforming voter registration and voting practices may not be enough to improve our low voter turnout, and the Supreme Court's campaign finance decisions pose a barrier to comprehensive campaign finance reform. But for present purposes, the key question is whether and to what extent desirable legal changes need to or should entail *state constitutional* changes.

Elections, redistricting, campaign finance and public integrity are constitutional issues. The state Constitution already addresses voting and voter registration, electoral administration, and redistricting. Campaign financing and government ethics would be new additions to the Constitution, although both were debated at our last state constitutional convention in 1967.[7] The question is what can or should be done about them in our Constitution. An important strand in contemporary state constitutional revision thinking has been to simplify and streamline constitutions, to remove excessive "statutory" text inappropriate for a foundational document. Detailed provisions are more likely to become unsuitable in light of changing social, economic or technological factors or to lock in "reforms" which over time prove to be inadequate or ineffective. The Constitution should focus on setting up the structure of government, establishing the basic powers of and constraints on the state, and articulating fundamental values. What is the place of the democracy agenda in the possible revision of our state constitutional framework?

I suggest that we think about constitutional revision in three parts. First, we need to address those provisions of the Constitution that are obstacles to democratic reform. Many reforms can be enacted by ordinary legislation—but not if there is language in the Constitution that gets in the way. There are provisions in our Constitution that may have been adopted for good reasons or may have made sense at one time, but are currently inconsistent with strengthening our political process. Constitutional revision is necessary for clearing these barriers to reform.

Second, constitutional provisions may be needed to create the institutions required to effectively oversee and enforce the rules of democratic self-governance, such as election administration, redistricting, and government ethics. A major role of constitutions is to design and entrench the

institutions by which we govern ourselves. These institutions could be created by ordinary legislation but then there is a risk that they will be subject to ongoing tinkering and manipulation in response to changing political pressures. In ethics, for example, the state totally revamped its ethics oversight structure twice in four years, creating a Commission on Public Integrity in 2007, and then replacing it with a Joint Commission on Public Ethics in 2011.[8] Such instability and vulnerability to political change is not conducive to having an effective and independent political watchdog.

Institutional design is a traditional function of constitutions. The institutions that oversee and enforce the honest operations of the political process especially need to be insulated from that political process through entrenchment in the Constitution. Creating these political framework institutions at a constitutional convention rather than through the legislative process could also help separate the deliberation over their design from short-term political considerations.

Third, constitutional revision can involve the adoption of new substantive provisions—the direct imposition of new restrictions or requirements, or directives to the legislature mandating that it take or refrain from taking certain actions, in order to promote democratic self-governance. These will almost always be measures that do not require constitutional change because they involve actions that the legislature already has the power to take or to refrain from taking. Putting them in the Constitution makes sure that desirable policies are in place and undesirable ones precluded. Entrenching them in the Constitution also reflects a certain distrust of the legislature—the concern that the one currently in office will not follow these policies, and that even if it does future legislatures might pursue a different course. In addition to deciding whether a constitutional amendment is needed to guard against legislative indifference or hostility to these policies is the question of whether proper constitutional language can be developed. By that I mean language specific enough to actually bind the legislature and comprehensive enough to fully address the question at issue but not so specific as to quickly become outdated or inadvertently create loopholes and not so comprehensive as to be unduly rigid and fail to provide for necessary flexibility or exceptions. A detailed legislative code probably ought not to be entrenched in the Constitution, but relatively general, hortatory commands may not do much good.

This chapter proceeds by examining, in turn, each of these aspects of constitutional revision—elimination of obstacles to democratic reform, institutions of effective political oversight, and affirmative policy steps to

promote accountable government. These issues will sometimes overlap and the sections intertwine. Faults in the design of existing political institutions or mistaken policies might be assessed in the first section that follows, and their corrections in later sections. The details of the new institutions or substantive policies themselves will be only lightly addressed. The question for this discussion is whether and to what extent these questions ought to be considered within the context of constitutional revision. The final section will briefly turn to the issue of whether, even for matters of constitutional dimension, a constitutional convention as opposed to the ordinary process of constitutional amendment—passage by two successive, separately elected legislatures and voter approval[9]—is desirable.

II. REMOVING OBSTACLES TO POLITICAL REFORM

I would place on the democracy agenda six provisions in our current Constitution that ought to be candidates for amendment or removal. Two deal with registration and voting; one with the design of the Senate; one interferes with the proper punishment of corrupt officials; and two involve features of the design of two of our framework institutions that needlessly politicize them and interfere with their effectiveness.

A. Voting

Voter turnout in New York is abysmal. In the 2014 general election, when the governorship, the other statewide positions, and the entire legislature were on the ballot, turnout was 29 percent of the voting-eligible population, or well below the national average of 36.7 percent. Indeed, New York placed 50th out of the 50 states and the District of Columbia. Nor was 2014 an outlier. Turnout in 2012—a presidential election year—was 53.5 percent in New York, compared with 58.6 percent nationally, and New York came in 46th out of 51. Turnout in 2010—again a year in which the entire state government was on the ballot—wasn't much better than in 2014—36.3 percent in New York versus 41.8 percent nationally, with New York ranked 47th out of 51.[10] Such repeated depressingly low turnouts, especially in state election years, is tantamount to a vote of no-confidence in our state government. It is far from clear how much this sorry record can be blamed on our election laws or election administrative system, as opposed to broader political, social, or even cultural factors, but surely this context makes constitutional provisions that impose unnecessary barriers to registering and voting all the more undesirable.

Two features of the current Constitution tend to create unnecessary barriers to registration and voting. First, article II, § 2 authorizes the legislature to provide for absentee voting only by qualified voters who are either going to be physically absent from their county of residence—or for New York City residents, from the city—on election day or who "may be unable to appear personally at the polling place because of illness or physical disability."[11] This limits the availability of absentee voting to those who know they will be out of town, are ill, or have a physical disability. Voters who simply prefer the convenience of absentee voting to the burden of waiting on long lines or the inconvenience of taking time off from work or juggling voting with other obligations do not have that option. Currently, 27 states and the District of Columbia provide for so-called "no-excuse absentee voting" in which a qualified voter can request a mail-in ballot within a specified period of time without having to give any reason, let alone one of the reasons specified in our Constitution. Another three states—Oregon, Washington, and Colorado—have gone further and automatically send a mail-in ballot to all voters without the voter having to request one. New York is one of just 20 states to have an excuse requirement for mail-in voting.[12] One can debate the merits of mail-in versus in-person voting but it is hard to see why the Constitution should preclude "no-excuse absentee voting." Article II should be amended to eliminate the limitation on absentee or mail-in voting.

Second, the Constitution requires the adoption of voter registration laws that require that "registration shall be completed at least ten days before each election."[13] The 10-day rule is in some respects quite generous to new voters; in a number of states the deadline for registration can be as much as 30 days before the election. But the 10-day deadline precludes registration systems that are even more participation-friendly. As of last year, 11 states and the District of Columbia offer same-day registration (SDR), also known as Election Day registration (EDR), which allows any voting-eligible resident of the state to go to the polls or an election official's office on Election Day, register that day, and then vote. Three other states, including California, the largest state, have authorized SDR but are only just beginning the process of implementing it, and a 16th state, Utah, is currently running a pilot project to test the efficacy of SDR. Voter interest in elections tends to rise as an election approaches so that reducing the time gap between registration and voting makes it likely that more people will both register and vote. To be sure, SDR raises important issues of implementation and, especially, the prevention of fraud, so that it is debatable whether it is a wise policy. But there is no reason that the Constitution should preclude it. Article II should be amended

to remove the requirement that registration be completed 10 days before Election Day.

B. The Senate

The New York Constitution contains a curious provision. Although the size of the Assembly is fixed at 150 seats, the Senate is directed to grow if the population of certain counties increases relative to their share—"ratio" is the constitutional term—of the state's population in 1894.[14] This constitutional oddity reflects the decision of the 1894 Constitution to base Senate seats on counties, and to limit the share of Senate seats the state's most populous counties could have. As a result, the growth of the largest counties could be accommodated only by increasing the size of the Senate, not by increasing their share of Senate seats. The 1894 Constitution's basing of Senate representation on counties, and its limitation on the number of seats any county can have, were both invalidated by the Supreme Court's one person, one vote decision in 1964. But the provision for increasing the size of the Senate based on the growth of the largest counties—those with three or more Senate districts—compared to their share of Senate seats in 1894 remains. This provision needs to go—for four reasons.

First, there is no reason to tie the size of the Senate to the change in the relative share of state population of the largest counties. If expansion of the state's population necessitates the expansion of the Senate, it shouldn't matter where the population growth occurred. Second and relatedly, there is no guarantee that the extra seat will go to the counties whose population growth triggered the expansion. Indeed, when the Senate was expanded from 62 to 63 seats in 2012, the additional seat was not given to a high growth county.[15] Third, the anachronistic nature of the provision is underscored by the fact that New York no longer has the same county-Senate structure as it had in 1894. At that time, Queens and Nassau were a single county, while Richmond and Suffolk were two counties but with a single, shared Senate seat. Over the years the legislature has used two different methods with different results for dealing with the change in county-Senate structure.[16] In 2012, the Senate used both methods simultaneously—one for Queens/Nassau, and the other for Richmond/Suffolk—to reach an obviously pre-determined result. A State Supreme Court judge found this inconsistency "disturbing,"[17] but declined to hold it unconstitutional. This leads to the fourth and final point: As the 2012 experience demonstrates, the Senate expansion provision, due in part to its complexity and the existence of multiple acceptable formulas for its application, is prone to manipulation for blatant gerrymandering.

Legislative bodies are fixed in size in part to prevent manipulation by the party in power. The size of the Senate should be fixed, too. The expanding Senate provision of Article III, § 4 ought to be eliminated.

C. Dealing with Corruption

On Monday, November 30, 2015, Sheldon Silver the long-time Speaker of the Assembly, was convicted of seven counts of corruption involving misuse of his state office, including honest services fraud, extortion, and money laundering. Three days later he submitted the paperwork for a state pension that could amount to as much as $98,000 a year.[18] On December 11, 2015, Senate Majority Leader Dean Skelos was convicted of eight counts of corruption involving misuse of his state office, including bribery, extortion, and conspiracy. Eleven days later he filed for his state pension, which is estimated to come to $95,000 a year.[19] A pension is deferred compensation earned for work undertaken in office. But should someone who flagrantly abuses the public's trust while in office be compensated for his misconduct?

In 2011, the legislature voted to deny pension benefits to public officials convicted of certain felonies related to holding public office.[20] But that provision applies only to individuals who became public officials and entered the state retirement system after the pension forfeiture measure became law. Lawmakers concluded that the Constitution's provision that "the benefits" of "membership in any pension or retirement system of the state or of a civil division thereof" "shall not be diminished or impaired"[21] bars the stripping of pensions from corrupt officials, like Silver and Skelos, who entered the pension system before 2011. The legislature has struggled with a pension forfeiture constitutional amendment; in June 2016 both chambers finally agreed on language and passed an amendment. However, before the amendment can be submitted to the voters, a new legislature must pass the identical text again and there is no guarantee that will occur.[22] Amending the Constitution to permit the forfeiture of pensions by public officials who have breached the trust they received from the people is a necessary step for promoting democratic accountability.[23]

D. Fixing a Broken Board of Elections

The Constitution requires that

> [a]ll laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or distrib-

> uting ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All such board and officers shall be appointed and elected in such manner, and upon the nomination of such representatives of said parties respectively, as the legislature may direct.[24]

Although there is surely some benefit in having a board of elections that is bipartisan rather than one that is dominated by a single party, it is apparent that the State Board of Elections is a dysfunctional institution, and the bipartisan duopoly that is hard-wired by the Constitution into its design is at least partly responsible for its problems. As the Preliminary Report of the Moreland Act Commission to Investigate Public Corruption found, the board's constitutionally mandated "bipartisan structure inhibits, and at times prevents, significant enforcement action from being taken. The Board has failed to carry out its duty to enforce the Election Law, enabling the culture of corruption in Albany."[25] The bipartisan structure has resulted in the creation of parallel internal patronage-based Democratic and Republican senior staffs, contributing to policy paralysis, and failure to take steps to investigate let alone punish misconduct. Its "anti-enforcement policies and practices are rooted in partisanship, and are exacerbated by willful inaction."[26]

The constitutional provision has three particularly egregious features that contribute to the board's failings. First, the Constitution affirmatively requires that boards of elections be bipartisan, not nonpartisan, or multipartisan. It does not just limit the number of seats that any party can hold, but directs that the top two parties hold all the seats. That means that political independents and members of third parties cannot be appointed to the board. Second, it mandates that the top two parties have an equal number of seats. That means an even-numbered board, which is a recipe for inaction. Third, it provides that the members of the board are to be selected by the parties themselves. This guarantees partisan control and effectively precludes any independent efforts to examine the activities of the parties or their candidates. As the Moreland Act Commission aptly concluded, "the Board lacks the structural independence necessary to serve as a watchdog for our campaigns and elections. Its party-based structure has resulted in political stalemates and inaction."[27] One crucial item of the democratic reform agenda would be to amend the Constitution to restruc-

ture the State Board of Elections—and the county-level boards that are also subject to the Constitution's design requirements—to be independent of the parties and more capable of taking decisive action.

Similarly problematic is the newly authorized "independent redistricting commission," created by a constitutional amendment added through legislative passage and voter approval in November 2014.[28] The problem with the independent redistricting commission is that it is not independent but structured to represent and act on behalf of the major parties. To be sure, only eight of the 10 members are appointed directly by the majority and minority party leadership of the state; the other two may not be members of either of the two major parties—but they are appointed by the eight partisan members. And the eight partisan members are not appointed directly by the political parties but are instead appointed by the eight partisan leaders—the majority and minority leaders of each chamber of the legislature. But that is a distinction without a difference. And given that the function of the districting commission is to draw up legislative districts it is just as inconsistent with any independent function as empowering the political parties to control the Board of Elections. The partisan nature of the independent restricting commission is confirmed by its voting rules, which are framed in terms of the partisan affiliation of the legislative leaders to make sure that any plan has the approval of the representatives of both of the major parties.[29] And going beyond the Board of Elections, the split partisan staffing of the commission is explicitly mandated by the Constitution, which calls for two co-executive directors, one for each political party.[30] As with the Board of Elections, the structure of the commission is intended to entrench shared partisan control rather than promote independent decision-making.

As the commission has only just been authorized and no commission has actually been created or called upon to begin the work of redistricting, it is of course too soon to tell how much its partisan structure will warp its decisions. Moreover, the constitutional amendment also imposes redistricting criteria, procedural requirements, and an opportunity for judicial review that could constrain the tendency to bipartisan gerrymandering built into its design. As a result, it is not as clear as with the Board of Elections whether or to what extent the commission will interfere with public-interest-oriented districting. Nonetheless, reconsidering the structure of the redistricting commission to make it less closely tied to the legislature's partisan leadership and more truly independent ought to be an item on the democracy agenda.

III. ENTRENCHING WATCHDOG INSTITUTIONS

Although I have been critical of the Constitution's current provisions for the design of the elections board and the redistricting commission, it is entirely appropriate that the Constitution establish and address the structure of the institutions that regulate access to, fair competition in, and the potential for abuse of the political process. These watchdog institutions administer, interpret, monitor compliance with, and enforce the rules necessary for democratic self-government. To be sure, these institutions cannot be—and probably should not be—entirely outside the political process. But it is desirable that their establishment and design be at least somewhat separated from the immediate political concerns that ordinarily drive political decision-making. A more effective watchdog may be more likely to be created outside the ordinary political process. And entrenchment in the Constitution operates to increase the likelihood that the watchdog will develop stable practices and be at least somewhat insulated from manipulation by short-term political considerations.

To the constitutionalization of the institutions overseeing elections and undertaking redistricting, I would add a constitutional government ethics board or commission, and possibly a campaign finance board. Like registration, voting, and redistricting, ethics and campaign finance are critical to the fair and publicly accountable operations of our government. Ethics rules address the dangers posed by conflicts of interest, while campaign finance laws can mitigate the dangers of undue influence and unfair competition that can result from unrestricted private funding of campaigns. The institutions that oversee these rules governing the honest operation of the political process ought to have the status, stability, and the semi-detachment from day-to-day politics that incorporation in the Constitution can provide.

Constitutional status can enhance the role of these bodies.[31] It is difficult to imagine the legislature—any legislature—creating a truly independent body with the power to enforce ethics rules against and impose punishments on members of the legislature. The current legislatively created Joint Commission on Public Ethics (JCOPE) lacks that power. By law, all JCOPE can do with respect to legislative branch officers and employees is to make referrals to the legislature's in-house[32] Legislative Ethics Commission.[33] It is likely that only a constitutional ethics commission would be able to oversee both the executive and legislative branches and take a coherent and integrated approach to ethics across the entire government.[34] A commission created outside the ordinary legislative pro-

cess would also be less likely to have the convoluted, legislative-incumbent-protective voting rules with which JCOPE has been saddled. The commission cannot even respond to a complaint by undertaking an investigation of a member or employee of the legislature without the approval of two members of the commission that have been appointed by one of the legislative leaders of the political party to which the person who is the subject of the complaint belongs.[35] In other words, 11 of the 14 JCOPE commissioners (all the executive branch appointees, all the legislative branch appointees by the leaders from the other party, and one legislative branch appointee by a leader of the party of the person subject to the complaint) could vote to open an investigation and the vote to investigate would fail for lack of sufficient support from that person's legislative party. Such a complex, partisan voting rule is hardly likely to generate public confidence in the commission's process, and yet such a voting rule—along with the commission's ungainly size—is a predictable product of the kind of raw political bargaining that is likely to shadow the legislative creation of such a commission.

I will address, and express some skepticism about, the wisdom of adding substantive ethics provisions to the Constitution in the next part, but constitutionalizing the ethics board does not require constitutionalizing our ethics rules. New York has constitutionalized a board of elections without providing much constitutional content to the rules governing registration, voting, or election administration generally. Moreover, the real problem we have with our government ethics system today is not so much the lack of appropriate rules—the code of ethics in the Public Officers Law provides a reasonable set of norms for state officers[36]—but the mechanism for administration and enforcement. That is where an effective, independent nonpartisan ethics board could make a difference, and that may be more likely to emerge from the constitutional revision process than from the ordinary political process.

I am less certain whether the Constitution ought to include a new, separate campaign finance board or whether campaign finance ought to continue to be subject to regulation by (a reformed) board of elections. These functions can be combined or kept separate. This might turn on the scope of our campaign finance regulatory system. Campaign finance laws consisting simply of contribution limits and disclosure requirements could be handled by a reformed board of elections. But a more ambitious program that provides public funds to candidates would entail significantly greater administrative responsibilities which would be likely to peak at about the

same time in the election cycle as the principal burdens of administering the registration and voting process shift into high gear, so an institutionally separate campaign finance board would make sense. More generally, it is not clear if there are synergies in having the institution that manages registration, voting, election day operations, and vote tabulations also take charge of administering and enforcing disclosure requirements, contributions, and, potentially, determining the qualifications for and dispensing public funds. If not, it might be appropriate for the separate functions to be handled by separate institutions.

What should these political watchdogs—a reformed board of elections, a truly independent districting commission, a state ethics commission, or a possible campaign finance board—look like? If there is a constitutional convention, the structure of these institutions is likely to be the subject of extended debate in the months leading up to the convention and at the convention itself. At this point, it is probably most useful to say that the watchdog institutions should be designed considerably differently from the ones we have now. Among the design differences would be an odd-sized membership unlike the even-sized board of elections (four members), independent redistricting commission (10 members),[37] or JCOPE (14 members), and a relatively small size—say, five members—again unlike the redistricting commission and JCOPE.[38] Small size and odd-number will reduce the likelihood of deadlock and increase the capacity for decisive action. These bodies should be structured to be nonpartisan rather than representative of the parties. Thus, although there should be rules limiting the number of members on any board affiliated with a particular party to less than a majority, the boards should not have designated slots for appointments by specific partisan officeholders, and should avoid the kinds of complex, party-driven voting rules that lead to the situation where an 11-3 vote on JCOPE can, as discussed previously, be a victory for the three, or the requirement that seven out of 10 votes defined in terms of specific party alignments are necessary for the independent redistricting commission to pass a redistricting plan. Board members should not serve at the pleasure of the appointing officer or officers, but rather should hold longish—longer than the term of the appointing officer—and staggered terms. And they should not hold other public offices or party positions or be registered as lobbyists while sitting on these boards and perhaps also for some period of time before their appointment and after their board service is completed.

Most likely, to factor political considerations into account while separating the members of these boards from direct ties to the political pro-

cess, they should be appointed through a filtering mechanism similar to the Commission on Judicial Nomination used to propose nominees to the Court of Appeals.[39] The state's principal political leaders, such as the statewide elected officials and the legislative leaders and possibly senior judicial figures, could be authorized to name the members of the nominating commission, which would then be responsible for submitting a limited pool of candidates to the governor, who would nominate one for each board vacancy, subject to the consent of the Senate. A system like this has worked well for the selection of judges for our highest court and could be a means of creating relatively independent watchdog institutions while providing for appropriate input from interested political actors.

IV. SUBSTANTIVE REFORM PROVISIONS

Should the Constitution be amended to include substantive reform provisions? These could include requirements, or prohibitions, directly addressing registration and voting, government ethics, and campaign finance.[40] These could include, for example, measures requiring the state to adopt some form of automatic voter registration process in which the state takes the lead in registering voters;[41] ethics reforms that include limits or a ban on legislators' outside income[42] and improved disclosure of or restrictions on conflicts of interest; and campaign finance reforms ranging from closing the notorious "LLC loophole"[43] to lower contribution limits and improved disclosure to the creation of a robust public funding program for candidates that would reduce or eliminate their dependency on large private donations. Few, if any, of these matters actually require constitutional action, at least once the relatively minor constitutional obstacles to registration and voting reform mentioned in Part II are removed. The legislature currently, or with modest constitutional tweaks, has the power to adopt all of these. Certainly all the ethics and campaign finance measures on the reform agenda are within the scope of the legislature's current powers, so that strictly speaking constitutional action is not necessary.

Considering whether to add any of these measures to the Constitution requires the resolution of two sets of competing concerns. On the one hand, placing them in the Constitution actually gets them done. Proposals to facilitate registration and voting, limit or ban legislators' outside income, close the LLC loophole, create a public funding system and enact other reform measures have been debated for years. Recent years have witnessed the multiple episodes of misconduct that led to the creation of the Moreland Act Commission,[44] the controversial termination of the

Commission by the Governor,[45] the unprecedented near-simultaneous indictments and convictions of leaders of both houses of the legislature, and continuing cloud of corruption hanging over the legislature.[46] The legislature, however, continues to fail to address these questions. Albany may have had its "Watergate moment,"[47] but as of this writing there has been little legislative response. Constitutional amendments are an entirely appropriate response to legislative inaction. Moreover, entrenching reforms in the Constitution can protect them from repeal by future hostile or indifferent legislatures or governors. Constitutionalization of reform reflects a lack of confidence in the ordinary political process, although it seems fair to say that that lack of confidence is merited.

On the other hand, many of these matters will require relatively detailed provisions, spelling out specific rules and requirements with varying criteria, definitions, and exceptions. Even something as relatively straightforward as a limit or ban on outside income would have to define outside income and consider whether or not it includes salaries, fees, book royalties, honoraria, dividends, property rentals, or capital gains and, if a cap and not a ban, how it treats expenses incurred in generating the income. A restriction on contributions by LLCs—"limited liability corporations"—would need to define them and, to avoid circumvention, need to consider other business forms that provide similar opportunities for getting around campaign finance restrictions. A public funding system would require even more details, including the criteria for determining eligibility for funding, the amount of funding an eligible candidate gets, any limits on the uses of those funds, appropriate reporting requirements, penalties for the violation of any conditions on the funds, and procedures for the determination of whether penalties should be imposed, and, if so, what they should be. Any fully worked out public funding system would have to be quite lengthy and detailed. Moreover, it is likely that many reforms—particularly public funding, campaign finance and disclosure rules, and conflicts of interest restrictions—would need to be revised over time in light of changing campaign finance practices, new forms of lobbying, and simply the learning that comes from the experience of finding out which restrictions and requirements work, which have proven easy to evade, and which are unduly rigid and burdensome. Dollar-sign provisions will either need to be indexed—with the proper adjustment formula spelled out—or regularly updated. But if entrenched in the Constitution any revision of these measures would have to run the constitutional amendment gauntlet of passage by two separately elected legislatures and voter approval in a referendum.

In short, the specific restrictions and requirements needed to make reform effective may wind up entrenching petty "statutory" details and unintentional mistakes that will be difficult to correct, and will ultimately require legislative support to adopt necessary revisions.

An alternative approach would be to amend the Constitution to direct the legislature to enact certain programs—a system of automatic voter registration, limits on legislators' outside income, a campaign finance disclosure regime, a mechanism for providing public funds for qualified candidates—but leave the details to legislature. A few specific aspects—such as a ban on LLC donations or outside income or a requirement that all campaign participants disclose their expenditures and contributions above a threshold amount—could be written into the Constitution, but most of the rules, definitions, procedures, and the exceptions, would be left to implementation through the ordinary political process. It is uncertain what this would accomplish. Possibly inclusion in the Constitution, coupled with the prospect of judicial enforcement, could provide the necessary pressure to get the normal political process to act. Or this might prove to be little more than a hortatory statement of democratic values, more symbolic than significant in effect.[48]

I may be overstating the difficulties and downsides of writing substantive democratic reform measures into the Constitution. Some goals might be accomplished without complex rules, and there could be a value in mandating basic norms. Perhaps the point is that in the months leading up to the vote on whether to hold a constitutional convention these questions need to be discussed by those who are interested in democratic reforms. If the vote is positive, then in the year and a half between the vote and the convention, the reform community needs to focus on what substantive provisions to strengthen our democracy actually belong in the Constitution and what, more precisely, those measures should say.

V. CONCLUSION

Constitutional revision could strengthen democracy in New York by eliminating obstacles to democratic change that are in the current Constitution, by reforming the Board of Elections and adding a state ethics commission and perhaps a campaign finance board, and possibly by adopting certain substantive requirements and restrictions. Even for those constitutional changes that are desirable, a further question is whether a constitutional convention is the right way to achieve constitutional change. After all, there is another method of amending the Constitution—passage by

two separately elected legislatures and voter approval.[49] Although there has not been a successful constitutional convention since 1938, the Constitution has been amended multiple times since then.[50] Even pro-democratic constitutional change may be effectuated without a constitutional convention, as the recently adopted redistricting amendment demonstrates.

By the same token, it is far from clear that a constitutional convention will produce constitutional changes that reform the political process. At the state's last constitutional convention, in 1967, roughly 82 percent of the delegates had had at least some experience holding a governmental position, nearly half had been elected to public office, and 35 percent had served or were serving in the legislature.[51] Fifteen percent of the delegates had served in the state's judicial system, which at that time was composed of elected judges.[52] In addition, just under half of the delegates (91 of 186) had held substantial political party positions, and half the delegates interviewed in a study of the 1967 convention reported they had family members who were active in politics.[53] These were not political outsiders but were parts of the political system that may be seen as in need of reform. It is, of course, far too soon to determine who the delegates to a 2019 constitutional convention will be, but if 1967 is any indication it is likely that a significant number of them will be political insiders used to, if not comfortable with, the status quo.

Yet, there is still a case to be made that a constitutional convention is a route toward political reform. As noted, the non-convention path to constitutional reform requires getting the simultaneous consent of the Senate and Assembly twice. As the recent past has demonstrated, that has been extremely difficult to achieve when meaningful electoral, ethics, or campaign finance reform is the issue. Even something as straightforward and easy to draft as a pension forfeiture amendment has so far proven to be elusive. Moreover, although *some* of the delegates to a constitutional convention are likely to be political insiders, by definition *all* of the participants in the normal legislative process are insiders. A convention at least raises the possibility of opening the process to outsiders and avoids the difficulty of having to satisfy both legislative houses twice. To be sure, changes passed by a convention would still have to be approved by the voters, but that would be true for amendments passed by the legislature.

A convention is neither necessary for constitutional change nor a guarantee that democratic reforms will be passed, but a convention could open up the process of constitutional debate and provide an opportunity for new

voices to be heard and influence the deliberations. How likely is that to happen? Will it be worth the costs, including the potential distraction of convention advocates from seeking reform from the legislature and the danger that any convention might weaken constitutional provisions that currently exist that protect democratic values and other important concerns? These are the questions that New Yorkers interested in advancing the democracy agenda will have to consider in the months between now and the November 2017 vote on whether to call a constitutional convention.

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1 *See* PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 109-10 (1996) (noting the provision was added by the Constitutional Convention of 1846 as Art. XIII, § 2 of the state Constitution).

2 The 1938 constitutional convention shifted the year of the next popular vote on whether to call for a convention from 1956 to 1957, so that the convention would be in 1959, and not in 1958, when an election for governor and the state legislature would take place. *Id.* at 308. Under the current Constitution, the vote on whether to call a convention occurs in a year ending in "7;" if approved the vote for delegates would occur in a year ending in "8" and the convention would be held in a year ending in "9."

3 The vote in 1957 was 1,242,538 for to 1,368,086 against. *See* HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 40 (1997). The vote in 1977 was 1,126,902 for, and 1,668,137 against. The vote in 1997 was 929,415 for and 1,579,390 against. HENRY M. GREENBERG ET AL., REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMMISSION ON A CONSTITUTIONAL CONVENTION 15–16, 18 (2015). In 1965, the legislature put before the voters a call for a convention off the Constitution's 20-year cycle, primarily in reaction to the decision of the United States Supreme Court in 1964 invalidating the state constitutional provisions dealing with the apportionment of the state legislature. The call was approved by a vote of 1,681,438 to 1,468, 431, leading to the convention of 1967. *See* DULLEA, *supra* note 3, at 71.

4 Public Integrity's State Integrity 2015 investigation gave New York a "D-", placing the Empire State in 31st place nationwide. *See* Matt Krupnick, *New York gets D- grade in 2015 State Integrity Investigation*, CTR. PUB. INTEGRITY (Nov. 9, 2015, 12:01 AM), https://www.publicintegrity.org/2015/11/09/18477/new-york-gets-d-grade-2015-state-integrity-investigation.

5 *See* TEMP. STATE COMM'N ON CONSTITUTIONAL REVISION, EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY 12–22 (1995) (recommending "action panels" on fiscal integrity, state-local relations, education, and public safety).

6 The central issues of the constitutional conventions of 1821 and 1846 were the expansion of the suffrage, the determination of which offices would be elective, and legislative apportionment. *See* GALIE, *supra* note 1, at 76–77, 83, 89, 95, 105, 107-08. The constitutional convention of 1894 also focused on voting rights, election administration and legislative apportionment. *See id.* at 163-83. Suffrage and legislative apportionment issues were also addressed at the 1938 convention. *See id.* at 241. Voting and apportionment have also been the subjects of constitutional amendments without constitutional conventions. *See id.* at 267–69.

7 *See* DULLEA, *supra* note 3, at 202–04. Some aspects of these issues are also addressed in other states' constitutions. *See, e.g.*, ARIZ. CONST. art. VII, § 16 (directing the legislature to enact a campaign finance disclosure law); *id.* art. XXII, § 19 (directing the legislature to enact laws and adopt rules for the regulation of lobbying).

8 For a review of the recent history of state ethics administration and enforcement, see N.Y. CITY BAR ASS'N & N.Y. COMMON CAUSE, HOPE FOR JCOPE 6–12 (2014), www.commoncause.org/states/new-york/issues/ethics/jcope/hope-for-jcope-now.pdf.

9 N.Y. CONST. art. XIX, § 1.

10 *See* UNITED STATES ELECTION PROJECT, http://www.electproject.org/.

11 N.Y. CONST. art. II, § 2.

12 *See Absentee and Early Voting*, NAT'L CONFERENCE STATE LEGISLATORS (Mar. 24, 2016), http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

13 N.Y. CONST. art. II, § 5.

14 N.Y. CONST. art. III, § 4.

15 *See, e.g.*, Bill Hammond, *Albany, Land of Legal Scandals*, N.Y. DAILY NEWS (Apr. 17, 2012, 4:07 AM), http://www.nydailynews.com/opinion/albany-land-legal-scandals-article-1.1062630 (although the population growth that led to the creation of a 63rd Senate seat occurred in the New York City region, the new district was "shoehorn[ed] . . . into Republican territory upstate").

16 Cohen v. Cuomo, 35 Misc.3d 478, 480 (N.Y. Sup. Ct. 2012), *aff'd*, 19 N.Y.3d 196 (2012).

17 *Id.* at 484.

18 Jimmy Vielkind, *Sheldon Silver Files for His Pension*, POLITICO N.Y. (Dec. 3, 2015 1:01 PM), http://www.capitalnewyork.com/article/albany/2015/12/8584616/sheldon-silver-files-his-pension.

19 Yancey Roy, *Ex. Sen-Dean Skelos Files for Pension 11 Days After Conviction, Officials Say*, N.Y. NEWSDAY (Dec. 29, 2015, 6:38 PM), http://www.newsday.com/long-island/politics/spin-cycle/ex-sen-dean-skelos-files-for-pension-11-days-after-conviction-1.11273707.

20 *See* N.Y. RETIRE. & SOC. SEC. LAW §§156-159 (McKinney 2016).

21 N.Y. CONST. art. V, § 7.

22 *See* N.Y.S. Legislature, 2016 Session, S.8163, A.10739 (passed June 17, 2016).

23 *See, e.g.*, Editorial Board, *A Gaping Pension Loophole*, TIMES-UNION (Jan. 3, 2016, 8:15 PM), http://www.timesunion.com/tuplus-opinion/article/Editorial-A-gaping-pension-loophole-6733148.php.

24 N.Y. CONST. art. II, § 8.

25 COMM'N TO INVESTIGATE PUB. CORRUPTION, PRELIMINARY REPORT 9 (2013), publiccorruption.moreland.ny.gov/sites/default/files/moreland_report_final.pdf.

26 *Id.* at 63.

27 *Id.* at 59.

28 N.Y. CONST. art. III, § 5-b.

29 *See id.* § 5-b(f).

30 *Id.* § 5-b(h).

31 Four states—Colorado, Oklahoma, Texas, and Utah—establish ethics commissions in their state constitutions. *See* Colo. Const., art. XXIX, § 5; Okla. Const., art. XXIX, § 1; Tex. Const., art. III, § 24(a); Utah Const., art. VI, § 10. Four other state constitutions call for the establishment of ethics commissions. *See* Fla. Const., art. II, § 8; Haw. Const. art XIV; La. Const., art. X § 21; R.I. Const., art. III., § 8.

32 The Legislative Ethics Commission consists of nine members, eight of whom are appointed by the four legislative leaders. Each leader appoints one person who is a member of the legislature and one non-legislator. The ninth member is then appointed jointly by the Senate Majority Leader and the Assembly Speaker. *See About the Legislative Ethics Commission*, http://www.legethics.com/site-page/about-legislative-ethics-commission (last visited Apr. 3, 2016). Currently, the two co-chairs of the Commission are both members of the legislature. *See Commission Members*, http://www.legethics.com/commission-directory/members (last visited Apr. 3, 2016).

33 *See Jurisdiction and Authority*, N.Y. STATE JOINT COMM'N PUB. ETHICS, http://www.jcope.ny.gov/about/jurisdiction.html (last visited Apr. 3, 2016).

34 On the value of an "independent, unified ethics commission," see Lawrence Norden et al., *Meaningful Ethics Reforms for the "New" Albany*, BRENNAN CTR. JUSTICE 2–4 (2011), https://www.brennancenter.org/page/-/publications/48650383-Meaningful-Ethics-Reform-for-the-New-Albany.pdf.

35 *See* N.Y. EXEC. LAW § 94.13(a) (McKinney 2016).

36 N.Y. PUB. OFF. LAW § 74 (McKinney 2016).

37 N.Y. CONST. art. III, § 5-b.

38 Of the four ethics commissions created by state constitutions, three (Colorado, Oklahoma, and Utah) have five members and one (Texas) has eight members. See sources cited in note 31, *supra*.

39 *See* N.Y. CONST. art. VI, § 2(d).

40 As a result of the 2014 amendment, the Constitution already includes substantive provisions addressing redistricting. *See* N.Y. CONST. art. III, §§ 4, 5, 5-b.

41 *See, e.g.*, LIZ KENNEDY ET AL., AUTOMATIC VOTER REGISTRATION: FINDING AMERICA'S MISSING VOTERS 8 (2015).

42 *See, e.g.*, Charles D. Lavine, *After Skelos and Silver, How to Save Albany*, N.Y. TIMES (Dec. 11, 2015), http://www.nytimes.com/2015/12/12/opinion/after-skelos-and-silver-how-to-save-albany.html; ANDREW CUOMO, BUILT TO LEAD 278–79 (2016), www.governor.ny.gov/2016SOSBook.

43 *See, e.g.*, COMM'N TO INVESTIGATE PUB. CORRUPTION, *supra* note 25, at 11; OFFICE OF STATE SEN. DANIEL SQUADRON, DROWNING DEMOCRACY: HOW LLCS DONATE MILLIONS TO POLITICAL CAMPAIGNS 3 (2015), https://www.nysenate.gov/sites/default/files/articles/attachments/squadron_llc_report_0.pdf.; Casey Seiler, *Ethics Reform Advocates Roll Out "Clean Conscience Pledge,"* TIMES-UNION (Jan. 6, 2016, 4:44 PM), http://blog.timesunion.com/capitol/archives/244960/ethics-reform-advocates-roll-out-clean-conscience-pledge/; CUOMO, *supra* note 42, at 277–78.

44 *See, e.g.*, COMM'N TO INVESTIGATE PUB. CORRUPTION, *supra* note 25, at 3–5 (noting that between 1999 and 2013 one out of 11 legislators who left office did so "under the cloud of ethical or criminal violations" and listing 19 legislators who were charged with or pled guilty to crimes involving corruption).

45 *See, e.g.*, Erica Orden & Christopher Matthews, *Federal Investigation Looks at Cuomo and Moreland Commission Referrals*, WALL STREET J. (Aug. 7, 2014, 9:01 PM), http://www.wsj.com/articles/federal-investigation-looks-at-cuomo-and-moreland-commission-referrals-1407459680; Susanne Craig et al., *Cuomo's Office Hobbled Ethics Inquiries by Moreland Commission*, N.Y. TIMES (July 23, 2014), http://www.nytimes.com/2014/07/23/nyregion/governor-andrew-cuomo-and-the-short-life-of-the-moreland-commission.html.

46 *See, e.g.*, Vivian Yee, *Specter of Corruption Hangs Over Special Elections for New York Legislature*, N.Y. TIMES (Feb. 18, 2016), http://www.nytimes.com/2016/02/19/nyregion/specter-of-corruption-hangs-over-special-elections-for-legislature.html.

47 *See* Dick Dadey, *Silver Is Gone, Albany's Still Rotten*, N.Y. DAILY NEWS (Dec. 2, 2015, 4:15 AM), http://www.nydailynews.com/opinion/dick-dadey-silver-albany-rotten-article-1.2452119.

48 Several state constitutions do include substantive ethics provisions. The Colorado Constitution contains both general hortatory principles and a detailed gifts ban and revolving door restrictions, *see* Colo. Const., art. XXIX, §§ 1, 3, 4. The Florida Constitution includes an express pension forfeiture provision, disclosure requirements, a revolving door provision, and a directive to the legislature to adopt an ethics code. *See* Fla. Const., art. II, § 8. The Hawaii and Rhode Island Constitutions combine general statements about the ethical responsibilities of public servants with directives to their respective state legislatures or ethics commissions to adopt ethics codes with some specifics concerning the topics those codes should address. *See* Hawaii Const., art. XIV (ethics code "shall include, but not be limited to, provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure, and lobbyist registration and restriction"); R.I. Const., art. III,§§7,8 (ethics code should include, but not be limited to, provisions on conflicts of interest, confidential information, use of position, contracts with government agencies and financial disclosure).

49 N.Y. CONST. art. XIX, § 1.

50 *See, e.g.*, GALIE, *supra* note 1, at 262–306 (discussing 106 constitutional changes approved in the 1938-1967 period); *id.* at 332–357 (discussing an additional 46 changes approved in the 1968-1995 period).

51 *See* DULLEA, *supra* note 3, at 124–26.

52 *Id.* at 125–26.

53 *Id.* at 126–27.

CHAPTER SIX

THE OPTION OF A CONSTITUTIONAL COMMISSION TO DRIVE REFORM IN THE 21ST CENTURY

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I. INTRODUCTION

Constitutional reform in New York can be initiated through a convention or through action by the legislature. Historically, conventions have provided opportunities for political leaders to develop and for voters to approve numerous changes in a relatively short period—including major reforms that may not have occurred outside the focused activity of a high-profile governmental event.

Some analysts argue that broad constitutional revision can only be accomplished through a convention. But at this juncture of the state's history, pursuing reform through a constitutional commission that would propose a series of amendments to the legislature and the people of the state over a period of years may be a more effective approach.

One argument for such a conclusion: Voters must approve both the call for a convention and any amendments resulting from it, but are cautious about supporting revision of their fundamental laws. While voters tend to believe that governmental reform in concept is necessary, experience in recent decades shows that even when voters appear to favor constitutional revision, such support can be shallow and susceptible to arguments against major change. A convention-only focus on reform creates a risk that one of the two required public referenda may fail, and thus no change to the current Constitution may occur within the near future.

Constitutional commissions have been used in New York for well over a century to lay the groundwork for constitutional conventions. With an automatic statewide referendum on whether to call a convention scheduled for 2017, many constitutional scholars recommend such a commission start work as soon as possible, both to enhance public understanding of the question and to inform delegates' deliberations if a convention is held. In his 2016 State of the State address, Governor Andrew M. Cuomo announced he would create such an advisory commission.

The work of a commission could, however, go further to undertake the work traditionally considered the purview of convention delegates—developing specific amendments for consideration by New Yorkers. Such an approach would recognize the reality that the work of state government has grown dramatically broader and more complex since the first half of the 20th century when a constitutional convention last submitted and won voter approval for significant revision to New York's charter.

Constitutional conventions historically have completed their work within a matter of months, but such a time frame may be inadequate now, given the number of areas where complex and potentially controversial reforms are needed. Legislatively proposed amendments require voter approval, just as do those emerging from conventions. Compared to a convention, however, a constitutional commission might more naturally take a period of several years to examine major areas of the current charter individually, to engage the public in transparent discussion of potential changes, to submit proposed amendments to the legislature, and to help build support among voters. Such a group of knowledgeable citizens could be appointed either by leaders within the state government, by a respected outside entity, or by a combination of the two. While the legislature could act at any time to revise the Constitution without recommendations from a commission, the appointment and work of such a group could create a galvanizing effect among voters that otherwise might not occur.

Constitutional convention supporters may argue that a commission would be less likely than a convention to propose dramatic changes in governmental institutions and processes. Proposals adopted at a convention need not win approval in the legislature, which is often portrayed as the primary obstacle to reform. Yet, no constitutional convention in New York's history has been dominated by apolitical citizens, and none in recent decades has won ratification of major changes. Given the uncertainty of voter support first for a convention and then for its proposals, the risk of another "magnificent failure" of constitutional reform remains very real.[1]

Analysts of the current New York State Constitution broadly agree that major changes are not only desirable, but long overdue. The charter is long, complex, and often opaque, minimizing citizens' ability to understand and assess their state's fundamental law and their government's adherence to it. Targets for longstanding criticism include, for example, the legislative article, which includes important elements that are nothing more than dead letters because of court rulings a half-century ago. Court rulings handed down more than a decade ago leave major questions regarding the constitutional dividing line between the governor's budget authority and that of the legislature. Leading jurists and other legal experts have repeatedly called for streamlining and modernization of the court system through revision of the judicial article.

Any drive for constitutional change is most likely to succeed if it first educates opinion leaders and voters about what they might expect from a

convention or, alternatively, a well-planned and sustained series of legislatively initiated amendments. At the same time, supporters of reform could mitigate potential opposition by making clear that cherished elements of the existing Constitution should not be at risk. One or more champions—leaders in state government, outside or both—will increase the chances of success.

Building on prior work by Henrik Dullea, Peter Galie, and others, this chapter seeks to inform discussion of the role that constitutional commissions may play in the 21st century. It summarizes some of the areas where revision of New York State's charter may be most clearly needed; provides a brief overview of the use of constitutional commissions throughout the state's history; and discusses characteristics of the two alternative approaches to constitutional change in New York as well as reasons that a commission may be preferable to a convention.

II. THE NEED FOR CONSTITUTIONAL REFORM

As the 2017 plebiscite on a New York constitutional convention draws closer, many experts believe the desirability of revision to the state's current charter is clear. Consider:

- **The legislative article.** Key sections of Article III related to apportionment of Senate and Assembly districts were effectively repealed by court rulings in the 1960s, but remain in the Constitution. As has been true since the state's early days, the text of the present charter directs drawing of state Senate districts in ways that limit representation in the most populous counties. It also guarantees almost every county at least one Assembly district, such that residents of lightly populated regions would be overrepresented relative to those from major cities and suburbs. Replacing these now meaningless provisions with language reflecting the legal reality today would help render the document more comprehensible to non-experts.

- **State finance provisions.** Article VII—as interpreted by state courts in recent decades—leaves unclear the division of budget-making authority between the governor and the legislature. In addition, the existing Constitution forbids state borrowing without voter approval, but the state has circumvented this prohibition for decades by using public authorities to issue debt for state purposes; some 95 percent of state-supported debt is now a result of such "backdoor borrowing" with no review by voters. State Comptroller Thomas P. DiNapoli is among those urging more effective constitutional restrictions on debt.[2]

- **The judiciary article.** State judicial leaders, including the late Chief Judge Judith Kaye, have long called for major restructuring of a court system they describe as so complex and inefficient as to harm the cause of justice. A 2007 report issued by the Special Commission on the Future of the New York State Courts, appointed by Judge Kaye, concluded that "New York State has the most archaic and bizarrely convoluted court structure in the country."[3]

Aside from such concerns regarding the institutions of state government, supporters of reform have argued the Constitution should also be amended and modernized in areas including individual rights and liberties, election law, education, state-funded grants and loans to private entities, and the structures and roles of local governments.

Yet, while the need for constitutional revision and renewal seems clear, the path to reform is clouded. The following section describes the two approaches to constitutional revision that are possible under the current charter. Both approaches—a convention for the first time in decades, and legislative initiation of proposed amendments—are fraught with uncertainty.

III. ALTERNATIVE APPROACHES TO CONSTITUTIONAL CHANGE IN NEW YORK

The most recent commission to study New York's Constitution in preparation for a possible convention—a group appointed by Governor Mario M. Cuomo in 1994—observed that periodic "deep plowing" is every bit as essential to democratic governance of society as it is to productive farming of the land.[4] Article XIX of New York's Constitution provides that only the people may institute civic "deep plowing" in the form of changes to the state's fundamental law. Unlike some other states, New York does not allow citizens to initiate such changes on their own; elected representatives must first propose revisions to the voters. Such proposed changes may be brought to the electorate for consideration in two distinct ways.

First, an amendment that is approved by two separately, consecutively elected legislatures will be submitted to the statewide ballot. Second, the voters may call a constitutional convention, whose elected delegates have the authority to place amendments on the ballot. Article XIX provides that the question of whether to call a convention will automatically be placed before voters every 20 years; the legislature also may "by law" (thus involving gubernatorial review) submit the question to the ballot in any

year.[5] The Constitution gives some preference to the convention method of revision: If the convention proposes an amendment "relating to the same subject" as one proposed by the legislature, the former will supersede the latter.[6]

Conventions and the legislative amendment process have both generated significant changes over time. But there is little question that, historically, the leading New Yorkers who have shaped state government have considered a constitutional convention the natural vehicle for important revisions to the state's charter. Most recently, in 1965, Democrats who had taken control of the Senate and Assembly after many years in the political wilderness chose to ask voters to call a convention, rather than pursue the individual amendment process, to advance the constitutional changes they considered necessary. Gerald Benjamin has argued that "choice of a method of constitutional change has implicit within it a second choice, about the desired scope of change."[7] If the goal is broad change, according to this argument, a convention is the preferred route.[8]

In some cases, impetus for conventions has come from governors who saw that path to reform as the only one available, because the legislatures with whom they served did not see the need for constitutional revision. With their bully pulpit and other means of political suasion, governors have played important roles in winning enactment of major constitutional revisions ranging from the executive budget amendment to gubernatorial appointment of the Court of Appeals. Still, only members of the legislature and delegates to constitutional conventions—not New York's chief executive—can directly initiate proposed amendments.

On numerous occasions, amendments first developed during constitutional conventions have ultimately been enacted through the legislative amendment process, if sometimes in different form. Major examples include several expansions of gubernatorial power that originated in the 1915 convention and failed to reach enactment that year, but became key parts of the Constitution during the 1920s. Numerous proposals advanced at the 1967 convention became state policy in later years, "although much of this activity has been statutory rather than constitutional."[9]

Both processes for constitutional revision in New York create multiple hurdles to change. In either case, at least three separate votes by the people are required. In the case of a convention, voters must agree to call a convention, elect the delegates, and ratify any revisions. The process requires voters to make something of a leap of faith that a group of delegates, unknown at the time of voting on the convention itself, will develop

desirable reforms. (For conventions outside the 20-year time frame of automatic plebiscites such as the one in 2017, further steps are necessary. Placing such a question on the ballot requires approval by both houses of the legislature and the governor, or a two-house override of a gubernatorial veto.) For legislatively initiated amendments, voters elect the two consecutive legislatures that must approve placement of proposed changes on the ballot, and then have the power to approve or reject any such amendments. This process requires four separate votes by legislative bodies representing diverse communities across the state.

American governmental processes purposefully raise hurdles to enactment of statutory changes—for example, sharing of legislative power between lawmakers and executives, and bicameral legislatures at the federal level and in most states. Constitutional change is even more difficult, in New York as elsewhere. Whether constitutional or legislative, institutional and policy changes ultimately must be driven by popular will. Given the greater challenge of constitutional change, the question of how to achieve reform requires especially careful attention to how the popular will may be harnessed to achieve desired outcomes.

A. Difficulties Inherent in the Convention Route to Revision

While conventions have generally been the preferred option to achieve broad constitutional revision, recent history indicates that supporters of a "yes" vote in the 2017 question on calling a convention face a challenging landscape.

As Dullea has written regarding recent decades' plebiscites on calling constitutional conventions, in New York and elsewhere, many voters are predisposed to perceive that changing a constitution "creates uncertainty and risk":[10]

> In almost every instance . . . the occasion for a convention has generated intense debate about fundamental public policies as well as about the structure of state and local government
>
> . . .
>
> For many people, the very notion of such a fundamental debate is frightening. Whatever their ideological approach to everyday politics, New Yorkers, like most American voters, are increasingly conservative when it

> comes to their institutions of government. We are less and less inclined to tinker with our structures. In large measure, that is because our society has been relatively free from widespread social turmoil. But it is also because more and more people (judges, legislators, governmental officials, special interest group representatives, and so-called public interest group lobbyists alike) have such an enormous stake in the accumulation of policies, benefits, and perquisites reflected in our constitutions as currently crafted.[11]

New Yorkers are not alone in their hesitation to revise their state charter. Voters in 14 states with automatic ballot questions regarding a potential constitutional convention have demonstrated clear reluctance to call conventions in recent decades.[12]

The last time New Yorkers agreed to call a convention was the 1965 vote that led to the 1967 convention. As Dullea points out, conditions for voter approval that year were unusually favorable. The 1965 plebiscite took place in a context of recent court decisions that increased awareness among New York City voters of the unequal representation imposed on them by then-longstanding provisions in the state Constitution. In addition, a leading Upstate voice, Canandaigua businessman Howard Samuels, led a campaign in support of a convention, urging voters to recognize the need for a more modern and efficient state government. National developments such as enactment of major civil rights laws, and Governor Nelson A. Rockefeller's broad agenda of expanding state government services, may have influenced voters' thinking about the possibilities of positive change. An "almost total lack of organized opposition" was another factor—as was the fact that nearly half of New Yorkers who went to the polls that Election Day did not cast a vote either way.[13]

The 1965 vote carried by a comfortable margin; however, it does not appear that voters were strongly committed to constitutional reform. Largely the same electorate voted yes on calling the convention in November 1965 but overwhelmingly rejected the product of that convention two years later.

Voters' caution regarding constitutional revision raises questions about the potential enactment of such revisions, whether initiated at a convention or via legislative initiative. However, one significant area of uncertainty applies uniquely to the constitutional convention: potential legal questions regarding election of delegates.

In a view shared by some other experts, the Temporary State Commission on Constitutional Revision appointed by Governor Mario M. Cuomo expressed concern regarding the delegate selection process required under the current charter. The commission found "a reasonable possibility that the electoral mechanisms for delegate selection would, in whole or in part, be found in violation of the [federal] Voting Rights Act . . . ."[14] The multimember districts established for election of delegates (three delegates from each Senate district) could violate federal law because of potential discriminatory impacts on minority voters, according to the Commission.[15]

B. Recent Constitutional Amendments via the Legislature

Two comparatively recent questions on the statewide ballot—a 2005 proposal to change the budgetary balance of power between the governor and the legislature, and the 2013 vote on commercial casinos—provide further room for consideration of voter behavior on constitutional matters, particularly amendments initiated through the legislature. The former illustrates the difficulty of winning approval when voters are uncertain about a given proposal, while the latter may reflect the greater chance of success when a question on the ballot is more readily understandable to the public.

The 2005 amendment reflected the legislature's frustration with what many lawmakers perceived as executive overreach in the budget process. Two Court of Appeals decisions in December 2004 had held that Governor George Pataki did not violate the Constitution in writing certain statutory policy changes into appropriation bills.[16] Together with a previous holding by the high court, *Bankers v. Wetzler*,[17] the 2004 rulings left legislators with no ability to revise or remove language in appropriation bills to which they object.[18] Particularly in the wake of those decisions, many legislators were determined to rewrite Article VII to allow the legislature to introduce its own appropriation bills if the governor's proposed appropriations had not been acted upon by the start of the fiscal year. In such cases, the Executive Budget appropriation bills would be nullified. Supporters presented the amendment as a way both to restore proper institutional balance between the executive and legislative branches, and to end a history of late state budgets over two decades.

The proposal attracted support from groups including Common Cause/NY, the League of Women Voters, and New York Public Interest Research Group, as well as education and some other advocacy organizations. Three independent polls in late September and early October showed

either a majority or plurality of voters indicating they planned to vote for the amendment, with margins of support ranging from 10 to 20 percent. Groups endorsing the proposal outspent opponents three to one, according to one analysis of state Board of Elections records. Opponents of the budget process amendment included former Governor Carey, Governor Pataki, Attorney General Spitzer, fiscal watchdog groups, and, ultimately, most daily newspapers in the state.

On Election Day—just weeks after polls showed respondents tending to support Proposal One—voters rejected the amendment by nearly two to one. Some 1.7 million voters, more than 40 percent of the day's total, did not cast a vote on the proposal.[19] Compared to surveys during the campaign, election results seemed to show many New Yorkers changed their minds within the final weeks, or potential supporters were especially likely to abstain from voting on the proposal.

In contrast to the 2005 vote, New Yorkers' views on a 2013 proposal authorizing up to seven commercial casinos across the state were comparatively consistent from pre-Election Day polls to the actual vote. A series of surveys by the Siena Research Institute during the months leading up to the vote, for example, found respondents either marginally in support of the measure or evenly divided.[20] On Election Day 2013, 57 percent of voters supported the casino amendment. In contrast to 2005, fewer than 16 percent of ballots cast were left blank on the constitutional question.

A full analysis of the 2005 and 2013 votes is beyond the scope of this chapter, and definitive explanation of any electoral outcome is difficult. Clearly, the 2013 outcome was driven in part by favorable advertising and the strong support of a governor who was politically popular. (Siena's final poll before the 2013 election found a 62 percent favorability rating for Governor Cuomo.) In addition, ballot language on the casino amendment mentioned positive aspects of the proposal while omitting any potential negative implications. Yet there is also reason to believe that voters—whatever their perspective—simply were more confident casting a ballot on the casino amendment than on the proposed change to Article VII. The dramatic difference in the number of blank ballots—a proportion more than three times as high in the latter case—is one such indication. In addition, most New Yorkers have comparatively little understanding of the balance of budgetary power between the executive and legislative branches of their state government, a factor that may have increased hesitation to provide approval. By contrast, the majority have at least some familiarity with state-sanctioned gambling in the form of the Lottery and/or casinos.

As noted earlier in this chapter, analysts of state constitutions in New York and elsewhere have concluded that voters in recent decades generally have become more reluctant to change their foundational governmental laws. Such reluctance may be highest when voters are not sure which outcome may be most protective of their interests—that is, when questions before them are most complex and least familiar. Such is the case with most major issues of constitutional revision.

One factor in voter rejection of the 1997 question on a constitutional convention was a publicity and advertising campaign, in the final weeks before Election Day, urging a "no" vote. It is too early to assess whether the organizations that organized the successful opposition effort will take the same position in 2017.

IV. A CONSTITUTIONAL COMMISSION RATHER THAN A CONVENTION?

As summarized above, experience in recent decades demonstrates the inherent challenge of achieving constitutional reform through either the convention or legislative amendment routes. Within this context, some experts on New York's constitutional history have argued that the state's best hope for reform is a commission designed to advance amendments for legislative consideration. At the same time, some others argue that only a convention can pave the way for major change. Peter Galie, who has written more extensively on New York's Constitution than any other modern scholar, champions the former view. Henrik Dullea, whose work stands as the definitive study of the state's most recent constitutional convention, comes to the latter conclusion.

The perspective of Galie and co-author Christopher Bopst:

> Some of the most significant constitutional revision in New York has been the product of such commissions . . . .[21]
>
> The reluctance to resort to conventions, combined with the inability or unwillingness of state legislatures to propose systematic revision, has left states with few options for meaningful constitutional change. The constitutional commission has the potential to break this constitutional logjam. The commission allows an educated, highly specialized group of persons to analyze the problems of the state in a deliberate and relatively nonpartisan manner . . . .

> Florida, Utah and Georgia provide models of constitutional commissions that differ from the traditional commission employed in New York. These varied state experiences, and the history of the commission in New York, suggest that a constitutional commission to undertake a comprehensive evaluation of the constitution and provide recommendations to the legislature for its revision, offer the state its best hope for accomplishing needed constitutional reform.[22]

Dullea agrees that a permanent constitutional revision commission could make valuable contributions. He proposes a body with members appointed to staggered terms by the governor, legislative leaders and the chief judge.[23] It would periodically report to the legislature and to the public on the need for constitutional amendments, "either on an issue-by-issue basis or as part of a multi-year program of simplification."[24] Yet, while a commission could achieve "small-scale successes [that] might well lead to more ambitious undertakings,"[25] in Dullea's view, it cannot be expected to replace a convention:

> Only in a Constitutional Convention are the people's elected representatives given the opportunity to focus on the Constitution as a whole, free from the routine constraints of the legislative arena, dependent only on itself and no other body for action, and subject to veto only by the people themselves in referenda, not by the Governor.[26]

Both Dullea, and Galie and Bopst, outline their perspectives in detail elsewhere in this book.

Some supporters of a convention argue that it gives voters the opportunity to assign reshaping of the state's fundamental law to representatives who are not currently serving in the legislature and thus may be more independent-minded. "[T]he sovereign people should have some way of making changes in their governmental structure without having to rely on action by those in statewide and legislative offices, many of whom may be beneficiaries of a flawed status quo," Gerald Benjamin has written.[27]

Other observers have also argued that fundamental change is more likely to emerge from delegates who have not previously held the reins of government.[28]

Yet, the history of constitutional change in New York argues against any conclusion that a convention is likely to involve apolitical citizen delegates forcing reform on the status quo. In none of the state's conventions over more than two centuries were the delegates who produced the new constitutional texts mostly individuals who were fresh to the political process. The last convention, in 1967, did propose numerous major changes, including an independent body for legislative redistricting. Yet its leaders were simultaneously leaders in the legislature, and many delegates were also legislators, judges, or others very much involved in government.

Supporters of a constitutional commission, in addition to those cited above, have also included good-government groups, bar associations, and New York's current governor.

In recommending that voters approve the 1997 question on a constitutional convention, Citizens Union of the City of New York endorsed a permanent, nonpartisan Constitutional Revision Commission whose role would be something of a hybrid of the Galie and Dullea models. The recommended commission would be composed of members appointed by the governor, attorney general, comptroller, and legislative leaders, serving for fixed terms. It would propose amendments "from time to time, and evaluate proposed amendments submitted by the legislature or governor. If the legislature did not approve, reject or modify its proposals within a certain period, the commission would be empowered to place amendments directly before voters."[29]

Given the important work of previous commissions, calls have already emerged for creation of such a body in preparation for the 2017 referendum and the convention that may follow.

During his 2010 campaign for governor, then-Attorney General Andrew M. Cuomo proposed both a constitutional convention and a constitutional commission. His campaign policy platform included a call for a convention and added:

> [P]rior to the constitutional convention, we should create a constitutional commission to help define the constitutional convention and issues that need to be addressed, including recommending amendments for passage. That blueprint will then provide the starting point for both the constitutional convention and any amendments made via voter approval at the ballot box. While less well-known than constitutional conventions, these commissions have

> been key tools used to amend our Constitution. . . . Created by an executive order or with the Legislature by statute, this commission will include the best and the brightest of reformers, legal experts, and statespersons and will be independent from those who created the commission.[30]

The New York State Bar Association's Committee on the New York State Constitution issued a report in November 2015 recommending a nonpartisan preparatory commission "as soon as possible."[31] Among other tasks, the proposed group would be charged with educating the public about the state Constitution and processes for changing it; "making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification"; researching procedures used at previous conventions; and overseeing development of background studies and other materials that would inform both the public and potential delegates.[32]

While such a convention would be more than three years away, the committee wrote:

> Nearly 50 years have passed since New York last held a Constitutional Convention. Likewise, 18 years have passed since the last referendum vote in 1997. As a result, the collective memory on preparing for and organizing a Convention has waned significantly. The Commission will face not only a herculean task reviewing New York's Constitution and the numerous subjects it encompasses, but also a massive historical reclamation project to develop and provide information on the mechanics of a Convention itself.[33]

The committee also pointed to the broad support needed for any effective constitutional reform project. Noting that some previous commissions have been created by governors, and other by the legislature, it said: "History teaches that regardless how a preparatory commission is formed, it requires the support of all branches of government to produce useful and comprehensive work product for the benefit of New York voters, lawmakers, interested groups, and delegates if a Convention is held."[34]

Constitutional commissions have taken on different roles and structures in other states. In Florida, the state Constitution dictates that an appointed constitutional revision commission be created every 20 years. Unlike

those in New York, the Florida commissions possess the power to submit recommended revisions directly to the electorate, rather than to the legislature.[35] The next such commission will be formed in 2017, the same year New Yorkers prepare to vote on their convention call. In October 2015, a group of academic institutions, citizen groups, and others created a coalition to educate and engage Florida voters in advance of the next commission.[36]

In 1969, Utah created a permanent Constitutional Revision Study Commission. The 16 members of the commission serve six-year terms and are authorized to undertake their own initiatives as well as consider recommendations from state leaders and the public. Their recommendations are submitted to the governor and legislature rather than directly to voters.

In September 2015, the Rockefeller Institute of Government of the State University of New York and several other organizations launched a multiyear educational campaign to promote awareness of the 2017 vote. The initiative includes public events, writings by constitutional experts, and media briefings to educate voters and policymakers.

Discussion of how a constitutional commission may be helpful in the 21st century should be informed by an understanding of how such commissions have been used over the past 144 years.

V. A BRIEF HISTORY OF CONSTITUTIONAL COMMISSIONS IN NEW YORK

New York's first Constitution was the product of a provincial Congress that recast itself as the Convention of Representatives of the State of New York on July 10, 1776. With a Revolutionary War creating quorum challenges, among other factors, the convention adopted a Constitution on April 20, 1777, "marking that day the birth of New York as a constitutional state."[37] The foundational charter for the new state reflected the collective views of the delegates, and was not submitted to voters for approval—the latter fact prompting criticism from some citizens.[38]

As New York's population rose in succeeding decades, its social conditions and economy grew more complex, and government gradually did so, as well. Constitutional conventions in 1801, 1821, 1846, and 1867 were among the efforts to enhance the state's governance in response to such change.

New York's first experience with constitutional commissions, in 1872, was born from dissatisfaction with the outcome of the constitutional convention of 1867. Voters had rejected by 66,000 votes[39] most of that convention's proposals for revisions; the exceptions were recommendations to the judiciary article. The legislature was able to propose and win voter approval of a few amendments in the years succeeding the constitutional convention, but leaders including Governor John T. Hoffman saw a need for more comprehensive revision.

Hoffman advocated a constitutional commission in his annual message to the legislature, which approved the proposal.[40] The first constitutional commission in New York State was comprised of 32 members—four from each of the eight judicial districts—who were appointed by the governor and confirmed by the Senate.[41] The commission was tasked generally with "proposing to the legislature, at its next session, amendments to the constitution."[42] The commission presented its final report to the legislature on March 25, 1873, recommending changes to almost every article of the Constitution. Many of these were very similar to the amendments put forth by the 1867 constitutional convention. All 11 amendments the legislature submitted to referendum were ratified by popular vote—including removal of property qualifications for African American voters, provision of an item veto, extension of the governor's term from two to three years, and imposition of limits on the use of money and credit by both the state and local governments. In addition, the commission report was the impetus for the enactment of a series of measures aimed at eliminating corruption in the electoral process. The success of the 1872 constitutional commission opened up a new avenue for constitutional revision in New York State, one that would be revisited several times in succeeding decades.

Only two years after action on the recommendations of the first constitutional commission, in May 1875, Governor Samuel J. Tilden advocated for the creation of a commission to focus on municipal reform, one of the priorities of his administration. The Tilden Commission, as it became known, differed from the 1872 commission in its more limited scope, "to devise a plan for the government of cities," and its size, a 12-member group that was appointed only by the governor.[43] The legislature ultimately failed to approve the recommendations of the Tilden Commission, but many of its amendments would be revisited during the constitutional convention of 1894.[44]

Another narrowly focused commission was created in 1890. After political disputes delayed the convening of the constitutional convention

approved by voters in 1886, the legislature authorized the creation of a constitutional commission in the meantime to address the pressing need for revision to the judiciary article. A 38-member panel, with "four from each judicial district, with four additional members from the first district, and two from the second," was appointed by the governor, approved by the Senate, and tasked with submitting proposed Article VI amendments to the legislature.[45] These amendments included limits on the jurisdiction of the Court of Appeals and the creation of appellate divisions of the Supreme Court.[46] They were deliberated and accepted when the constitutional convention eventually occurred in 1894.[47]

The Judiciary Constitutional Convention of 1921, though commonly called a convention, had more in common with the constitutional commission of 1890 than with an actual convention. It was created by statute rather than popular vote, was focused solely on one topic, and its recommendations were submitted to the legislature for action rather than directly to the voters.[48] Nearly all of the recommendations of the Judiciary Constitutional Convention were approved by the voters, marking the most significant reform of the judiciary article of the New York State Constitution of the 20th century.[49]

In 1914, voters approved a constitutional convention for the following year. The legislature created a five-person commission to "collect, compile and print such information and data as it may deem useful for the delegates to the constitutional convention."[50] This marked the first time that a constitutional commission was created expressly to help prepare materials for a forthcoming convention. The commission worked with the Bureau of Municipal Research, whose resulting report was "the most extensive set of studies of state government done to that date."[51] A similar preparatory constitutional commission was created in 1937 in advance of the 1938 convention, by an executive order of Governor Herbert H. Lehman.[52] The Poletti Commission, as the group became known, produced 12 volumes of materials for the convention—five reference volumes and seven volumes devoted to issues including the bill of rights, taxation and finance, home rule, and local government.[53]

Governor W. Averell Harriman expanded in 1956 on the use of a constitutional commission to prepare for a constitutional convention by creating a commission before the voters had determined whether a convention would be held. The 15-member Temporary State Commission on the Constitutional Convention, chaired by Nelson A. Rockefeller, was tasked with three responsibilities: "to study proposals for change and simplification of the Constitution, to collect and present information and data useful for the

delegates and electorate prior to and during the convention, and to issue reports to the governor and the legislature."[54] The commission expanded the role of the public in deliberations on constitutional revision by hosting a series of hearings in Buffalo, Albany, and New York City.[55] The commission suggested several sections of the Constitution that could be eliminated or rewritten, but voters in 1957 decided against calling a convention.

The temporary commission was statutorily slated to terminate in 1958 if voters rejected a convention. After the negative vote in 1957, Harriman and many lawmakers saw both the continuing need for constitutional revision and the value of a commission to shape an agenda for reform. A special legislative committee was formed, disbanded when Rockefeller assumed the governorship in 1959, and reconstituted as a temporary commission whose focus was on "modernizing and simplifying the structure" of the Constitution.[56] The temporary commission was allowed to expire by the legislature in 1961, in part because the commission began exploring the question of reapportionment.[57]

With a constitutional convention slated for 1967, Governor Rockefeller signed in 1965 legislation for the creation of a preparatory constitutional commission. Though the commission held public hearings and examined constitutional issues in areas including education, local government, and health, policy and personality conflicts within the commission, as well as delays in the appropriation of funds for the commission's work, resulted in turmoil and turnover.[58] Although the 1967 convention produced sweeping proposals for constitutional revision, the commission's expert staff studies had no role in the deliberations because of infighting among commission and convention leaders.[59] This outcome may have been one reason that, when voters were presented with the mandatory question of a constitutional convention in 1977 (and declined the opportunity), no constitutional commission was authorized in preparation of the decision.[60]

The commission approach came back to life, however, in advance of the next mandatory constitutional convention vote in 1997. Governor Mario M. Cuomo issued an executive order in 1993 that created the Temporary State Commission on Constitutional Revision, tasked with "the improvement of the structure of government in New York through an objective examination of the constitutional change process and the range of constitutional issues to be considered by the people of New York."[61] This commission differed from previous constitutional commissions in New York in both its purpose and its results. "Unlike preceding commissions, it was established not to serve potential delegates, but to inform the

people at large about the constitutional change process and to advise the Governor and Legislature about how best to prepare for the possibility that a convention might in fact be called."[62] The commission's products included a final report calling for "Action Panels" to prepare recommendations in major policy areas of state fiscal policy, education, public safety and state/local relations.[63] Voters rejected the call for a convention.

VI. IS THIS A DIFFERENT ERA FOR CONSTITUTIONAL REVISION?

The history of constitutional commissions reflects an understanding that writing the fundamental law for a large and complex polity such as New York requires extensive commitment of time and resources by knowledgeable experts. How should this understanding inform debate over constitutional reform in the 21st century?

While the issues faced by governments in the late 1800s and early 1900s were by no means simple, social and economic conditions today are far more complicated—and the scale of state government far larger. Before the 20th century, state government played at most a limited role in provision of health care, support for social services, protection of the environment, stimulation of economic development, and other tasks that occupy much of the agenda in Albany today. The state's budget and debt dwarf those of a century ago, even after adjusting for inflation.

The Empire State's population today, some 19.8 million, is well over twice the 7.3 million counted by the 1900 Census. Although immigrants represented large numbers then as now, today's foreign-born New Yorkers are far more diverse in origin.[64]

Perhaps most important, individual citizens and interest groups representing various combinations of them have a far greater role in government today than a century or more ago. Such increased engagement is a good thing, ensuring that decisions affecting broad numbers of individuals are more likely to be made with their knowledge and consent. But the multiplicity of organized, sometimes narrow-minded interests can also lead to what one observer calls *demosclerosis*, "government's progressive loss of the ability to adapt."[65] Constitutional reform, by definition, involves potentially major change affecting society broadly. In an era when governments at all levels sometimes are challenged simply to enact annual budgets, it's no surprise that achieving lasting constitutional reform is not easy. The broader involvement of interest groups and indi-

viduals, compared to earlier eras in New York State's history, requires far more extensive education and engagement on the need for constitutional revision if such change is to occur.

Some core functions of state government that would likely be among the areas considered at a constitutional convention illustrate the probability of heated debates—reinforcing the need for engagement and persuasion of the public.

For example, the system of local governments in New York, among the largest and most complex in the country, has long been a focus of constitutional debate. Numerous voices have called for consolidation, sharing of services, and other steps to make the matrix of counties, cities, towns, villages, school districts, fire districts, and other special districts more simple and cost-effective. Yet, when voters in localities across the state have been asked in recent decades to approve consolidation with neighboring jurisdictions, most have rejected the idea. Any significant constitutional change in this area would be difficult and controversial, likely requiring extensive public persuasion.

In the realm of education, Article XI simply requires the legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[66] The Court of Appeals has ruled that this generally worded provision requires every child to have an opportunity to obtain "a sound basic education."[67] What exactly this requirement means in terms of resources remains an open question.

The Constitution includes important provisions regarding individual rights and liberties. Some opinion leaders believe the longstanding list should be expanded to address an explicit right of privacy, freedom from discrimination based on a variety of personal characteristics, the right to clean and healthful air and water, access to affordable housing, and other issues.[68]

The above paragraphs summarize only some of the challenging issues that arise from a review of New York's current charter, beyond concerns about the legislative, judicial, and state finance articles cited earlier. Consideration of even such a partial list raises these questions:

- Can a single constitutional convention of limited duration realistically be expected to address the multiple, complex changes that could be

considered in any redrafting of the state Constitution for the 21st century?

- Can the necessary work of educating voters about multiple issues of lasting importance be accomplished over a compressed period such as a few months? (The current constitutional rules provide that a convention decides when the product of its work will be placed before voters; historically, conventions have submitted proposed revisions at the next succeeding general election.)

These are not entirely new questions. In calling for a "yes" vote on the 1997 convention question, The Business Council of New York State urged that delegates take two years to develop a new Constitution. Under this recommendation, the first year would be "devoted to fact-finding, citizen participation, public hearings and detailed studies of constitutional issues," with "actual drafting of a new constitution only after the groundwork has been properly laid."[69]

Basic education about the need for and process of constitutional revision may be only part of the path to actual reform. If Dullea is correct that voters have become more resistant to change, building support for constitutional reform may require reassurance that particularly cherished elements of the status quo are not likely to change. The Business Council's 1997 call for a convention addressed this issue, suggesting that supporters of reform publicly commit to retaining current provisions, including those that address care of the needy, the pension rights of public employees, and protection of the Forest Preserve.[70]

The last constitutional commission, appointed in 1993 and chaired by Peter Goldmark, issued its final report in 1995, hoping to inform New Yorkers in advance of their vote two years later on whether to call a convention to revise the state's charter. As described above, commission members identified four major areas in need of reform, and called for state leaders to appoint "Action Panels" that would develop specific recommendations in each area.[71]

The call for such a new group of experts may have represented acknowledgment that constitutional reform in the modern era is too large and complex an undertaking to be accomplished in a short time frame. The proposed Action Panels were intended to be "a new instrument . . . the kind of deliberative, 'action-forcing mechanism' that can provide the required focus and energy" to overcome longstanding inertia and jump-

start a new period of reform.[72] The Goldmark Commission recommended that each panel "operate under a special rule predetermined by the governor and the legislature that would fix a date certain for it to report its proposals and fix a following date certain by which the legislature would have to act on the proposals."[73] Panels would hold public hearings around the state, consult with the governor and legislature through the course of their work, and propose to the legislature "an integrated package of reforms in each area."[74]

Whatever the merits of arguments for and against a convention, voters' cautionary instincts regarding major constitutional change may make such reform impossible unless state leaders or others conduct a broad, extended effort to educate and persuade the electorate. The major recommendation of New York's last constitutional commission represents one such approach. A constitutional commission that prepares recommended amendments for legislative and voter consideration, and builds public support for them over time, is another potential pathway to constitutional change after many years of frustration for reformers.

VII. CONCLUSION

Constitutional revision should not be easy, and is not. Change cannot occur without support of the people. While scholars of New York State's Constitution generally believe charter reform is required, voters have repeatedly demonstrated their willingness to retain the status quo. Given the multiple areas where the state Constitution could be updated and improved, and the complex implications of any change, achieving the necessary level of voter engagement and approval may take continued effort over a period of years. Supporters of constitutional reform should consider whether a constitutional commission, rather than a convention, may be the most effective vehicle to achieve broad public involvement and ratification of constitutional amendments.

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1 Henrik Dullea has used this term, first applied to the Maryland Constitutional Convention of 1967–68, to describe the 1967 New York convention that produced wide-ranging proposals for reform of the Empire State's charter. HENRIK DULLEA, CHARTER REVISION IN THE EMPIRE STATE 402, 404 (1997). Voters in both New York and Maryland rejected the products of their conventions. *Id.* at 404.

2 *See, e.g.*, OFFICE OF THE N.Y. STATE COMPTROLLER, DEBT IMPACT STUDY 3 (2013).

3 SPECIAL COMM'N ON THE FUTURE OF THE N.Y. STATE COURTS, A COURT SYSTEM FOR THE FUTURE 7, 9 (2007). The commission's reports, and other documents, are available at www.nycourtreform.org.

4 *See* TEMP. N.Y. STATE COMM'N ON CONSTITUTIONAL REVISION, EFFECTIVE GOVERNMENT

NOW FOR THE NEW CENTURY 3 (1995) [hereinafter EFFECTIVE GOVERNMENT].

5 N.Y. CONST. art XIX, § 2.

6 *Id.* § 3.

7 Gerald Benjamin & Melissa Cusa, *Amending the New York State Constitution through the Legislature*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 385, 385 (Gerald Benjamin & Henrik N. Dullea eds., 1997).

8 Their article posits that: "The distinction between amendment and revision is significant. Though amendments may be quite extensive in scope and effect, amendment through the legislature is generally used for more limited changes. Revision, through the convention, is almost always more widespread, encompassing the entire document." *Id.* As the writers observe, however, the distinction between "revision" and "amendment" is more clearly drawn in some other states than in New York. *Id.* at 385 n.1.

9 DULLEA, *supra* note 1, at 390.

10 Henrik N. Dullea, *Constitutional Revision in 1967: Learning the Right Lessons from the Magnificent Failure*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 367, 367 (Gerald Benjamin & Henrik N. Dullea eds., 1997).

11 *Id.* at 367–68.

12 Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, *in* 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 145, 148 (G. Alan Tarr & Robert F. Williams eds., 2006).

13 DULLEA, *supra* note 1, at 71.

14 TEMP. N.Y. STATE COMM'N ON CONSTITUTIONAL REVISION, THE DELEGATE SELECTION PROCESS 6 (1994).

15 *Id.* at 5.

16 Pataki v. New York Assembly, 824 N.E.2d 898, 899 (N.Y. 2004). The cases were *Pataki v. Assembly* and *Silver v. Pataki*. *Id.* at 902.

17 N.Y. Bankers Ass'n v. Wetzler, 612 N.E.2d 294 (N.Y. 1993).

18 *Id.* at 294.

19 Robert B. Ward, *Proposal One: "Modest" Reform, or a "Runaway Spending Amendment"?*, 1 J. GOVERNMENTAL FIN. & PUB. POL'Y 13, 19 (2006). For additional background and analysis regarding Proposal One, see *id.*

20 Siena polls showed 52 percent of respondents in favor in both December 2012 and January 2013; pluralities of 48 and 46 percent favorable in February and March. Press Release, *Majority of NY'ers Support Casino Gambling Constitutional Amendment*, SIENA RESEARCH INST. (Sept. 29, 2011), http://www2.siena.edu/uploadedfiles/home/Parents_and_Community/Community_Page/SRI/Independent_Research/Sports%20Release%20September%202011.pdf; Press Release, *Cuomo Still Honeymooning; Record High Job Performance,* SIENA RESEARCH INST. (Jan. 16, 2012), http://www2.siena.edu/uploadedfiles/home/parents_and_community/community_page/sri/sny_poll/SNY%20January%202012%20Poll%20Release%20--%20FINAL.pdf; Press Release, *50% Say New Teacher Evaluations Will Improve Public Ed. Quality; By 2-to-1 Voters Say New Evaluation System is Fair to Teachers*, SIENA RESEARCH INST. (Mar. 5, 2012), http://www2.siena.edu/uploadedfiles/home/parents_and_community/community_page/sri/sny_poll/SNY_March_5_2012_ReleaseFINAL.pdf; Press Release, *Ryan Selection Offers No Help for Romney In New York*, SIENA RESEARCH INST. (Aug. 21, 2012), http://www2.siena.edu/uploadedfiles/home/sri/SNY%20August%202012%20Poll%20Release%20--%20FINAL.pdf; Press

Release, *New York Voters Support Casino Gaming Constitutional Amendment with the Language that Appears on the Ballot*, SIENA RESEARCH INST. (Sept. 30, 2013), http://www2.siena.edu/uploadedfiles/home/parents_and_community/community_page/sri/sny_poll/SNY%20September%202013%20Poll%20Release%20--%20FINAL.pdf. An October 2013 poll found 49 percent favoring the amendment when given a "generic" description of it, and 56 percent in support when told of ballot language that was favorable to the proposal. Press Release, *Moreland & Its Work Largely Unknown to Voters, Who Strongly Want Commission to Continue Investigations*, SIENA RESEARCH INST. (Oct. 21, 2013), http://www2.siena.edu/uploadedfiles/home/parents_and_community/community_page/sri/sny_poll/SNY%20October%202013%20Poll%20Release--FINAL.pdf. Polls are available at http://www2.siena.edu/pages/3390.asp.

21 Peter Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1287 (2001). In contrast to the present article, Galie and Bopst provide a more detailed discussion and analysis of the history of constitutional commissions in New York.

22 *Id.* at 1324.

23 Dullea, *supra* note 1, at 401.

24 *Id.* at 400.

25 *Id.*

26 *Id.* at 5.

27 Benjamin, *supra* note 12, at 146.

28 For example, Robert L. Schulz, a citizen activist from Queensbury and onetime Libertarian party candidate for governor, organized a "We The People Congress" in advance of the 1997 convention vote, urging that "the convention is controlled by the people rather than the government."

29 Citizens Union of the City of New York, *Citizens Union Supports Constitutional Convention for New York State* (1997).

30 ANDREW CUOMO, THE NEW NY AGENDA: A PLAN FOR ACTION 30, 31 (2010).

31 N.Y. STATE BAR ASS'N COMM. ON THE N.Y. STATE CONSTITUTION, REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMMISSION ON A CONSTITUTIONAL CONVENTION 18 (2015).

32 *Id.* at 20.

33 *Id.* at 18–19.

34 *Id.* at 19–20.

35 Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commissions in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 15 (1996).

36 *About Us*, P'SHIP FOR REVISING FLORIDA'S CONSTITUTION, http://www.revisefl.com/index.php/about-us (last visited Mar. 5, 2016). Information on the Partnership for Revising Florida's Constitution is available at www.revisefl.com.

37 PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 37, 38 (1996).

38 *Id.* at 36.

39 CHARLES Z. LINCOLN, II THE CONSTITUTIONAL HISTORY OF NEW YORK 422 (1906).

40 *Messages of Gov. Hoffman*, *in* PUBLIC PAPERS OF JOHN T. HOFFMAN, GOVERNOR OF NEW YORK

308 (1872).

41 Act of June 15, 1872, ch. 884 § 1, 1872 N.Y. Laws 2178.

42 *Id.*

43 LINCOLN, *supra* note 39, at 668–69.

44 Galie & Bopst, *supra* note 21, at 1294.

45 LINCOLN, *supra* note 39, at 683–84.

46 GALIE, *supra* note 37, at 170–71.

47 *Id.*

48 Galie & Bopst, *supra* note 21, at 1300.

49 *Id.* at 1302–03.

50 Act of April 9, 1914, ch. 261 § 1, 1914 N.Y. Laws 758.

51 Williams, *supra* note 35, at 12.

52 *Miscellaneous*, *in* PUBLIC PAPERS OF HERBERT H. LEHMAN 664 (1937).

53 GALIE, *supra* note 37, at 233.

54 *Id.* at 262–63.

55 Dullea, *supra* note 1, at 34.

56 *Messages to the Legislature*, *in* PUBLIC PAPERS OF GOVERNOR NELSON A. ROCKEFELLER 32 (1959).

57 PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 28 (1991).

58 Dullea, *supra* note 1, at 134.

59 ERNEST HENRY BREUER, NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1967, APRIL 4–SEPTEMBER 26TH 1967: A SECOND SUPPLEMENT TO CONSTITUTIONAL DEVELOPMENTS IN NEW YORK, 1777–1958, at 3 (1967).

60 Williams, *supra* note 35, at 13.

61 N.Y. COMP. CODES R. & REGS. tit. 9, § 4.172 (2016).

62 EFFECTIVE GOVERNMENT, *supra* note 4, at 11.

63 *Id.* at 13.

64 For discussion of increased diversity in the foreign-born population of New York City (home to a majority of the state's foreign-born residents in 2010), see ARUN PETER LOBO ET AL., THE NEWEST NEW YORKERS: CHARACTERISTICS OF THE CITY'S FOREIGN-BORN POPULATION 2–3 (2013).

65 JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT 123 (1994).

66 N.Y. CONST. art. XI, § 1.

67 Campaign for Fiscal Equity, Inc., v. New York, 655 N.E.2d 661, 665 (N.Y. 1995). The specific requirements are spelled out in several cases, including *Campaign for Fiscal Equity Inc.*, 655 N.E.2d at 666.

68 Then-Assemblyman Richard L. Brodsky outlined these and other proposals in an "Agenda for Constitutional Reform" in 1997, as that year's referendum on a constitutional convention was approaching. RICHARD L. BRODSKY, AGENDA FOR CONSTITUTIONAL REFORM 1, 4, 5 (1997).

69 The Business Council of New York State, Inc., *A New Constitution for a New Century* (Sept. 24, 1997).

70 *Id.*

71 EFFECTIVE GOVERNMENT, *supra* note 4, at 13.

72 *Id.* at 6, 7.

73 *Id.* at 6.

74 *Id.*

CHAPTER SEVEN

EXECUTIVE BRANCH: NEED TO ENSURE STABILITY AND LEGITIMACY IN ISSUES OF SUCCESSION TO THE OFFICES OF GOVERNOR AND LIEUTENANT GOVERNOR

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I. INTRODUCTION

Article IV of the New York State Constitution establishes the structure of the executive branch of New York State government. Creating the offices of governor and lieutenant governor, it requires that the governor and lieutenant governor "be chosen jointly, by the casting by each voter of a single vote applicable to both offices,"[1] vests executive power in the governor,[2] specifies this power devolves on the lieutenant governor in the event of death, impeachment, disability or absence from the state of the governor,[3] sets forth the eligibility requirements for both offices,[4] and imposes certain powers and duties upon the governor[5] and lieutenant governor.[6] The New York State Court of Appeals supplemented these constitutional provisions as to lieutenant gubernatorial succession in *Skelos v. Paterson*,[7] holding that a vacancy in that office can be filled through an appointment by the governor, an appointment power found not in Article IV, but through an interpretation of Public Officers Law § 43.[8]

Upon its face, Article IV's provisions appear sufficiently comprehensive to address executive branch election, powers and allocation thereof, and succession issues. However, closer analysis reveals serious flaws as to succession issues. The following possibilities illustrate this claim:

First—the governor leaves New York to attend a meeting convened by the President to include all state governors to address homeland security concerns in response to terrorist attacks in the United States. In the governor's absence, the lieutenant governor approves, or vetoes, legislation, appoints people to public office and issues Executive Orders. Surely, you say, the lieutenant governor cannot undertake such action, but under Article IV as it presently stands, it can be argued the lieutenant governor can legitimately engage in such conduct as the governor is "absent from the state" and in that situation "the lieutenant-governor shall act as governor" until the governor returns.[9]

Second—the governor suffers an incapacitating illness or accident which prevents the governor from communicating and the resulting condition may last for a period of time; and the governor disputes that he or she is disabled, or is unwilling, or unable to declare his or her inability to govern. Of course, you say, the lieutenant governor steps in and automatically assumes the executive power. Not so fast as Article IV, while providing a transfer of all gubernatorial power to the lieutenant governor as acting governor when the governor is "otherwise unable to discharge the powers" of the office of governor,[10] does not define "inability" and does

not specify how and when such an "inability" is to be determined. What happens then?

Third—"X" is appointed lieutenant governor by the governor when the incumbent dies, as permitted by *Skelos*. If the governor were to die or otherwise resign, "X" becomes the governor and then "X" can appoint the lieutenant governor, "Y," creating an entirely unelected executive branch.[11]

While these scenarios have not occurred, been the subject of litigation, or been the cause of political strife or rancor, their underlying structural deficiencies need to be addressed, as if any one of the above scenarios do occur, New York will experience a crisis that dwarfs Albany's much bally-hooed "dysfunction."[12] They are matters that can and should be discussed and voted on at a constitutional convention. This article will discuss these matters and various approaches that can be implemented to address them in order to highlight the need for a constitutional convention in 2017.[13]

II. ABSENCE OF GOVERNOR FROM STATE

As noted above, Article IV provides that "[i]n case the governor is . . . absent from the state [. . .], the lieutenant governor shall act as governor until the inability shall cease or until the term of the governor shall expire."[14] This provision gives the lieutenant governor full, albeit temporary, responsibility for the exercise of the powers and duties given to the governor. As acting governor, the lieutenant governor is free to act on whatever matters he or she determines need attention during the governor's absence from the state. Thus, if action taken by the lieutenant governor is within the powers vested in the governor by Article IV, the action is valid.[15]

The origin of the "absent from the state" provision dates back to when the Dutch controlled New York (then New Amsterdam) and the chief executive was a director general appointed by the Dutch West India Company and he had a vice director general whose commission provided that he was to fill the director's place "in the absence of the said Director."[16] When New York became a British colony, the Crown appointed a governor to govern New York, and a lieutenant governor whose primary function was to act during the governor's absence, or in case of the death of the governor until a new governor was appointed.[17] New York's first constitution, the New York Constitution of 1777, which replaced the Colonial Charter, continued the offices of governor and lieutenant governor and

provided, among other things, that if the governor were absent from the state, the lieutenant governor would exercise the authority of governor until the absent governor returned.[18] This provision has been in every New York constitution since: Constitution of 1821, Article III, § 6; Constitution of 1846, Article IV, § 6; Constitution of 1894, Article IV, § 6.

Of note, the absence from colony or state provision was common in colonial practice and state constitutions which came into existence shortly after the Declaration of Independence.[19] Presently, 29 states contain an "absent from the state" provision which automatically affects a transfer of gubernatorial power to the lieutenant governor or other specified successor.[20]

While there is little express historical documentation as to what the framers of the Constitution of 1777 were attempting to achieve by this provision, the pattern of thinking in other states in that era, as discerned from their inclusion of similar provisions in their original constitutions, strongly suggests its purpose. In this regard, these provisions were adopted at a time of limited means of communication and travel, which resulted in the governor not being able to exercise the executive power vested in him when traveling outside the state to conduct state business or to attend to personal affairs.[21] The framers of the initial state constitution wanted no interregnum; someone must always be capable of exercising executive power.[22] That this was also the intent of the framers of the Constitution of 1777 cannot be gainsaid.

Certainly, this purpose of the provision at the time it was enacted and as continued in subsequent decades was laudable. However, now the provision appears to be unnecessary due to modern conditions of travel, e.g., planes, trains and automobiles, and the present "Digital Age" of communication, e.g., fax, email, text messaging, video-conferencing, Skype, as compared to the long-gone horse and buggy and limited telephone service era, which permit a governor to exercise gubernatorial power while outside the state, as well as outside the United States.[23] While that alone may not be problematic, a troublesome situation, indeed crisis, could occur when, as suggested in the first scenario mentioned in Part I, the lieutenant governor goes "rogue" and acts in a manner that conflicts with announced gubernatorial or legislative policy.[24] The situation would be even worse if the lieutenant governor in such a situation was not elected but appointed, as permitted under *Skelos.* While such a situation has not occurred in New York, other states with state constitutions that contain such a provision have experienced and endured such a scenario;[25] and recent events in New York belie the non-likelihood of a lieutenant governor going rogue. The

question then is what is the best approach to take to prevent such a scenario from occurring?

Initially, it should be noted that an interpretation of "absent from the state" by the New York State Court of Appeals could eliminate any need for constitutional amendment while preserving its historical role in modern times. In this regard, the words can properly be construed to mean "effective absence," i.e., presence outside the state which prevents the governor from exercising gubernatorial power. Examples would be when the governor is incommunicado, e.g., in a jungle or mountain wilderness, isolated by a natural disaster or other catastrophic event, or the result of a total communications failure.[26] Such an interpretation is a reasonable one as it invokes and relies upon the original goal of the provision—ensure there is someone able to exercise gubernatorial power—and applies it to present-era travel and communication. Notably, several state courts have so interpreted the provision as contained in their state constitutions.[27]

While their interpretation is a reasonable one, it can be viewed as "judicial activism" by which a constitutional provision and its original purpose are improperly "modernized" through judicial fiat.[28] For this reason, other state courts have rejected such a construction. Instead, they have construed the provision in accordance with its literal common meaning to mean any physical absence from the state.[29] Under this construction if the governor were to leave the state whether for a short period of time, e.g., one day or even one hour, irrespective of the reason for leaving the state, all gubernatorial power devolves to the lieutenant governor. In further support of this construction, these courts note a "conceptual difficulty" with the effective absence standard, namely, "virtually any physical absence of the governor may create a need for action by an acting governor, at least to deal with emergencies."[30]

There is no judicial authority in New York interpreting the provision. But a case can be made for the adoption by a New York state court of the "effective absence" interpretation of the phrase. This position is based upon other language in Article IV, § 5, namely, "[i]n case the governor is . . . absent from the state or is *otherwise unable to discharge the powers and duties of the office of governor*, the lieutenant governor shall act as governor until the *inability* shall cease or until the term of the governor shall expire."[31] As the Law Revision Commission has stated: "The words 'otherwise unable,' used in conjunction with 'is absent from the state', imply that the authors of this section intended 'absent' to mean 'an absence during which the governor is unable to discharge the powers and duties [of the office of governor]."[32] This conclusion is further supported

by the use of the words "until the inability shall cease," together with the absence of the word "return" of the governor to the state, and a review of this succession provision as contained in earlier New York constitutions, specifically, the Constitution of 1777, Article XX, the Constitution of 1821, Article III, § 6, the Constitution of 1846, Article III, § 6.[33]

Nonetheless, it is not a foregone conclusion that the above argument will ultimately prevail in the courts; and in any event resort to the courts after the crisis has occurred may not be the best course of action. Rather, the most appropriate means to update this provision is through a constitutional amendment.[34]

As to the scope of such an amendment, the Law Revision Commission's recommendation—amend Article IV, § 5 by deleting the phrase "is absent from the state"—deserves serious consideration.[35] Why? The speed of modern modes of communication and transportation, which permit prompt response to matters that need immediate action, has obviated the need for this gubernatorial succession provision; and its retention, as previously discussed can only lead to uncertainty and the potential for abuse.[36] To the extent a governor may be incommunicado and there is a need for the lieutenant governor to exercise gubernatorial power, the phrase "unable to discharge the powers and duties of the office of governor" will effect the transfer of gubernatorial power.[37]

III. TEMPORARY GUBERNATORIAL INABILITY

Article IV effects a transfer of all gubernatorial power to the lieutenant governor as acting governor, in addition to when the governor is "absent from the state," when the governor is "otherwise unable to discharge the powers" of the office of governor.[38] It further provides that this exercise of gubernatorial power is for a limited tenure since it specifies that the gubernatorial power given to the lieutenant governor ends when the "inability shall cease."[39] Notably, Article IV does not specify or otherwise define what constitutes an "inability," and as well who is the judge of its occurrence and of its termination in the absence of a voluntary declaration of inability by the governor. Nor is there any statutory provision that addresses these issues. Resolution of these issues is an open issue.

The absence of coverage of these issues is surprising and as well disturbing. Referring to the second scenario posited in Part I, if the governor were so disabled and unable to function effectively that the governor were unable to make a voluntary declaration of inability to govern or were competent to do so but refused to do so, there is no mechanism to transfer

gubernatorial power to the lieutenant governor. The state would be left without leadership and depending upon the nature of the inability the lack of leadership could extend for a lengthy period of time, at least up until the next gubernatorial election. Such a situation would put the state in crisis mode and one could safely say that "dysfunctional" would be inadequate to describe the situation.

How did New York arrive at this situation? Analysis starts with the origin of this inability provision. Of note, this succession provision was not contained in the New York Constitution of 1777. Only "impeachment of the governor, or his removal from office, death, resignation, or absence from the State" were enumerated as triggering events.[40] Contemporaneously enacted state constitutions contained identical contingencies with only North Carolina, Delaware, and Virginia also including an inability to govern contingency.[41]

Inability to discharge gubernatorial power first became a contingency in the New York Constitution of 1846.[42] Its origin can be traced to Article II, § 1, clause 6 of the United States Constitution which provides in pertinent part that "[i]n case of . . . inability [of the President] to discharge the powers and duties of the said office, the same shall devolve on the Vice President . . . ."[43]

This presidential succession provision was the subject of much discussion during the Constitutional Convention of 1787.[44] It was clearly intended to address the situation where the President suffers an affliction, mental or physical, which impairs the President's ability to thrive, make decisions and govern the country.[45] However, while concern was expressed about the extent of impairment necessary to trigger the transfer of presidential power to the Vice President and how that determination was to be made, these concerns were not fully addressed either at the Constitutional Convention or in the constitutional provision.[46]

It was not until the mid-1960s that these deficiencies were fully addressed during the congressional debate on the Twenty-Fifth Amendment.[47] As ratified in 1967, the Amendment clarifies provisions relating to presidential disability as well as provisions concerning succession to the presidency and the vice presidency. It provides that upon the removal of the President from office, or the President's death or resignation, the Vice President shall become President;[48] and when the office of Vice President is vacant, the President shall nominate a Vice President who will take office upon the confirmation by a majority vote of both houses of Congress.[49]

Where the President is "unable to discharge the powers and duties" of the office of President, two methods for temporary presidential succession are provided for.[50] As the Amendment is read in its entirety, this provision relates to the inability to perform the presidential duties for some reason other than removal, death or resignation, e.g., a physical or mental disability, either of a temporary or permanent nature.

As to such a disability these methods, first, if able and willing to do so, the President may provide for the temporary transfer of presidential power to the Vice President, who becomes the Acting President, by transmitting a written declaration of an inability to discharge the presidential duties to the Temporary President of the Senate and the Speaker of the House.[51] This assumption of presidential power continues until the President submits a written declaration that the inability no longer exists.[52]

Second, where a voluntary declaration of inability is not made or is not forthcoming, a declaration of presidential inability can be made by joint action of the Vice President and a majority of the President's Cabinet or "such other body as Congress may by law provide," upon which the Vice President becomes Acting President.[53] The President may then resume the powers and duties of the office by transmitting a letter to the Temporary President of the Senate and the Speaker of the House declaring that no inability exits, unless the Vice President and a majority of the President's Cabinet or other body designated by Congress once again submit a written declaration of inability to the congressional leadership, within four days. Congress would then become the final arbiter as to the President's ability to resume office as it is charged with determining by a two-thirds majority of both the Senate and the House of Representatives whether the President is unable to discharge the presidential duties and in the absence of such a majority the President shall resume the presidency.[54]

In the aftermath of the ratification of the Twenty-Fifth Amendment, 31 states have established procedures for implementing the general gubernatorial "inability" language of their constitutions, including a voluntary declaration of inability.[55] The 20 states providing for a voluntary declaration of inability closely adhere to the procedure set forth in the Twenty-Fifth Amendment.[56] As to an involuntary declaration of inability, a wide variety of approaches have been implemented.[57] They show differences not only as to the initiation of the process but also as to how "inability" is to be determined. As to the latter, while most state constitutions provide for the highest court of the state to make the final determination of inability, others have delegated it to the state legislature, state executive offi-

cials, or a disability commission composed of public officials and medical experts.[58]

New York is one of 19 states that have not established procedures to implement the inability provision in their state constitution. Such absence reflects poor public policy and there is nothing that compels New York to maintain the *status quo.* To prevent such a situation and ensure no interruption in the continuity of government, a constitutional amendment providing for the creation of procedures relating to a determination of when the governor is unable to perform his or her duties is required. The only question relates to the nature and form of those procedures.

The Law Revision Commission in 1984, 1985, 1986, 1987 and 1988, upon an exhaustive study of the discussions and proposals leading to the passage of the Twenty-Fifth Amendment,[59] prior proposals put forth by state legislators, and the procedures in states having an "inability" provision in their state constitution, proposed a comprehensive procedural mechanism to implement the "unable to discharge" provision contained in Article IV, § 5.[60] The procedure is "weighted heavily in favor of the elected Governor, involves representation by all branches of government, and yet is limited to a two-step process."[61]

The Commission's proposal, like the Twenty-Fifth Amendment, provides a means for a voluntary declaration of inability to discharge the powers and duties of the office by the incumbent governor, in which event the gubernatorial power would be exercised by the lieutenant governor as acting governor.[62] In such a situation the governor shall resume the exercise of gubernatorial power merely by a subsequent declaration that the inability has ceased. In a situation where the governor cannot or will not voluntarily declare his or her inability to govern, the Commission proposes an adjudication of the issue upon the written declaration, transmitted to the Chief Judge of the Court of Appeals by the lieutenant governor, the Temporary President of the Senate, the Speaker of the Assembly and the minority leader of each House of the Legislature, that in their unanimous opinion the governor is unable to discharge the power and duties of his or her office, together with the reasons for that opinion.[63] If gubernatorial inability is controverted, the Court of Appeals would convene to adjudicate the matter.[64] Once there has been an adjudication of inability, the lieutenant governor would become acting governor pursuant to the existing provision in Article IV, § 6. Gubernatorial power would be restored to the governor upon the unanimous written declaration of the lieutenant governor, now the acting governor, and the four legislative leaders that such inability has ceased or upon an adjudication by the Court of Appeals

that such inability has ceased, which adjudication is initiated by the Governor by a written declaration transmitted to the Chief Judge that no inability exists.[65]

The rationale for the Commission's proposal some 30 years after it was initially released in 1984 remains well-reasoned. Of note, most state disability provisions give their state's highest court a major role, as does the Commission.[66] To be sure, there is room to consider modifications and alternatives to the Law Revision Commission's proposal.[67] Nonetheless, it is an appropriate start to correct a glaring omission in the New York State Constitution.

IV. VACANCY IN THE OFFICE OF LIEUTENANT GOVERNOR

When there is a vacancy in the office of lieutenant governor, Article IV, § 6 provides that "the temporary president of the Senate shall perform all the duties of lieutenant governor during such vacancy." Since the duties of the lieutenant governor are assumed by the Temporary President of the Senate when there is no lieutenant governor, the general understanding prior to the Court of Appeals' decision in *Skelos,*[68] decided in September 2009, was that the Constitution did not mandate that the office be filled prior to the next general election of governor and lieutenant governor.[69] In this regard, it is worth noting that from 1777 to 2009 there had been at least 10 occasions when the office became vacant and the governor on those occasions did not seek to appoint a successor.[70]

However, the Court of Appeals in *Skelos*, as previously mentioned, held that the vacancy could be filled prior to a general election through an appointment by the governor. In so holding it upheld the appointment by Governor Paterson, who himself had become governor from his office of lieutenant governor upon the resignation of Governor Spitzer, of Richard Ravitch, a private citizen to the office of lieutenant governor, who had not previously held an elected position.[71] Notably, since this appointing power was found to exist solely by reason of § 43, Mr. Ravitch was not subject to any legislative confirmation or even vetting. Thus, under *Skelos* the governor has the unrestricted right to designate his or her own successor, which leads to the distinct possibility that the "citizens of this State will one day find themselves governed by a person who has never been subjected to scrutiny by the electorate, and who could in turn appoint his or her own unelected lieutenant governor."[72]

This unprecedented appointment by Governor Paterson and its approval by the Court of Appeals has been criticized as reflective of bad public policy.[73] Indeed, even those supportive of the Court of Appeals' finding of an appointive power in the Public Officers Law have not embraced the result.[74] This is an anomalous result, inconsistent with democratic process.[75]

What should be done then to correct this anomalous situation? One matter that should not create controversy is to recognize initially that it is surely good policy to fill a vacancy in the office of lieutenant governor as rapidly as possible instead of having the Temporary President of the Senate, or the Speaker of the Assembly as next-in-line, assume the duties of the office upon a vacancy, as currently provided in Article IV, § 6. This approach is preferable to waiting until the next general election at which a lieutenant governor can be elected or even conducting a special election for the office.[76] As the Law Revision Commission has observed:

> [Present] arrangement is not adequate inasmuch as the Temporary President of the Senate already has substantial responsibilities as legislative leader and may be of a different political party from the Governor. It would not be likely under such circumstances for a Temporary President of the Senate or a Speaker of the Assembly to play the kind of role contemplated for a Lieutenant Governor who is jointly elected with the Governor. There would be limited opportunity for a Governor to delegate administrative tasks to a legislative leader serving simultaneously as Lieutenant Governor.[77]

Nor is it bad policy to allow the governor to appoint a person to fill the vacancy. Executive office comity and the need to assure policy continuity in the event of a vacancy in the office of governor, augur in favor of a gubernatorial appointive power. The Law Revision Commission has so concluded, noting that "this philosophy is embraced in the 25th Amendment to the federal Constitution and was partly recognized in New York State by the adoption of the requirement of a joint election for Governor and Lieutenant Governor."[78]

This appointive power would, however, have a check on it, namely, the governor's appointee would need to be approved by the legislature. While this approach does not have direct electoral input into filling the vacancy, there is indirect electoral input as the members of the legislature are elected and responsible to their voters at the next general election for their

votes. Moreover, there would necessarily be vetting of the appointee before a confirmation.

As to legislative approval, a model would be the Twenty-Fifth Amendment which provides for the President's appointee to be subject to confirmation by both Houses of Congress. The Senate and Assembly would vote separately, i.e., by concurrent resolution, rather than joint ballot in joint session. This method, as suggested by the Law Revision Commission, is preferable as each house of the Legislature is given equal status.[79] Another method would be the manner in which vacancies in the offices of Comptroller and Attorney General are filled which requires a vote by the entire legislature through a joint ballot.[80] This method has been criticized as "rife with inherent conflicts, biases, and problems."[81]

In sum, while there is apparent unanimity that the *Skelos* decision reflects poor public policy and needs to be changed, there are various proposals for achieving such change.[82]

V. CONCLUSION

This chapter has shown that there is a need for a careful and comprehensive consideration of changes to issues of gubernatorial and lieutenant gubernatorial succession. Such changes must be accomplished by amendments to the operative provisions in Article IV of the State Constitution. Furthermore, such amendments should be addressed together and not separately to avoid undesirable piecemeal reform efforts. As these amendments concern matters of critical importance to the State, they warrant a constitutional convention.

1 N.Y. CONST. art. IV, § 1.

2 *Id.*

3 N.Y. CONST. art. IV, § 5. Further gubernatorial succession from the lieutenant governor is provided for in N.Y. CONST. art. IV, § 6, which specifies that gubernatorial succession from the lieutenant governor is to the Temporary President of the Senate and then to the Speaker of the Assembly, and the situations when that succession will occur. N.Y. CONST. art. IV, § 6.

4 N.Y. CONST. art. IV, § 2.

5 N.Y. CONST. art. IV, § 3.

6 N.Y. CONST. art. IV, § 6.

7 *Skelos v. Paterson*, 915 N.E.2d 1141 (N.Y. 2009).

8 *Id.* at 1144.

9 N.Y. CONST. art. IV, § 5.

10 N.Y. CONST. art. IV, § 5.

11 Patrick A. Woods, Comment, Automatic Lieutenant Gubernatorial Succession: Preventing Legislative Gridlock Without Sacrificing the Elective Principle, 76 ALB. L. REV. 2301, 2305 (2013).

12 *See, e.g.*, Greg David, *The Root Cause of Albany's Dysfunction*, CRAIN'S N.Y. BUSINESS (Jun. 28, 2015, 12:01 AM), http://www.crainsnewyork.com/article/20150628/BLOGS01/150629906/the-root-cause-of-albanys-dysfunction.

13 This chapter draws upon the author's prior article on these matters. *See* Michael J. Hutter, "*Who's in Charge?": Proposals to Clarify Gubernatorial Inability to Govern and Succession*, NYSBA GOV'T, L. & POL'Y J., Spring 2010, at 28. It also draws upon several Reports of the Law Revision Commission: 1984 Report of NYS Law Revision Commission: Memorandum and Recommendation Relating to Gubernatorial Inability and Succession; 1985 Report of NYS Law Revision Commission: Memorandum and Recommendation Relating to Gubernatorial Inability and Succession; 1986 Report of NYS Law Revision Commission: Memorandum and Recommendation Relating to Gubernatorial Inability and Succession; 1987 Report of NYS Law Revision Commission: Memorandum and Recommendation Relating to Gubernatorial Inability and Succession; Recommendation of the Law Revision Commission to the 1988 Legislature: Relating to Filling a Vacancy in the Office of Lieutenant Governor; and 1989 Report of NYS Law Revision Commission: Memorandum and Recommendation. 1984 N.Y. Sess. Laws 2946 (McKinney) [hereinafter *1984 Report*]; 1985 N.Y. Sess. Laws 2534 (McKinney) [hereinafter *1985 Report*]; 1986 N.Y. Sess. Laws 2508 (McKinney) [hereinafter *1986 Report*]; 1987 N.Y. Sess. Laws 1789 (McKinney) [hereinafter *1987 Report*]; 1988 N.Y. Sess. Laws 1778 (McKinney) [hereinafter *1988 Report*]; 1989 N.Y. Sess. Laws 1611 (McKinney) [hereinafter *1989 Report*].

14 N.Y. CONST. art. IV, § 5.

15 *See* In re Comm'n on the Governorship of Cal., 603 P.2d 1357, 1364 (Cal. 1979) (providing the Lieutenant Governor of California with the powers vested in the governor under the California Constitution, when the lieutenant governor must "act as governor").

16 *See 1987 Report*, *supra* note 13, at 1803.

17 *See* Charles Z. Lincoln, 4 CONSTITUTIONAL HISTORY OF NEW YORK 492 (1906).

18 N.Y. CONST. of 1777, art. XX.

19 See John D. Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, 32 FORD. L. REV. 73, 77–78 (2015).

20 See Calvin Bellamy, Presidential Disability: The Twenty-Fifth Amendment Still an Untried Tool, 9 B.U. PUB. INT. L.J. 373, 382 (2000).

21 *See, e.g.*, Walls v. Hall, 154 S.W.2d 573, 577 (Ark. 1941); Bratsenis v. Rice, 438 A.2d 789, 791 (Conn. 1981). *See also* Peter J. Galie & Christopher Bopst, *Constitutional "Stuff": House Cleaning the New York Constitution - Part I*, 77 ALB. L. REV. 1385, 1420 (2014).

22 *See* Ex parte Crump, 135 P. 428, 433 (Okla. Crim. App. 1913) ("In all regular governments there is no interregnum, and there should always be some one capable of administering the laws at the head of the government.").

23 Galie & Bopst, *supra* note 21, at 1420; Report of the Task Force on the New York State Constitutional Convention, 52 THE RECORD 523, 584 (1997).

24 Galie & Bopst, *supra* note 21, at 1421.

25 *See, e.g.*, *Walls*, 154 S.W.2d at 574; In re Comm'n on the Governorship of Cal., 603 P.2d 1357, 1360 (Cal. 1979); Montgomery v. Cleveland, 98 So. 111, 111 (Miss. 1923); Sawyer v. First Judicial Dist. Court, 410 P.2d 748, 748 (Nev. 1966); *Ex parte Crump*, 135 P. at 436; s*ee also* Ira H. Lurvey, *Absent Officials: No Carte Blanche for Successors*, 15 EMORY J. PUB. L. 324 (1966) (collecting cases).

26 *See In re Comm'n on the Governorship of Cal.*, 603 P.2d at 1367 (Newman, J., concurring).

27 *See, e.g.*, Markham v. Cornell, 18 P.2d 158, 162–163 (Kan. 1933); State ex rel. Ashcroft v. Blunt, 813 S.W.2d 849, 853 (Mo. 1991); Johnson v. Johnson, 3 N.W.2d 414, 415 (Neb. 1942); *Sawyer*, 410 P.2d at 750.

28 See In re Comm'n on the Governorship of Cal., 603 P.2d at 1363.

29 *See e.g.*, *Walls*, 154 S.W.2d at 577; *In re Comm'n on the Governorship of Cal.*, 603 P.2d at 1362; Bratsenis v. Rice, 438 A.2d 789, 791 (Conn. 1981); *Montgomery*, 98 So. at 114; Ex parte Hawkins, 136 P. 991, 993 (Okla. Crim. App. 1913).

30 In re Comm'n on the Governorship of Cal., 603 P.2d at 1363.

31 N.Y. CONST. art. IV, § 5 (emphasis added).

32 *1984 Report*, *supra* note 13, at 2959.

33 *Id.* at 2960.

34 *See* Jason A. Cabrera, Note, *The Right and Wrong Ways to Reform the Gubernatorial Absence Provision of the New Jersey Constitution*, 44 RUTGERS L.J. 271, 295 (2014) (advocating for a constitutional amendment to update New Jersey's "absent from the state" provision).

35 *1984 Report*, *supra* note 13, at 2961.

36 *See* Galie & Bopst, *supra* note 21, at 1421 (urging repeal of this obsolete provision); *Report of the Task Force on the New York State Constitutional Convention*, *supra* note 23, at 584 (urging repeal of this obsolete provision).

37 N.Y. CONST. art. IV, § 5; *1984 Report*, *supra* note 13, at 2961.

38 N.Y. CONST. art. IV, § 5.

39 *Id.*

40 N.Y. CONST. of 1777 art. XX.

41 *See* Feerick, *supra* note 19, at 81–87.

42 N.Y. CONST. of 1846 art. IV, § 6.

43 U.S. CONST. art. II, § 1.

44 *See* Feerick, *supra* note 19, at 81–87.

45 *See id*.

46 *Id.* at 83.

47 *See* Bellamy, *supra* note 20, at 379–380. The underlying debates are fully discussed in JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT (2d ed. 1992).

48 U.S. CONST. amend. XXV, § 1.

49 U.S. CONST. amend. XXV, § 2.

50 U.S. CONST. amend. XXV, §§ 3, 4.

51 U.S. CONST. amend. XXV, § 3.

52 *Id.*

53 U.S. CONST. amend. XXV, § 4.

54 *Id.*

55 *See* Bellamy, *supra* note 20, at 386.

56 *Id*.

57 *Id*. at 386–87.

58 *Id*.

59 During the preparation of this Report, the Commission was ably guided by the experience of a Commission member, John D. Feerick, who was actively involved in the drafting of the Twenty-Fifth Amendment.

60 *1984 Report*, *supra* note 13, at 2964–66.

61 *Id.* at 2958.

62 *Id*. at 2964–65.

63 *Id*. at 2965.

64 *Id*.

65 *Id*. at 2965–66.

66 Bellamy, *supra* note 20, at 391.

67 *Id*. at 398–406 (discussing alternate approaches and modifications).

68 Skelos v. Paterson, 915 N.E.2d 1141 (2009).

69 *See* Letter from Jerry H. Goldfeder, Chair of the Committee on Election Law of the Bar of the City of New York, to Charles O'Byrne, Secretary to the Governor (July 1, 2008), http://www.nycbar.org/pdf/report/Governor_re_Succession.pdf; Statement of Attorney General Cuomo Regarding Lieutenant Governor Appointment Proposal (July 6, 2009), http://ag.ny.gov/press-release/statement-attorney-general-andrew-cuomo-regarding-lieutenant-governor-appointment; *1987 Report*, *supra* note 13, at 1812.

70 *Skelos*, 915 N.E.2d at 1152 (Pigott, J., dissenting).

71 *Id*. at 1142 (Lippman, J., majority opinion).

72 *Id*. at 1147 (Pigott, J., dissenting).

73 *See, e.g*., James A. Gardner, *New York's Inbred Judiciary: Pathologies of Nomination and Appointment of Court of Appeals Judges*, 58 BUFF. L. REV. 15, 24 n.26 (referring to the appointment as a "disgraceful capitulation" to the Governor); Eric Lane & Laura Seago, *Albany's Dysfunction Denies Due Process*, 30 PACE L. REV. 965, 984 (2010) (describing decision as resting on "thin law"); Michael J. Hutter, *Hijacking High Office*, N.Y. POST (July 11, 2009), http://nypost.com/2009/7/11/hijacking-high-office (referencing appointment power reminiscent of discredited divine right of a king to appoint his successor recognized in medieval times).

74 *See, e.g*., Richard Briffault, Skelos v. Patterson*: The Surprisingly Strong Case for the Governor's Surprising Power to Appoint a Lieutenant Governor*, 73 ALB. L. REV. 675, 699 (2010) ("Judge Pigott was right to worry that an unelected lieutenant governor could become an unelected governor.").

75 *See* 1943 N.Y. Op. Att'y Gen. 378, 382 (Aug. 2, 1943).

76 *See Report of the Task Force on the New York State Constitutional Convention*, *supra* note 23, at 588 (noting the high cost of such an election and the possibility of a lieutenant governor being elected who is of a member of a political party at odds with the governor).

77 *1987 Report*, *supra* note 13, at 1811.

78 *Id*. at 1812.

79 *Id*. at 1814.

80 *See* N.Y. PUB. OFF. § 41 (McKinney 2016).

81 Daniel Levin, Note, Improving the New York State Constitution: A Practical Solution for Choosing a New Attorney General and Comptroller During a Vacancy, 5 ALB. GOVT. L. REV. 914, 924 (2012).

82 *See generally* Woods, *supra* note 11, at 2308–20 (considering alternate proposals).

CHAPTER EIGHT

POSITIVE RIGHTS IN THE NEW YORK STATE CONSTITUTION: SOCIAL WELFARE AND EDUCATION

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In a nation of substantial and increasing economic inequality, New York stands out as the state with the largest disparities between rich and poor.[2] Such economic disparities may translate into inequalities in political influence by generating big differences in voting, campaign contributions, and other forms of political influence. They may also undermine political support for public policies aimed at assisting low-income people and disadvantaged communities.

Constitutions and courts might counter the reinforcing effects of economic and political inequality by establishing and enforcing rights available to all persons, including the poor. Many rights are procedural, such as due process, or negative, such as the right to engage in an activity without governmental interference. Some rights are considered "positive," obligating the state to provide some good or service to the holder of the right.[3] Positive rights in a state constitution can promote greater public services to economically and politically disadvantaged persons, even those who have no voting rights. But this is not a simple process. It may involve intense debate, require skilled and persistent advocacy organizations, and raise complicated questions about the relative powers of the different branches of government.

New York's constitution includes several provisions that appear to create positive rights. In this chapter, we examine the state's experiences with two of them: Article XVII, which mandates that the state provide "aid, care and support" to the needy; and Article XI, which requires the state to create a "system of free common schools, wherein all the children of this state may be educated." The New York courts, legislature, and executive branch have interpreted Article XVII to require state aid to *all* needy persons, including aliens not eligible for federal assistance, able-bodied low-income persons without dependent children, teenage mothers, and families who have been on public assistance for long periods of time. The courts have also interpreted Article XVII to require minimum standards in homeless shelters as well as a right to shelter for those in need. These and related policies have been incorporated into state law and implemented, though the shelter-related cases gave rise to a lengthy struggle over the adequacy of standards and supports. Article XI has led to a series of dramatic court decisions that established a right for all children in New York State to a "sound basic education." However, there has been little agreement across the three branches of government over what funding is needed to implement this mandate and whether or not the decisions have been implemented fully.

Although it is difficult to know how New York's social and education policies would differ in the absence of these two constitutional provisions, our overview suggests some plausible generalizations. First, even simple mandates can have broad policy impacts, many years after their constitutional adoption. Second, although the mandates are in a constitution and hard to change, their interpretations and applications can respond to a wide variety of new circumstances and issues. Third, constitutional mandates can strengthen the state's responsiveness to groups of individuals who are otherwise politically weak, such as those who are poor or ineligible to vote.

Fourth, some types of mandates are easier to implement than others. Mandates relating to eligibility for existing public benefits or services are easier to put into effect than mandates prescribing the levels of benefits or services. This difference may occur because mandates that can be incorporated into regulations, such as eligibility requirements, are easier to establish and sustain than mandates that require multiple public decisions across different institutions, such as how much funding is needed to provide a sound basic education in all school districts each year.

Fifth, constitutional guarantees of positive rights are not self-executing. The impact of constitutional mandates depends on other circumstances. For instance, several other states have constitutional provisions promoting aid to the needy, but those states (such as Alabama, North Carolina, Montana, and Louisiana) have not established the same extensive policies that New York has. It is possible that New York's political culture, wealth, and urbanism have allowed the courts to reach strong decisions about positive rights and see them implemented. In addition, there is little doubt that capable and persistent nonprofit advocacy organizations, such as the Campaign for Fiscal Equity, the Coalition for the Homeless, and the New York Legal Aid Society, were important in arguing and winning key cases and monitoring their impacts.

The effects of these constitutional provisions vary. Some types of policy changes are easier than others to influence, and political and institutional circumstances remain important. Yet state constitutions can influence the struggle for effective positive rights that address stubborn problems of fairness and inequality.

I. ORIGINS OF ARTICLE XVII

The social welfare article (Article XVII) in the New York State Constitution states in § 1 that the "aid, care and support of the needy are public

concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."[4] Article XVII was one of several progressive measures adopted at the 1938 constitutional convention aimed at strengthening state support for the economically disadvantaged. Other measures gave labor the right to organize and bargain collectively, and the right to an eight-hour day, five-day week at prevailing wage rates in public works projects. The convention also proposed amendments recognizing the state's role in protecting and providing for the mentally handicapped and in providing low-rent housing.[5]

Article XVII was intended to remove constitutional doubt about the state's responsibility to the needy and to "set[ting] down explicitly in our basic law a much needed definition of the relationship of the people to their government."[6] The article was proposed by the convention and adopted by the people after a long history of state efforts to consolidate, strengthen, and professionalize its role in providing for needy residents and strengthening those who are economically weak.[7]

These efforts were sometimes curtailed by the courts. In *People v. Westchester County National Bank* (1921), for example, the New York Court of Appeals ruled that the state could not issue bonds to provide bonuses to veterans of World War I. The U.S. national government had a moral obligation to the veterans, but the State of New York did not, the Court reasoned. The bonuses were a gift, according to the Court, and the constitution did not allow the credit of the state to "be given or loaned to or in aid of any individual, association or corporation."[8] The Court's ruling led to different interpretations about the state's authority to provide assistance to the needy, and the Article was adopted to end uncertainty about whether the judiciary would accept the State's efforts to relieve the destitution resulting from the Great Depression.

Its proponents did not intend the Article to be an end-run around the legislative process or a shift of power to the state judiciary. Yet it was intended to bind the legislature to honor its promises regarding aid to the needy. The obligation was mandatory, explained Edward F. Corsi, chairman of the Committee on Social Welfare, who introduced the amendment at the convention. The legislature had discretion, but "[w]hat it may not do is to shirk its responsibility which, in the opinion of the committee, is as fundamental as any responsibility of government."[9]

II. JUDICIAL INTERPRETATION OF ARTICLE XVII

Extensive public support for poor and other needy persons has long been a feature in New York State politics. New York is among the most generous states in supporting poor and near-poor individuals.[10] For instance, by one calculation, the state's maximum monthly benefit for families of three under the federal Temporary Assistance for Needy Families was $789 in 2014, 84 percent higher than the median state's benefit for a family of three.[11] Its earned income tax credits, housing subsidies, child care subsidies, and other benefits for low-income persons contribute to the fact that New York State's spending, per poor person, on need-based public welfare programs has long been at or near the top of all states.

It is not puzzling that New York State developed a generous safety net for needy persons. New York is a wealthy state with a large tax base and a highly urbanized population.[12] The state's Republican Party has been losing electoral strength for over half a century.[13] In comparative studies of states, these characteristics have been associated with greater and more widely distributed benefits for the needy.[14] It is likely that the state would have had a generous safety net if Article XVII had never existed. However, although the courts have acknowledged the legislature's role in establishing social welfare policy, they have not always deferred to elected officials and have carved out a sphere of judicial influence emphasizing the Article's mandate to aid those deemed needy.

Beginning in the 1970s, New York State courts made clear that Article XVII establishes a fundamental government obligation to aid needy persons, and that competing public interests cannot easily override that obligation. In *Tucker v. Toia* (1977), the New York Court of Appeals determined that Article XVII prevents the legislature from denying aid to needy individuals based on criteria unrelated to economic need. The case involved a state law adopted in 1976 that denied home relief to minor children who were not living with both parents and had not obtained an order showing that the absent parent was not responsible for their support. In many cases the minor children did not know where the parent was living, and it was difficult if not impossible for them to obtain these orders.[15]

The plaintiffs, in this case teen mothers, argued that the statute violated Article XVII of the New York State constitution. They met the criteria for economic need yet had been denied aid on unrelated grounds. The State responded that the statute rested on its compelling interest for fiscal sav-

ings. It also argued that the constitutional provision was "wholly precatory" and that the intent "was to declare no more than a statement of the State's good intentions."[16]

The Court of Appeals did not find the State's argument convincing. It held that "[i]n New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution." Both the legislative history and the plain words of the article made it clear, according to the Court, that "section 1 of article XVII imposes upon the State an affirmative duty to aid the needy." The legislature had discretion to define "needy", classify recipients, and determine the amount of aid provided. But it could not then refuse to provide aid to those who met the criteria of need. The Court agreed that the statute's purpose of achieving fiscal savings was valid, but savings could not be achieved by ignoring the "realities of the needy's plight and the State's affirmative obligation to aid all its needy."[17]

Tucker set a high bar for justifying denials of assistance to needy persons; other cases reinforced this finding. In *Jones v. Berman* (1975), the Court of Appeals found that counties may not shirk their responsibility to aid needy individuals, who in this case lost their federal and state assistance and requested emergency help from the counties, because higher levels of government refused to share the costs of the assistance. Similarly, the Court decided in *Lee v. Smith* (1977) that the state may not provide less assistance to aged, disabled, or blind persons receiving benefits under the federal Supplemental Security Income program than it gives to persons in comparable economic circumstances who receive support under the state's home relief program simply in order to save state funds and minimize administrative burdens.[18]

Although the Court determined that Article XVII and the equal protection clause require New York to provide comparable assistance to those who meet similar standards of need, it has also ruled that the state legislature has discretion in determining *who* is needy. In *Barie v. Lavine* (1976), the Court of Appeals ruled against a plaintiff, judged by the state to be employable, who lost her home relief benefits when she refused a job referral. The Court decided that the legislature may deny aid to "employable persons who may properly be deemed not to be needy when they have wrongfully refused an opportunity for employment."[19]

The state also has discretion in how it treats income and assets when establishing need. In *Queal v. Perales* (1984, 1986), the courts ruled that the state may deny aid to a family due to the mother's receipt of $2,000

from a divorce settlement even though she had already spent the money. The settlement money should have lasted longer, argued the defendants, and the Court agreed that it was the "obligation of these departments to preserve the public fisc by compelling recipients of public assistance to utilize their own resources for their support."[20] In *Jones v. Blum* (1985), the Court of Appeals affirmed the Appellate Division's ruling that the state may deny aid to those whose gross income was more than 150 percent of the need standard even though work-related expenses meant that the family's available income fell below the standard. "[T]he Legislature acted within its broad discretion," wrote the Appellate Division, and its rule advanced a "proper legislative objective of allocating the ever more scarce resource of welfare funds to only those persons incapable of maintaining their basic needs."[21]

According to the courts, Article XVII also gives the legislature discretion in determining the benefits provided to needy persons. In *Bernstein v. Toia* (1977), New York City petitioners owed rent payments that exceeded the maximum shelter allowances offered by the city and state. Ruling against the plaintiffs, the Court of Appeals held that Article XVII does not apply to the "absolute sufficiency of the benefits distributed to each eligible recipient." The constitution gave the legislature authority over the "manner and means" of providing aid, and the state's use of a "flat grant" was a reasonable exercise of that discretion.[22] *RAM v. Blum* (1980) underlined this interpretation. The plaintiffs argued that because the legislature had not increased benefit levels to keep pace with inflation, it had not met its constitutional obligations under Article XVII. But the Appellate Division ruled that "[t]he Constitution of the State of New York grants to the Legislature the authority to establish the public assistance formula for this State."[23]

Despite these rulings, several homeless men, assisted by the nonprofit Coalition for the Homeless, filed a class action suit (*Callahan v. Carey*) in 1979 challenging the sufficiency and quality of homeless shelters for men in New York City.[24] The Supreme Court issued a preliminary injunction, directing the state and city to provide board and lodging to the men. The case was settled through the *Callahan* Consent Decree in 1981. The city defendants agreed to provide shelter to all homeless men who met certain eligibility requirements. The consent decree established minimal yet detailed standards for the shelters involved in the case, such as the size and cleanliness of the beds and the availability of first aid, security, and laundry services.[25] The Supreme Court later extended the decree's cover-

age to homeless women in *Eldredge v. Koch* (1983)[26] and homeless families with children in *McCain v. Koch* (1984).[27]

Although housing advocates often conclude that these cases established a right to shelter under Article XVII,[28] the courts have shied away from a straightforward declaration of such a right. The Supreme Court noted in *McCain v. Koch* that the constitutional obligation to provide aid to the needy was mandatory but also observed that Article XVII did not explicitly say that emergency shelter shall be given to the needy. The Court found, however, that because the city provided emergency shelter as a means of aiding the needy, it could compel compliance with minimal standards through the exercise of its equitable powers. The plaintiffs alleged that the emergency shelters provided by the City required them to sleep on soiled mattresses and dirty linens and in insect- and rodent-infested hotels. Hot water and heat were infrequent. Children were threatened by other occupants with knives, and they were placed in shelters far from their schools. "In a civilized society," the Court reasoned, "a 'shelter' which does not meet minimal standards of cleanliness, warmth, space and rudimentary conveniences is no shelter at all."[29]

The Appellate Division, when it reviewed the case, stated it was likely that the plaintiffs would succeed in their claim that Article XVII obligated the city to provide emergency shelter to homeless families. There was "ample evidence" that the city's "policy of only providing cash allowances and information concerning housing availability amounts to the denial of aid to homeless families," argued the Court, in violation of Article XVII. However, the Appellate Division overturned the Supreme Court's decision on the grounds that it had to follow the Court of Appeals' rulings in *Bernstein* and *Tucker*. These held that "the adequacy of the level of welfare benefits is a matter committed to the discretion of the Legislature." The Appellate Division lamented this result, though, because too many children were "put at risk in their physical and mental health, and subject to inevitable emotional scarring, because of the failure of City and State officials to provide emergency shelter for them which meets minimum standards of decency and habitability," and it hoped the Court of Appeals would reexamine these holdings.[30]

When the Court of Appeals issued an opinion on *McCain v. Koch* in 1987, it agreed with the Supreme Court rather than the Appellate Division without clarifying the constitutional issues. The Court held that the Supreme Court had the power to fashion equitable relief when city agencies failed to provide emergency housing for homeless families with children that met minimum standards of sanitation, safety, and decency. It

avoided the question of whether the city was constitutionally required to provide emergency housing by finding that this issue was not before the court. It got around the issue of judicial interference with legislative discretion regarding benefit levels by reasoning that because there were no departmental regulations at the time, the lower court established its own minimum standards. "Having done so, the court invoked its equitable powers to compel compliance," and the preliminary injunction "involved no encroachment on the legislative or executive prerogative."[31]

The courts also avoided any suggestion of a constitutional constraint on assistance levels in *Jiggetts v. Grinker* (1990).[32] The plaintiffs alleged that the shelter allowances they received through Aid to Families with Dependent Children (AFDC) were not high enough to cover their rent. Their landlords threatened them with eviction, and they were unable to find alternative housing. They argued that this prevented them from raising their children in their homes, a central purpose of AFDC.

The Court of Appeals ruled for the plaintiffs, but the case turned on Social Services Law § 350 (1) rather than Article XVII. The Court of Appeals found the statute to mean that the legislature intended the shelter allowances to keep families together in home-type settings; shelter allowances must then bear a reasonable relation to the cost of housing. The ruling led to a lengthy process of developing and enforcing remedies. In 1997, the Supreme Court found that the shelter allowance did not bear a reasonable relationship to housing costs, and the court ordered that the state must operate an interim relief system for families facing eviction until a lawful shelter allowance is implemented.[33] After increasing shelter allowances in 2003 as an interim measure, the state finally established a new program, the Family Eviction Prevention Supplement (FEPS) in 2005, which largely brought the litigation to an end.[34]

In sum, New York courts have given teeth to Article XVII by emphasizing that the state constitution mandates support for *all* the needy, even if those in need are not supported by federal legislation or are viewed as especially deserving individuals. The court decisions are less clear about the constitution's control over policy decisions regarding benefit or service levels. In general, the courts have offered the political branches of government considerable discretion in determining what levels of benefits and services the state owes to needy persons. There are big exceptions, most notably the quality of emergency shelters for homeless individuals in New York City, and the adequacy of shelter allowances, but in both of these areas, court decisions have relied primarily on non-constitutional grounds.

III. WELFARE REFORM AFTER PRWORA

In 1996, the federal government adopted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[35] Commonly called welfare reform, this act replaced AFDC with a block grant giving states flexibility to design cash assistance, non-cash benefits and services in order to encourage work, reduce dependence on public assistance, and encourage marriage and two-parent families.[36] To comply with PRWORA, Governor George Pataki's administration proposed changes in New York State's social services laws that were enacted as the Welfare Reform Act of 1997 (WRA).[37] Our interviews with past and present state officials and others involved in welfare policymaking confirm that interpretations of Article XVII by state elected officials and administrators influenced important policy proposals and eventual choices. In particular, two patterns in New York's response to PRWORA connect back to the state constitution. First, New York established nearly universal eligibility with similar benefits offered to persons regardless of citizenship status and other characteristics not related to economic need. Second, New York adopted relatively weak negative incentives to induce employable persons to comply with work and other behavioral requirements.

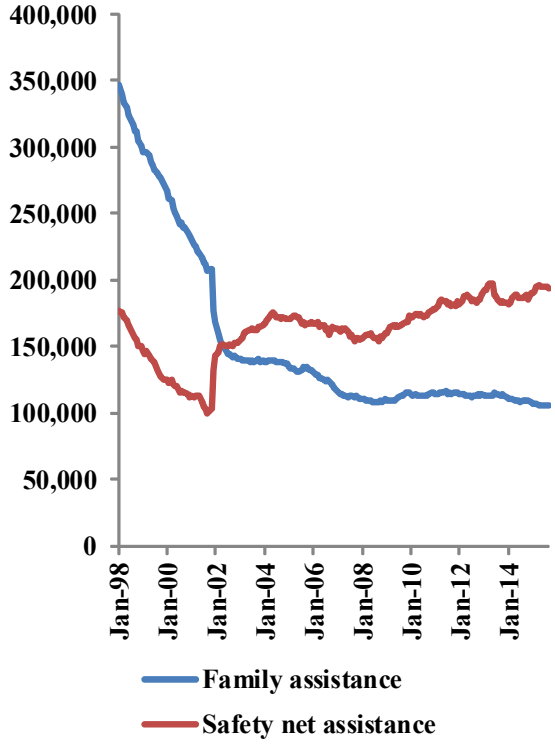
PRWORA imposed many restrictions on how federal block grant dollars could be used, including time limits on how long adult, employable recipients could receive assistance before being required to engage in work activities as well as a five-year lifetime limit on how long a family may remain on cash assistance. Yet PRWORA also offered states many choices. States were allowed to use the block grant and state funds to encourage work and minimize dependence. States could fund social services, work supports, and tax benefits to working families. States could modify earnings disregards and asset limits to encourage work and savings. They could adopt a child exclusion policy, or "family cap," which enables the state to *not* increase assistance to a family if a new child is born while the family is receiving aid. And they could strengthen incentives to comply with the new rules and expectations by imposing stronger sanctions on non-compliance, including "full family sanctions" that take away the entire cash grant to families whose adult heads fail to abide by the rules.

New York made several decisions under the Welfare Reform Act consistent with the main court interpretations of Article XVII. It did not adopt a "family cap," as New Jersey and 16 other states have done.[38] New York also did not adopt "full family sanctions." As of 2012, New York is one of only four states that does not withhold the entire benefit as the most

severe sanction it can impose on a family. Instead, its strongest penalty for noncompliance with work and other welfare rules is a six-month reduction in benefits.[39]

Perhaps most telling, New York did not impose lifetime limits on basic assistance, as nearly all other states did. Interviews with participants in and observers of the development of the WRA offer several reasons why the Pataki Administration was reluctant to propose limiting assistance based on length of receipt. Article XVII was a major factor and essentially "ended the conversation." Because the federal government prohibited states from using block grant funds to support adult caretakers after they received assistance for more than five years, aid beyond that time had to come from state funds. Persons and households who exceeded the lifetime limits thus had to be moved from "Family Assistance" (FA), the TANF program supported in large part by federal funds, to "Safety Net Assistance" (SNA). Safety Net Assistance was designed to be available to nearly all residents who met the standard of need, including not only persons who exceeded the five-year time limit on Family Assistance but also childless adults and couples, children living apart from any adult relative, families of persons who are found to abuse drugs or alcohol, and certain aliens not eligible for federal reimbursement.[40]

Figure 1. Number of family and safety net assistance cases by month in New York State, 1998-2015



One consequence is that SNA has now become the major public assistance program in New York State. As Figure 1 shows, while the number of FA cases in 1998 was twice the number of SNA cases, by 2015, the opposite was true.[41] The largest change occurred toward the end of 2001 and early 2002, when many families began to hit the time limits for FA, a shift exacerbated by the strong effects of the 2001 recession on New York. The growing importance of the SNA in New York is unusual compared to other states. Although many states have eliminated or substantially restricted their general assistance programs, New York remains the only state that provides broad coverage to employable as well as non-employable persons.[42]

One continuing question is whether or not benefits for these programs must be the same. Cash benefits provided under Safety Net Assistance were the same in value as those provided under Family Assistance, consistent with *Lee v. Smith* which stressed that Article XVII mandated that similar benefits be provided to all persons who face comparable economic need.[43] Other differences between Family Assistance and Safety Net Assistance remain, however. In *Brownley v. Doar* (2009), plaintiffs charged that the *Jiggetts* decision should apply to families with minor children receiving SNA. Based on statutory interpretation of the social services law, the Court concluded that the legislature did not intend to mandate adequate shelter allowances for SNA. The Court also rejected a constitutional claim because the state had not "wrongfully excluded a class of needy individuals from" SNA and because there was "no right to a constitutionally prescribed minimum shelter allowance."[44]

Questions about comparability of benefits also arose in *Aliessa v. Novello* (2001). Consistent with *Tucker*, the state provided Safety Net Assistance and emergency medical assistance to needy residents for both legal aliens and citizens when it changed its social welfare programs in response to PRWORA. But New York denied state-funded Medicaid benefits to most non-qualified aliens, including immigrants "permanently residing under color of law" (PRUCOLS). Federal law under PRWORA permitted states to provide *federal* TANF and Medicaid benefits to qualified aliens who entered the U.S. before August 22, 1996 or who have been in a qualified alien status for five or more years. But other immigrants were banned from federally funded benefits, along with most non-qualified aliens (including PRUCOLS).[45] Although the state was free to provide state-funded Medicaid benefits to immigrants not eligible for the federal program, New York opted to follow the distinctions among immigrants that appeared in federal law and deny Medicaid to most non-qualified aliens.

The Court of Appeals overturned this policy in *Aliessa*. The State defended its policy by claiming that it did not entail a complete denial of benefits. Because the plaintiffs in this case were eligible for emergency medical assistance and safety net assistance, the State argued that the exclusion from Medicaid was about the level of benefits provided and thus well within legislative discretion. Plaintiffs, however, argued that the ongoing medical care available through Medicaid was a distinct "species of aid." Agreeing with the plaintiffs, the Court of Appeals found that the statute was akin to the situation in *Tucker*. It violated "the letter and spirit of article XVII, [section] 1 by imposing on plaintiffs an overly burden-

some eligibility condition having nothing to do with need" and deprived plaintiffs of an entire category of benefits.[46] Because Article XVII refers to "aid, care and support of *the needy*" and "the protection and promotion of the health of the *inhabitants* of the state," it applies to non-citizens as well as citizens.[47]

Although *Aliessa* required the state to provide Medicaid benefits to immigrants who were not eligible for the federal program, in *Khrapunskiy v. Doar* (2009) the Court ruled that the state did not have to provide the same level of benefits to immigrants who were not eligible for the federal SSI program.[48] The plaintiffs received Safety Net Assistance, but the benefits were lower than what they would have received through SSI and the federally required state supplement. The Court ruled that the state is not obliged to match the benefits that individuals would have received from a *federal* program if the federal government had not ended their eligibility.

In sum, the state adopted many welfare policies consistent with *Tucker* in response to PRWORA. It did not adopt lifetime limits on the receipt of aid, full family sanctions, or a family cap. Through Safety Net Assistance, it continued to provide state-funded benefits to needy individuals and families. Although it initially distinguished among the needy on the basis of citizenship status and denied Medicaid to many immigrants, the Court ruled that this policy was an unconstitutional exclusion from benefits rather than an acceptable limit on the level of benefits provided. That distinction mattered. Efforts to convince the Court that benefit levels are too low and need to be raised in order to meet the constitutional obligation have been mostly unsuccessful. The Court continued to recognize legislative discretion in defining who is needy, what benefits are to be provided, and in what form care and aid are offered.

IV. ORIGINS OF ARTICLE XI

Adopted at the 1894 Constitutional Convention, § 1 of Article XI directs the state to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[49] The report to the convention recommending adoption of the article acknowledged widespread support for common schools and could not imagine the "State refusing to provide education for its children."[50] Yet it emphasized the importance of including this obligation in the Constitution. Education was of great importance to the state's future, and there was an obvious connection between the "improvement and growth of its schools and its material prosperity."[51] The people of the commonwealth

were united, the report pronounced, on the principle "that the first great duty of the State is to protect and foster its educational interests."[52]

Article XI was adopted during a wave of interest in education reform and the expansion of high schools. Although elementary schools existed throughout the state, in cities with large immigrant populations, they were severely overcrowded and of poor quality. High schools were relatively uncommon, especially in rural areas. Preparatory schools educated the few students who attended universities, but they did not have a standard curriculum and they confronted a confusing college admission processes.[53] Reformers wanted to improve education through centralization, standardization and expert management. The report to the convention explained that the provision required "not simply schools, but a system" and that the foundation of the system "must be permanent, broad and firm."[54]

In explaining why a system of education was necessary, the report concluded that sustaining education in elementary schools required both strong high schools and higher education. One could not build a system only from the ground up. If the state did not establish public high schools, it would "soon have class education in its most vicious form." The wealthy would send their children to private schools. The public grade schools "would thus be abandoned to the poorer classes, and attendance in them would become a badge of indigence. When the public school degenerates into a mere charity school the proudest of the poor will save their self-respect by keeping out of it. The public school then would be merely an assembly of paupers."[55] A system of education was needed to prevent class divisions and preserve public schools as an institution for all children of the state.

A. Judicial Interpretation of Article XI

In contrast to Article XVII, individual access and a right to public education have not been grounds for major legal challenges. Laws prohibiting tuition charges for public schools and requiring school attendance were adopted in the 19th and early 20th centuries, establishing individual access to public schools. Instead, debate has centered on the quality of the education provided and whether or not differences in that quality across the state constitute a failure to establish a system of education.

As the system of education expanded in the 20th century, state aid for education increased, and aid formulas were designed to take the wealth of a district into account. Despite these formulas, by the early 1970s, state

aid had little impact on equalizing educational spending across districts.[56] In *Levittown v. Nyquist* (1982), the Court of Appeals acknowledged large disparities in school funding across the state but found that Article XI did not require that education be equal or substantially equivalent in every district.[57] The plaintiffs, representing several property-poor school districts, contended that the state violated § 1 of Article XI because the method of financing education led to not one state system but rather hundreds of different school systems with varying capacities and no uniformity in resources across districts. They charged that the state's funding system led to "grossly disparate financial support" for education because reliance on the local property tax meant that property-rich districts were able to raise more school revenues than property-poor districts and because state aid did not ameliorate these unequal revenues. Intervening in the case, plaintiffs from Buffalo, New York City, Rochester, and Syracuse, the four largest city school districts, asserted that although they were not property-poor, the state's aid formula underestimated the needs of their students and overestimated city resources by ignoring the additional demands for municipal services.[58]

The plaintiffs also charged that the state's funding scheme violated the equal protection clause of the state and federal constitutions. The Court concluded, however, that Article XI did not trigger a higher standard of judicial review of equal protection claims. According to the Court, the Article indicated that public education was "unquestionably high on the list of priorities of governmental concern and responsibility," but it did not necessarily mean that education was a fundamental constitutional right.[59] Thus, the Court relied on the rational basis test to decide whether or not the state's funding of education violated the equal protection clause, and it held that the desire to maintain local control of schools justified disparities in school funding.

The ruling narrowed the possibility of successful complaints alleging inequality of school funding. But the Court's decision established a minimum standard that a system of education had to provide. The Court found that the constitution required a state-wide system of education that provided minimally acceptable facilities and services constituting a "sound basic education."[60] The phrase "sound basic education" is not in Article XI and was introduced when the Court of Appeals explained its interpretation of the Article. Because New York already spent so much more on education than most other states, however, the Court was reluctant to declare that funding was inadequate and that education should have even a higher priority for the state. Still, it acknowledged the possibility that

evidence of "gross and glaring inadequacy"[61] could result in a successful case against the state.

The Court's analysis of the education article left open the possibility of an adequacy lawsuit, which was brought by the Campaign for Fiscal Equity (CFE) in 1993. Instead of relying on the charge that the system of educational aid resulted in unequal educational opportunities, the CFE alleged that state funding for New York City schools was insufficient to meet the minimum standard of a sound, basic education. Ruling against the state, the Supreme Court held that "the education provided New York City students is so deficient that it falls below the constitutional floor set by the Education Article of the New York Constitution." [62] Following a template laid out by the Court of Appeals in an earlier ruling about whether or not the case could move forward, the trial court judge identified "too many ill-trained and inexperienced teachers," "dilapidated" school buildings, overcrowding, large class sizes, and a shortage of textbooks, library books, and classroom supplies and equipment as evidence of inadequate facilities and instruments of learning. These had impeded student achievement, as indicated by poor performance on standardized tests, a high drop-out rate, and a low graduation rate. Concluding that "the schools have broken a covenant with students and with society," the trial court found that the "majority of the City's public school students leave high school unprepared for more than low-paying work, unprepared for college, and unprepared for the duties placed upon them by a democratic society."[63]

The trial court also found that the state was responsible for these educational deficiencies. For over a decade, the state had not distributed sufficient funds to New York City public schools. Moreover, the state recognized this. The "SED, the Regents, and numerous State-appointed blue ribbon commissions" had repeatedly told the legislature that not all districts received adequate aid.[64] The funding formulas were complex, opaque, arbitrary and malleable. The evidence at trial demonstrated that the data were ignored and the formulas were not followed. Instead, political negotiations determined the share New York City should receive, and the formulas were adjusted to ensure this result. The state could not claim that the distribution of aid served legitimate state purposes.

As the case proceeded to higher level courts, a central dispute concerned the definition of a sound, basic education. Overruling the trial court, the Appellate Division set off a firestorm of protest when it decided that education equivalent to the 8th or 9th grade met the constitutional standard. Ruling against the CFE, the Appellate Division determined that

the state only had to provide a "minimally adequate educational opportunity" and did not have to "guarantee some higher, largely unspecified level of education." The skills needed to obtain employment, vote and sit on a jury were taught to students before they entered high school. Higher standards were laudable but not constitutionally required. The CFE failed to demonstrate that New York City schools were not achieving this minimal standard, concluded the Appellate Division, and it ruled for the State.[65]

The reaction to the Court's decision was immediate and outraged. Michael Rebell, director of CFE, called it "callous" and "shocking."[66] The *New York Times* editorial board said it was "wrongheaded."[67] The *New York Sun* marveled that the "narrow, Dickensian language of the court must be read to be believed."[68] The two Democrats running for governor criticized Governor Pataki's favorable reaction to the ruling. Carl McCall declared the decision "outrageous," and Andrew Cuomo said it was ludicrous and that Pataki was basically arguing that educational standards should be "dumbed-down."[69] Even Pataki tried to distance himself from the Court's reasoning while he defended its ruling. Although he continued to oppose CFE, he declared that an 8th grade education was not adequate and announced that as long as he was governor, the state needed to "make sure that every single kid gets a good-quality high school education."[70]

When the Court of Appeals weighed in on this question, it found the Appellate Division's reasoning unpersuasive. Although it was reluctant to peg sound basic education to any particular grade level, the Court ruled that a "meaningful high school education" that prepares students "to function productively as civic participants" was the appropriate constitutional standard. Not only was a high school education "all but indispensable" for preparing students "to compete for jobs that enable them to support themselves," students required "more than an eighth-grade education to function productively as citizens." An 8th or 9th grade education might have been sufficient in the past, but it no longer served as an acceptable constitutional standard for education.[71]

Although the Court of Appeals rebuffed the Appellate Division, it also refused to embrace the State's own educational standard as a constitutional requirement. In response to standards-based education reform, the Board of Regents and Commissioner of Education were phasing in new requirements for a high school diploma, dubbed the Regents Learning Standards. But the Court concluded that these standards went beyond what the constitution required because they exceeded "notions of a minimally adequate or sound basic education." The Court relied on the impor-

tance of preserving judicial power; to rule that the Regents Learning Standard is here the constitutional requirement "would be to cede to a state agency the power to define a constitutional right." Thus, in contrast to interpretations of the social welfare article, the Court retained the authority to determine the standard of education that met the constitutional obligation. The legislature was free to establish higher standards, but Article XI did not obligate it to provide sufficient funding to meet them.[72]

When it ruled that the state had not provided sufficient funding to New York City schools, the Court of Appeals preserved its autonomy by reserving the right to interpret the meaning of the education article. But the Court also wanted to avoid trampling on the separation of powers and therefore gave responsibility for devising an appropriate remedy to the governor and the legislature. It gave the state one year to determine how much additional funding was necessary and left it to the state to decide how responsibility to provide that money should be apportioned between the state and the city.

B. Legislative and Executive Responses

Although elected officials agreed that a sound basic education consisted of a high school education, they disagreed about the appropriate remedy for the lawsuit. The ruling was limited to New York City, but elected officials called for a statewide remedy. Senate majority leader Joseph Bruno (R-43rd District) asserted that state efforts to fix underperforming New York City schools should be extended to schools "that are all across upstate New York in similar districts where they may have comparable performance results."[73] Assembly speaker Sheldon Silver (D-65th district) declared that although the lawsuit centered on New York City, "clearly the principle applies across the state."[74]

Providing additional funds for New York City raised the prospect of cutting aid to suburban and rural schools, an option state legislators wanted to avoid. Other school districts maintained they were in the same position as New York City, in desperate need of additional funding to provide educational services to large numbers of disadvantaged students. At a rally of Long Island school districts, Senator Kenneth LaValle (R-1st district) proclaimed that the main priority was "to make sure our region doesn't get raped in the move to take care of a New York City problem."[75]

But a statewide remedy raised the dilemma of how to overhaul the state aid formula, widely criticized as outdated, byzantine, and incomprehensible. Legislators from well-funded districts zealously protected the amount of aid received by these schools, and many were loath to revisit the earlier agreements that benefited their constituents. Governor Pataki, the Republican Senate, and the Democratic Assembly laid out different proposals for complying with the court's ruling, and all plans faced heavy criticism. Pataki presented his proposal as generous but fiscally prudent. Michael Rebell, director of CFE, responded that Pataki was offering a "rehash of the same unacceptable numbers, just packaged differently" and that the funding was "totally inadequate."[76] Senate Republicans presented a plan similar to Pataki's, one that included little new state spending and instead rested heavily on expected increases in state aid as well as uncertain future funding from the federal government and gambling. Speaker Silver said the Democratic plan honored the commitment to schoolchildren. Pataki called it unaffordable, irresponsible and a setback to negotiations, while Republicans countered that it would hurt wealthier suburban districts.[77]

By the end of the year, no agreement had been reached. The state finalized education spending shortly after the Court's deadline passed. Although New York City received an additional $300 million in state aid, that amount was less than Governor Pataki, the Senate Republicans or the Assembly Democrats had proposed in the competing plans they had earlier presented. The legislature also did not revise the school funding formula, leaving unaddressed how the state would correct its funding failures over the long run.

Disappointed with the lack of legislative action, CFE returned to court, asking the judiciary to determine a remedy for the lawsuit. After receiving the report of a special panel charged with reviewing various cost estimates, the Supreme Court ruled that New York City needed an additional $5.6 billion per year, a 43 percent increase in its school budget, and another $9.2 billion for school construction in order to meet constitutional requirements.[78] The ruling led to another round of calls for state action. But the legislature did not overhaul the school funding formula even when the Appellate Division ruled in the spring of 2006 that New York City schools required an additional $4.7 billion to $5.6 billion per year.[79] Governor Pataki and the Republican-led Senate were not inclined to act, and the Assembly did not push to include funding for the CFE lawsuit in the 2005 or 2006 budget.

Agreement was reached, however, on additional funding for school construction in the city. Blaming state legislators and Governor Pataki, New York City Mayor Michael Bloomberg announced in February 2006 that he was dropping 21 buildings from his school construction plan. "The reason is pretty obvious," he said. "It's the state's shameless shortchanging of our city's children out of the billions of dollars we need for capital school funding."[80] Whether the result of a high-stakes poker contest or an assessment of school needs, the scratched projects were in the districts of prominent legislative actors, including Republican senators and the Assembly speaker. In the subsequent negotiations, the state agreed to a school construction package for New York City, leading Assembly Speaker Silver to conclude that "[w]e will have, by this, complied entirely with the construction provision of the C.F.E. decision, in its entirety, by this authorization."[81]

Without an overhaul of the school aid formula, the dispute continued into the gubernatorial election. Democratic candidates again called for additional funding for New York City schools. Insisting on a greater sense of urgency, underdog Thomas Suozzi said: "This is not just a funding crisis, or educational crisis, this is a moral crisis that has to compel all of us to act."[82] But frontrunner Eliot Spitzer complained that his opponent was calling for far too little. Christine Anderson, a spokeswoman for Spitzer, explained that "[a] responsible candidate for governor cannot honestly say he wants to resolve C.F.E. and improve education for New York's children without committing to a solution within the $4.7–$5.6 billion range mandated by the court."[83]

When the Court of Appeals ruled on the case in November of 2006, it settled on a much lower amount of additional funding, $1.93 billion, drawn from the proposal submitted to the court by the Pataki administration. The majority determined that the Supreme Court had erred by giving the panel of referees a mandate to recommend one of the many proposals. Instead it should have first determined whether or not the state plan was a reasonable estimate, and the Court of Appeals ruled that it was. Other assessments could be justified, but the state's estimate was defensible. Given that, the judiciary needed to defer to the state and not intrude into policy making and budget decisions that were the responsibility of the legislature. Prudence, pragmatism, and respect for the separation of powers required the court to accept the state's plan.[84]

The Court grounded its reasoning on deference to the legislature, but the state plan it referred to was produced by a commission Governor Pataki established after the 2003 ruling. The legislature had not adopted this

plan. It ended its session without a state budget plan or a permanent change in the school funding formula that complied with the court's initial ruling. Moreover, Chief Justice Kaye pointed out in a sharply worded dissent, the executive branch had not submitted this plan to the referees for their consideration. Instead, the Attorney General had submitted to the referees a plan prepared by Governor Pataki that proposed much higher spending for New York City.[85]

The decision from the state's highest court did not end the dispute over how much additional funding should be provided to New York City schools. Senate majority leader Bruno reaffirmed the earlier Republican position when he said that "The ruling makes it clear that the education spending plan advanced by the governor and the Senate was more than sufficient to meet the needs of schools, not only in New York City, but throughout the state."[86] But the newly elected governor called for much higher levels of funding, tying this initiative to the state's economic growth. "We must provide more funding than this constitutional minimum," Eliot Spitzer announced, "so that all of New York's schoolchildren have an opportunity to thrive in the 21st-century workplace."[87]

In his state of the state address, Spitzer called for a "new, transparent school funding formula that dramatically increases investment over the next four years throughout the state, targeting the investment where we need it most."[88] The subsequent changes made to the state aid formula consolidated about 30 grants into a foundation grant that would allocate about 70 percent of the total state aid provided to districts and, if followed, would provide more support for high need districts across the state.[89] The state also substantially increased the amount of aid for New York City, providing an additional $3.3 billion in aid over four years which would be matched by an additional $2.2 billion from the city. But in order to overcome opposition from Senate Republicans, these changes were coupled with increased education spending across the state and property tax relief for high tax areas. The changes demanded by the legislature benefited Long Island schools, and they received roughly the same proportion of state aid as they had in earlier years. "You can say both sides won," concluded Geri Palast, executive director of the CFE.[90]

C. After CFE

Critics of the Court worried that the CFE ruling would lead to a spate of lawsuits against the state. But the Court has not been reluctant to dismiss cases, and few have been allowed to proceed. The holdings of the Court have made it difficult to successfully bring equity complaints under

Article XI because the Court has concluded that the goal of local control of education is an acceptable reason for many variations across districts. In *Paynter v. State of New York* (2003), Rochester students and their parents attempted to bring an equity lawsuit within the parameters set by the CFE ruling. They alleged that the state system violated Article XI because the Rochester school district was comprised primarily of poor and minority students and this led to poor educational outcomes. They argued that through the drawing of district lines, the state had shaped one input of education—the demographic composition of the student body—in a fashion that impaired educational outcomes. The Court of Appeals ruled that there was not a sufficient cause of action because the complainants did not show that substandard educational outcomes were due to lack of funds or inadequate teaching, facilities or "instrumentalities of learning." Article XI "enshrined . . . a state-local partnership," concluded the Court, and holding the state responsible for the demographic makeup of schools would subvert local control.[91]

In 2005, the Court also dismissed a case brought by the New York Civil Liberties Union concerning 27 substandard schools outside of New York City. Pointing out that educational inadequacies alone were not sufficient grounds for an Article XI complaint, the Court held that the plaintiffs had not adequately identified the state's failure regarding the schools named in the complaint. The plaintiffs had to specify what the state had done that created this problem and not simply demand that the state had a responsibility to "determine the causes of the schools' inadequacies and devise a plan to remedy them." In addition, the Court found that the plaintiffs' focus on individual schools rather than school districts would "subvert local control and violate the constitutional principle that districts make the basic decisions on funding and operating their own schools."[92]

An adequacy lawsuit regarding school districts of several small cities survived the state's motion to dismiss and went to trial in 2015. Often referred to as the "Small Cities" case, in *Maisto v. State of New York* the plaintiffs contend that low student performances and deficiencies in important educational resources are due to insufficient funding from the state for these eight school districts. The *Maisto* districts have large numbers of economically disadvantaged students and low property wealth. They rely heavily on state aid. Because the state did not implement fully the foundation aid formula adopted in 2007–08, the plaintiffs allege, these districts have experienced significant shortfalls in funding that have hindered the ability of the districts to provide the educational resources necessary to provide the opportunity for a sound basic education.[93]

Questions about the state's implementation of the 2007 Budget and Reform Act center prominently in another lawsuit that the lower court has allowed to proceed. Often referred to as the "son of CFE," plaintiffs in *New Yorkers for Students' Educational Rights* (*NYSER*) charge that the state has violated its constitutional responsibility to ensure that students have the opportunity for a sound basic education throughout the state. The plaintiffs contend that the state has not implemented the plan adopted in 2007. Although the state increased aid in 2007–08 and again in 2008–09, it first froze and then reduced foundation funding in order to deal with declining tax revenues following the great recession. The state "repeatedly delayed the date for reaching the final foundation amounts needed to provide students the opportunity for a sound basic education."[94] Despite increases in state aid in 2012–13 and 2013–14, foundation aid for the state is "still almost $4 billion below the amount called for in the Budget and Reform Act of 2007."[95] In addition, the state adopted other policies that impede its capacity to meet the funding required by the 2007 Act. These include a provision that annual increases in state education aid cannot exceed the increase in personal income in the state for the previous year and a property tax cap that constrains the ability of local school districts to raise taxes. The property tax cap makes it difficult for districts to raise taxes to compensate for the loss of expected state aid and hampers the ability of some districts to raise sufficient revenue to meet their expected local contribution.

The plaintiffs argue that the 2007 Budget and Reform Act lays out the state's constitutional obligation because the legislature and the governor adopted the act as a means of implementing the court's decision in *CFE*. The formula was adopted by large legislative majorities in the Assembly and the Senate after a cost analysis conducted by the state Department of Education, recommendations for increased state aid by the Board of Regents, and a proposal for a new foundation aid program from the governor. The "formula represents the level of funding that the Legislature and Governor determined was necessary to provide students throughout the State with the opportunity for a sound basic education," conclude the plaintiffs in their memorandum opposing the defendants' motion to dismiss the case.[96] Moreover, the plaintiffs assert, the funding cuts "were taken solely because of fiscal constraints" and not because the state determined that districts could meet the constitutional standard of a sound basic education with less money.[97] In fact, allege the plaintiffs, because the legislature keeps delaying the implementation period, it implicitly recognizes the constitutional obligation to provide the funding identified as necessary in the 2007 Act. A constitutional mandate, the plaintiffs con-

tend, cannot be "disregarded, abridged, or delayed because of fiscal constraints or changes in economic circumstances."[98]

In a motion asking the Court to dismiss the case, the State responded that the foundation aid formula provided by the 2007 Budget and Reform Act did not constitute a "calculation of the minimum cost for the provision of a sound basic education."[99] The Act was not a plan to comply with *CFE*, according to the state, but rather a statement of aspirations regarding education funding. In response to the great recession, the legislature and governor made "the good faith, rational decision to enact annual appropriations consistent with the changing fiscal conditions" and reduced state aid below the amounts specified in the 2007 Act.[100] Because of the separation of powers, continued the state, the judiciary must defer to the governor and the legislature as they make budgetary decisions.

In addition to arguing that its funding formula was aspirational, the state also argued that the Court had already held that it could "set forth educational curricula more challenging than necessary to provide the opportunity for a sound basic education."[101] Because the educational standards established by the Board of Regents and Commissioner of Education could exceed the constitutional requirements, evidence that schools did not comply with those standards would not by itself indicate a violation of article XI.[102] Setting high standards and then not ensuring that districts had sufficient funds to meet those standards did not contravene the constitutional mandate. *NYSER* survived the state's motion to dismiss, and the case continues to work its way through the legal system.

Maisto and *NYSER* continue the focus on adequacy laid out in *CFE*, with additional emphasis on the state's responsibility to fully fund the educational standards it established. Even if the plaintiffs succeed in the courts, it is likely that intense political debates about funding the state educational system and tackling inequality will persist. Legislators from wealthy districts fight to preserve their funding advantage. New York spends more per pupil than any other state, yet according to the Education Trust, its spending across districts is also highly unequal. [103] Districts with the highest poverty receive less in state and local funds per student than districts with the lowest poverty. Districts serving the most students of color also receive less in state and local funds per student than districts serving the fewest students of color.[104] Because the Court's ruling in *Levittown* impeded lawsuits resting on unequal educational opportunity, advocates for greater equality in school finance will have to continue to press the legislature to address this issue.

V. CONCLUSIONS

A core question regarding state constitutional guarantees of positive rights is whether they strengthen the claims of persons and communities who are often disadvantaged in ordinary political and administrative processes. The positive rights considered here raise hard questions about governance. Education and public welfare programs comprise some of the larger functions in state budgets. Their policies and administrative structures are complex, and their adequacy, effectiveness, and efficiency depend on diverse and changing circumstances. Positive rights require governments to act; in these cases, to implement big and complicated tasks. How can courts enforce positive rights in such policy areas without getting overly involved in decisions performed by the legislative and executive branches, both of which are accountable, unlike the judiciary, to democratic processes?

New York's experiences with the social welfare and education articles offer mixed answers to these questions. With respect to income support policies, the courts developed a fairly consistent set of principles that helped shape New York's responses to federal welfare reform and the many options it offered. The courts determined that providing aid to all needy persons was a mandate, regardless of federal decisions about who was considered deserving or undeserving of assistance. As a result, some politically unpopular groups (such as needy yet "unqualified" immigrants, able-bodied adults without dependent children, teen mothers, and long-time welfare recipients) were granted eligibility for assistance little different from that received by politically more sympathetic persons (such as short-term welfare recipients, "qualified" immigrants, and families with children). This universality is a distinctive feature of New York's income support programs. Although other factors contributed to the breadth and even-handedness of these policies, Article XVII and its interpretations by state courts played a major role, and the courts exercised influence without directly and persistently intervening in legislative and executive decisions.

The Campaign for Fiscal Equity cases also led to major policy and budgetary changes and apparent benefits to disadvantaged groups. The courts established a broad principle and a basic finding: that Article XI mandated a "sound, basic education" for all students in New York, and that New York City schools had not received funding sufficient to meet this goal. Determining and implementing specific remedies, however, involved lengthy struggles within and between the branches of governments. For several years, there was little agreement over how much addi-

tional funding should be provided to New York City schools. Eventually, however, a new school funding formula was established that provided more support for high need districts, not just in New York City but across the state. It was a costly remedy, as the legislative process led to greater education spending in lower-need districts as well as property tax relief in high tax areas. Even after agreement was reached, however, there were delays in implementing the additional funding. Allegations of inadequate funding in several small cities and complaints that the state failed to implement fully the remedy it fashioned are now before the courts.

Like the CFE cases, the shelter and shelter allowance cases involved protracted political struggles. Just as the courts found that a poor education does not satisfy the constitutional mandate, they also found that wretched shelters do not constitute "aid, care and support" to the needy. If the state offers emergency shelters as a form of assistance to the needy, they must satisfy minimal standards. Although the courts avoided relying on Article XVII in other decisions involving the long-running *McCain* and *Jiggetts* cases, the constitutional mandate was often in the background of the consent decrees, equitable relief, and statutory interpretations used in these cases. For decades, however, the decisions regarding shelters and shelter allowances failed to move out of the courts. But the cases were eventually settled, and the major decisions are now primarily under the control of the city and state's elective branches.

Positive rights in a state constitution can be strong levers for those who want to increase governments' responsiveness to politically disadvantaged persons. Such provisions do not magically generate the broad coalitions across branches of government needed to remedy hard problems and inequities in public services. But if they do not override politics, they can affect its content and direction. The education and social welfare articles helped those who wanted to address issues of fairness and equity inject these questions onto the public agenda, sustain the political struggles, and influence the terms of the debates. As citizens of New York State deliberate about what they want from state government in the 21st century—perhaps a clean environment, affordable health care, public safety, or other services—it is worth considering these varied experiences and the potential of such provisions in leading the state toward a more inclusive and equal provision of public benefits.

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2 In 2005, New York's Gini Coefficient, one measure of income inequality, was 0.496, compared to 0.466 in the U.S. as a whole. Connecticut, Louisiana, and Alabama came in second, third, and

fourth. John J. Hisnanick & Annette L. Rogers, Household Income Inequality Measures Based on the ACS Data: 2000-2005 tbl.6 (2007) (working paper), www.census.gov/content/dam/Census/library/working-papers/2007/demo/ACS-inequality-report-2000-2005_v2.pdf. The Gini coefficient indicates that income inequality in the U.S. is third highest among 31 OECD nations, behind only Mexico and Turkey. *See* Income Inequality for 2012, OECD DATA, https://data.oecd.org/inequality/income-inequality.htm (last visited Mar. 13, 2016).

3 For a discussion of different types of rights, see DEBORAH STONE, POLICY PARADOX 331–53 (3rd ed. 2011).

4 N.Y. CONST. art. XVII, § 1. Article XVII, Section 3 uses similar language with respect to 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." N.Y. CONST. art. XVII, § 3. Other provisions in Article XVII authorize but do not mandate the care and treatment of persons suffering from "mental disorder or defect" and institutions for detention of criminals and systems of probation and parole. *See* N.Y. CONST. art. XVII, § 4. Our focus in this chapter is on Section 1, entitled "Public Relief and Care." N.Y. CONST. art. XVII, § 1. For a discussion of other social policy provisions in the New York State Constitution, see Gerald Benjamin & Melissa Cusa, *Social Policy*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 301–15 (Gerald Benjamin & Henrik N. Dullea eds., 1997).

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11 ERICA HUBER ET AL., WELFARE RULES DATA BOOK: STATE TANF POLICIES AS OF JULY 2014, OPRE REP. 2015-81, at 112–13 (2015), http://www.acf.hhs.gov/programs/opre/resource/welfare-rules-databook-state-tanf-policies-as-of-july-2014. Temporary Assistance benefits (which include benefits under Family Assistance and Safety Net Assistance) vary across counties, due to differences in shelter allowances. The maximum used by the Urban Institute in its comparisons with other states is the maximum in Suffolk County. Each allowance consists of a basic grant, a shelter allowance, a home energy allowance (HEA), a supplemental home energy allowance (SHEA), and a fuel allowance if heat is not included in rent. Each allowance category has a maximum and varies according to family size. For more details, see *Temporary Assistance Source Book*, N.Y. STATE OFF. TEMP. AND DISABILITY ASSISTANCE 2-2 (2011), https://otda.ny.gov/programs/temporary-assistance/TASB.pdf.

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CHAPTER NINE

CONSTITUTIONAL DEBT RESTRAINT

Peter J. Kiernan

I. INTRODUCTION

The current Comptroller Thomas P. DiNapoli and his immediate predecessor, Alan G. Hevisi, have advocated constitutional amendments to control the amount and means of the issuance of debt that implicates the credit of New York State. The predicates of this advocacy are that state supported debt is excessive and that its issuance is not subject to adequate control. Both Comptrollers lament the proliferation of state authorities that are authorized to issue debt and the growth and extent of "back door" borrowing, i.e., debt issued by authorities for the state and not approved by the voters in a general election. "Back Door" debt is opposed to "front door" voter approved debt which is backed by the full faith and credit of the state. These concerns and advocacy for constitutional amendments are shared by other prominent voices such as the Citizens Budget Commission, the Manhattan Institute for Policy Research, the New York City Bar Association and multiple scholars.

This chapter explores the arguments for constitutional change in respect of state debt. It also considers the efficacy of constitutional proscriptions concluding generally that they are of little positive effect and, possibly, counterproductive.

II. DISCUSSION

Constraints on borrowing in state constitutions became commonplace in the 1840s. During the Panic of 1837 and the depression that accompanied it, nine states defaulted on general obligation bonds as did many private entities, particularly railroad associated ones that had benefited from "economic development" loans and equity infusions from states. New York State's public financing and development of the Erie Canal in 1825 and the remarkable economic growth that the canal occasioned was the impetus for states to borrow significantly to finance economic development infrastructure often operated and built by private entities such as railroads. These entities were loaned the proceeds of the sales of states' general obligation debt. This economic development debt was considered to be "tax less finance" because notwithstanding that the full faith and credit of states backed the debt, the debt was designed to be serviced by repayment of loans of the proceeds and by enhanced equity investment returns. Thus, it was believed that no taxes would have to be imposed. But with widespread economic distress the nation's tax less debt became ephemeral. Reaction was adverse and led to a variety of debt limitation restrictions and procedural restraints adopted by most states. New York was not an exception.

In 1846, the New York State Constitution was amended to the effect that the state could not issue general obligation debt (G.O. Debt) unless specifically authorized by the electorate in a referendum. Today's Article VII, § 11 of the New York State Constitution provides that:

> [N]o debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election nor shall it be submitted to be voted on within three months after its passage nor at any general election when any other law or any bill shall be submitted to be voted for or against.[1]

This is a procedural restraint. It imposes no limit on the amount of general obligation debt that may be issued, if approved by the electorate in the manner proscribed by Article VII. As a practical matter, however, the Article VII procedural restraint has been an incentive to policymakers to avoid general obligation debt referenda. The electorate, if given the choice, is adverse to incurring debt and has to be persuaded to approve it. This phenomena is also seen at the national level where there are very frequent calls for a "balanced budget amendment" and a reduction in the budget deficit. The national debt is considered a disgrace by many, although the macro data are so large that many voters do not comprehend the proportion of debt to the gross national product. The otherwise routine ritual of raising the debt limit has become a high-drama political struggle in recent years.[2]

Similar strains are seen at state levels. Forty-nine of the 50 states have various forms of a balanced budget requirement (Vermont is the sole exception) to accompany general obligation debt restraints. It is thought that a balanced budget mandate minimizes long term debt. But balanced budget requirements are illusory and general obligation debt restraints in most states are very ineffective. They spawn wholesale efforts of avoidance and evasion, primarily through the device of creating semi-independent authorities legislatively authorized to issue revenue debt or other long term indebtedness backed by a specific lease or contractual commitment providing an identifiable source of debt servicing other than the unspecific full faith and credit of the state. New York State is in the forefront both of the evasion of constitutional debt restraint and the substitution of debt by authorities. Currently, New York has about $63 billion in

long term debt and only about $3 billion is general obligation debt.[3] This substantiates the observation that the amount of state debt is not significantly affected by constitutional restrictions on debt.[4]

A. Legislative Debt Limit

The New York State Constitution wisely does not impose a debt limit but the 2000 Debt Reform Act does. The Act applies to State-Supported debt, which it defines as any bonds or notes issued by the state or a state public corporation for which it is constitutionally obligated to pay debt service or contractually obligated to pay debt service subject to an appropriation. The Act caps the level of debt outstanding for debt issued after April 1, 2000 at 4 percent of personal income. Debt Service is also capped at 5 percent of all funds receipts. The caps were phased in but have been fully effective since April 1, 2010 and April 1, 2013, respectively. Importantly, the Act provides that debt issued after April 1, 2000 could be used only for capital purposes and maturities are limited to 30 years.

The Act has been heavily criticized for several reasons. The biggest criticism is that it is legislative and not constitutional which means it could be amended at any time. Another major criticism is that it excluded debt issued prior to April 1, 2000. Yet another criticism is that the provisions of the Act can be "not withstood" meaning that the legislature at any time could issue debt by stating such debt is to be issued notwithstanding the provisions of the Debt Reform Act. This has allowed the state to issue $7.6 billion of debt for non-capital purposes since the Act became effective. As of the beginning of State Fiscal Year (SFY) 2013–2014, 13.4 percent of the state's debt burden is attributable to non-capital purposes and the debt service for that debt is not covered by the Act. Comptroller DiNapoli reported that as of the SFY 2013–2014 approximately 43.4 percent of all state-funded debt and 48.5 percent of associated debt service is not recognized under the statutory debt caps. Arguably, then, the Debt Reform Act is not effective and is basically only aspirational.

Advocates for debt limits like those contained in the Act want them constitutionalized.

B. Evasion

The most immediate consequence of the constitutional procedural limitation placed on the issuance of long term general obligation debt in New York is that policymakers devised ways to issue long term debt legally without adhering to the requirements of the constitution. That also can be

said in most other states regardless of whether the constitutional limitations were procedural, such as New York, or substantive, such as caps, hard limits, or the carry capacity approach such as limiting debt to percentages of personal income, debt per capita or a percentage of debt service in annual operating budgets. Scholars have observed that the evidence demonstrates that the substitution of non-guaranteed debt for general obligation debt is highest in states with the most stringent debt limits.[5]

The most obvious form of evasion is the issuance of revenue debt whereby debt is issued for the purpose of a project that would produce a revenue stream in a sufficient amount to service the project purposed debt. Classic examples are bridges and tunnels that charge tolls. The revenue stream produced by the tolls services the debt. Courts throughout the states held revenue debt not to be debt that is guaranteed by the state, i.e., it is debt that is not backed by the full taxing and revenue raising capacity of the state. By the mid-1990s revenue bonds comprised 76 percent of total states' debt.[6]

But what if the revenue stream of a project proves to be insufficient to service the debt issued for the project? The New York State Court of Appeals addressed that just five years after the 1846 constitution. In *Newell v. People*,[7] the Court found that there was an implicit moral obligation of the state to appropriate funds necessary to meet debt service requirements.[8] The implicit moral obligation of the state provided reassurance to lenders that their investment in state securities was safe but it also highlighted the risk that the revenue debt was project debt and not general obligation debt. The legislature did not have a constitutional, legal obligation to appropriate debt service payments on the project debt.

Moral obligation debt began to be widely employed in the 1960s particularly in the administrations of Governor Nelson A. Rockefeller and his endeavors to build a statewide university system, develop moderate-income housing stock, build hospitals and other large projects. The state issued substantial "moral obligation bonds" that enjoyed the confidence of the investment class. In 1975, however, the state Urban Development Corporation was not able to make required payments on moral obligation bonds issued for housing. The state met its moral obligation to appropriate funds sufficient for the bonds. Thus, there came an end to the assumption that moral obligation bonds were cost free to the state. Thereafter, moral obligation bonds were seldom used.

More widespread than moral obligation bonds is subject-to-appropriation debt issued by state authorities. Such debt obligations assume the regular appropriation of state funds to the issuing authority for debt service.[9] Subject-to-appropriation legislative obligations are budgeted annually as baseline expenses. While the legislature is not legally bound to make the routine baseline appropriations, thereby rendering the debt constitutionally legal, their broad use emphasizes that such debt is issued "solely to evade the debt limits" and circumvent the state constitution.[10] Subject-to-appropriation bonds are derived from a variation of revenue bonds. Courts approved revenue bonds and also approved indirect revenue bonds. An example of the latter would be highways financed by gasoline taxes or vehicle license fees. The taxes and fees are not highway-specific tolls but they constitute a purposed revenue stream linked to the development of highways. Another example has been convention center developments designed to produce hotel occupancy tax revenues. There is not a direct nexus between the new convention center and the hotel tax revenues; the bonding to pay for one is said to cause the revenue from the other. The courts consent. In *Clean v. Washington*,[11] the court concluded that decisions how the state will raise money to pay for local public services are seen as matters of policy and politics, not matters of rights and constitutional law.[12] The court added that the legislature is best able to consider what measures promote general welfare.[13]

Other variations of revenue based or subject-to-appropriation financing, which scholar Richard Briffault terms "non-debt debt,"[14] include lease backed and contractual obligation backed financing. These constitute other opportunities for evasion[15] that courts agree are not constitutionally illegal as the definition of debt continuously has narrowed.

All of these evasions represent efforts to overcome the constitutional obstacles to debt issuance of the referendum and balanced budget requirements. However, the extent of New York's long term debt clearly demonstrates that there are no meaningful debt obstacles in New York. As noted by the New York Report of the Task Force on the State Fiscal Crisis ("Task Force"), no effective institutional mechanism exists to limit debt in New York,[16] and the intent to impose strict, procedural obstacles to the incurrence of debt as reflected in the constitution has been completely frustrated. As a result, the state has a complex set of mechanisms through which it finances its capital programs and, too often, occasionally operating requirements. Richard Briffault described New York's debt structure as "baroque."[17]

The ineffectiveness of constitutional debt limitations is true nationwide. "[R]estrictions do nothing to limit debt"[18] and their main consequence is a shift toward different forms of debt.[19] Restrictions have had little effect on aggregate debt.[20]

Evasion does come with costs. Analyses demonstrate that non-debt debt generally is more expensive: it demands higher interest rates and imposes higher administrative and legal costs while fragmenting asset development management.[21] Evasion also may invite cynicism of debt decision making. Nevertheless, "it is never an illegal evasion . . . by discovering or following a legal way to do it."[22] The evolution of evasions and avoidance measures of constitutional proscriptions has been a "coherent process," not "a series of random changes."[23] Evasions are not really a major constitutional issue.

Some may choose to argue that the New York Constitution's referendum requirement could be improved to be effective. One suggestion is to allow more than one referendum per year. Another is to eliminate the single purpose requirement. Both the current single referendum and single-purpose requirements tend to make general obligation debt proposals larger than they might otherwise be since they are structured to address projected capital needs over several years.[24] Another reason G.O. bonds tend to be larger than might otherwise be necessary is that they have to be structured to gain voter approval. Generally, a bond issue will not pass statewide unless it carries New York City. In order to carry New York City, city voters need to be shown that the proposed issue will benefit the city. This is more or less true of other population centers such as metropolitan Buffalo. Thus, a bond issue primarily designed to provide capital to build or maintain rural bridges for example, also would have to include New York City and other urban bridges. Most likely, therefore, the issue will be described as a transportation bond issue and will include all manner of transportation projects. While such a bloated issuance has more voter appeal because it is designed to have something for everyone, its very size may energize voters' innate antipathy to debt and bring out more nay voters. Importantly, the real issue with a bond issue is not whether to build this or that bridge (for example), but whether to borrow a lot of money. Only about half of the state's proposed bond issues have passed since the last quarter of the 20th century and there have not been many bond proposals. Since 1974, only 15 borrowing questions have been put before the electorate. Eight have been approved including five transportation bond issues and two environmental ones. There only have been five G.O. Debt proposals in the 21-year period ending in 2015. Bond issues

fare best in presidential election years when turnouts are significantly higher and there are more voters who are disinterested in debt issues.[25] Also, a consequence of constitutional debt restrictions is that debt questions increasingly devolve to local governments. Local jurisdiction voters are more homogeneous and focused on particular projects. In 2012, nationwide 384 of more than 500 bond issues in the approximate aggregate amount of $30 billion were approved. But most of these were local matters.

There may be many other suggested constitutional amendments designed to submit debt for voter approval, but the overwhelming evidence is that however skillfully drafted, the amendments would not be effective. Debt restrictions largely reflect a reaction to past actions (perhaps the perception that there are too many unaccountable authorities). Such limits, while designated to address past failures, soon will be rendered obsolete by the creativity of those who wish to evade the limits.[26] Constitutional limits are a trade-off between tying the hands of future policymakers and government's flexibility to address future problems. There is frequently an impulse to offset the temptations policymakers have to defer the costs of present actions and a belief that ordinary politics too often fails to provide an effective check on decisions to incur debt. But the more germane issue is the adequacy of state debt to meet future capital needs. Law Professor Richard Schragger argues that constraints adopted in the shadow of past crisis are not well-matched to present challenges. Advocates for constitutional debt restrictions do so as a means of pursuing political ends. It is very unlikely, however, that a constitutional provision can shape political choices toward some consensus goal. This is especially so since one's attitude about debt within reasonable ranges is really about one's appetite for taxation. Those who would impose debt restrictions primarily oppose new taxation. Yet taxation is always a salient political issue debated in nearly every election. Constitutional debt limits are an attempt to exercise a future veto on then-current political choices. State constitutions are linked to state politics. It is preferable that the constitution should be constrained by politics rather than politics be constrained by the constitution.

C. Authorities—New Agents of Issuance

Much of the literature on public authorities indicates that governments use authorities to circumvent constitutional debt limits. Beverly S. Bunch of the Maxwell School of Syracuse University undertook an empirical analysis to confirm that the literature is accurate.[27] Circumvention is the prime reason that debt issuing state governments use authorities and the

larger and more urban the state, the more authorities that the state creates. Bunch advocates unspecified constitutional reform.

Another analysis opines that money-raising ability accounts for the extensive use of authorities.[28] Comptroller DiNapoli has reported that there are 325 state authorities that issue long term debt. When local authorities are counted, including Industrial Development Authorities (IDA's), there are about 1,100 New York authorities.[29] Authorities have been referred to as "borrowing machines."[30] In New York, at least 95 percent of the state's current debt was issued by authorities. That ratio is unlikely to change. Notwithstanding the criticisms and lamentations that the proliferation of authorities evokes, there are many distinct advantages offered by authorities in addition to their ability to issue non state guaranteed debt and avoid the constitution's procedural restraint on general obligation debt. A significant advantage is that authorities align debt better with the users, payers and beneficiaries of the projects that the proceeds of the debt allow to be developed. Equally important aspects of authorities are that they offer flexibility in decision-making and the conduct of business; they are less burdened with the complications of line bureaucracies including civil service regulations; and they offer a more businesslike approach to government operations perhaps due to their corporate structures (authorities either are public benefit corporations or not-for-profit corporations). Authorities can operate across jurisdictional boundaries and, arguably, present a more specific focus on projects. A current example may be the construction of the new Tappan Zee Bridge by the Thruway Authority. Authorities can raise revenues (not taxes) and issue debt independently. They often charge bond issuance fees and can be, but not always are, self-sufficient. The biggest, general advantage of authorities is that their debt is not guaranteed by the state. This is true but less meaningful with debt that is subject to appropriation.

Theoretically, the legislature could decline to appropriate funds necessary to pay debt service on certain authority bonds or notes. Purchasers of authority subject-to-appropriation debt issued by authorities take that theoretical risk. But, as a practical matter, the legislature does not even contemplate not appropriating the requisite funds because the market would consider it a state default. That is especially so with authority debt that is backed by the personal income tax ("PIT Bonds") or the sales tax. Five state authorities are legislatively authorized to issue PIT Bonds: The Dormitory Authority, the Urban Development Corporation, the Thruway Authority, the Environmental Facilities Authority, and the Housing Finance Authority. PIT bonds only can be issued for capital purposes. To

ensure the security of PIT Bonds, the first 25 percent of the state's annual personal income tax proceeds must be segregated (or lock-boxed) for annual debt service. This provides very substantial coverage as about only 5 percent of the proceeds are required for debt service. Once the legislature appropriates the necessary amount of the PIT proceeds for debt service and required reserves, the balance of the PIT proceeds can be released for other appropriation. However, if the legislature were not to make sufficient appropriation of PIT proceeds for debt service, none of the segregated proceeds could be released for any other purposes. This is a powerful incentive to the legislature to make the required appropriation. The same procedure obtains with sales tax bonds, which are less common. Thus, with sales tax and PIT Bonds, there is no genuine risk. There is also a credit rating enhancement.

PIT Bonds (and lesser used sales tax bonds) require the diversion of operating funds for the servicing of long term debt. That places a natural limit on the incursion of debt and a cyclical restraint on spending.

Authorities tend to concentrate power in the executive branch and provide a fundamental tool of initiative to the Governor. There are some restraints on the Governor's powers, however. The Public Authorities Control Board must approve projects of certain authorities by unanimous vote of the Governor, the Speaker of the Assembly and the Majority Leader of the Senate. The 2005 and 2009 Public Authority Reform laws were designed to make authorities more independent and accountable, and less responsive to the Governor. The 2009 Act requires board members to be allegiant to the mission of the authority and not to the person that appointed them. Further constraints could be legislated if there were to continue to be perceived abuses. Legislation would be far better conceived than constitutional amendments that might be obsolete soon after their adoption.

D. Balanced Budget Requirements

One prominent, common fiscal institution is the requirement of a balanced budget. Every state except Vermont has a constitutional provision in respect of a balanced budget, some stronger than others.[31] Article VII of New York's Constitution requires the Governor's Executive Budget, which is to be submitted to the Legislature in February,[32] to be balanced. But there is no requirement that the budget be balanced when enacted, although there is a "sense" in New York (and most other states) that budgets must be balanced when enacted.[33] This "sense" surpasses the written constitutional provision and is part of the policymaking process on its

own. Thus, the experience in New York is that the budget is "facially balanced" on the day of enactment although there is never a day thereafter that it is. Significantly, there is no constitutional requirement that the budget must be in balance at the end of the fiscal year. This means that there is no actual prohibition on deficit spending in New York and the state often spends money that it does not have.[34] In order to do so, it borrows, either from lenders or from the future. An example of borrowing from the future is the accounting technique of counting as current year revenues funds that will be received in the ensuing fiscal year, perhaps federal aid. Another example is putting off a payment due in the current year to the next year. This type of accounting legerdemain can be accomplished because the state is not required to adhere to Generally Accepted Accounting Principles ("GAAP" or, in respect to government operations, "modified accrual accounting") for its operating budget.[35] Rather, the state employs cash or "checkbook" accounting. Current State Comptroller DiNapoli refers to these sleights of hand as the "Deficit Shuffle."[36] Others call them "gimmicks." These terms underscore the fact that balanced budget requirements are illusions and not an impediment to the incurrence of debt.

A consequence of the "sense" that the budget must be balanced is that long term debt that is not sanctioned by the Constitution is incurred for operating expenses. Two egregious examples of operating expense borrowing are the 1991 sale of Attica Prison and a 2002 School Aid transaction. In respect of Attica, in 1990, in order to achieve budgetary relief, the state authorized the sale of the Attica Correctional Facility to the Urban Development Corporation (UDC) for $200 million. In 1991, UDC issued $241.75 million in 30-year bonds to pay for the facility and other costs associated with the issuance. The state then leased the facility back from UDC. The lease payments are used by UDC to pay the debt service on the bonds. The budget relief of $200 million in 1991 is estimated to cost about $565 million (nearly three times the net 1991 proceeds) when the debt is finally retired in 2020. Those repaying that debt, some not born in 1990, received no asset for this cost.

In respect to School Aid, a financing structure created in 2002 allowed the state to provide for the payment of certain accumulated prior-year school aid claims (a state liability primarily supporting operational costs for school districts) through the issuance of bonds by the Municipal Bond Bank Agency (MBBA). In fiscal year 2003–04, the MBBA issued $510 million in bonds which allowed the state to spread its liability over a 20-year period. The debt issuance provided budget relief for both the state

and the school districts involved, but also created a long-term cost with no associated capital asset. The total cost for these operating expenses will exceed $1 billion.

Another recent example of borrowing long term for short term operating expenses occurred in 1995 when the state converted the stream of revenue from the tobacco industry settlement into one time, upfront payments. During the extreme revenue crisis occasioned by the Great Recession, some legislative leaders proposed refinancing the 1995 Tobacco Bonds. That would have repeated the 1995 practice of borrowing long for short term needs thereby avoiding painful, politically damaging spending cuts. Governor David Paterson refused.

Such long term borrowing for current operating expenses does not produce an asset that can benefit future taxpayers but it is future taxpayers that pay back the debt. This mocks the concept of intergenerational equity. About $9.5 billion of the state's current debt has been issued for non-capital purposes—about 16 percent of the total outstanding. Since the Debt Reform Act of 2000, which specifically restricted the use of state-supported debt for capital purposes, at least $7.6 billion has been issued for operating purposes.[37]

The pervasive practice of borrowing long term for short term expenses and, generally, counting borrowed funds as revenues, was a prime cause of the New York City Fiscal Crisis of the mid-1970s when the city, addicted to debt, abruptly was precluded from the capital markets. Reform was demanded and an important feature of the laws promulgated to create reform such as the Federal Seasonal Loan Act, the State Financial Emergency Act and the legislation creating the Municipal Assistance Corporation for New York City ("BIG MAC") was that New York City was required to achieve a budget balanced in accordance with GAAP. The city did and was able to return to the credit markets within the proscribed four years. Since then, the balanced budget in accordance with GAAP requirement has become a significant advantage for New York City financing. In 2010, New York Lieutenant Governor Richard Ravitch advocated legislation that, among other measures, would have required the state to adopt GAAP budgeting, to close the fiscal year with the budget balanced, and to prevent the state from counting borrowed funds as current revenue. None of this was adopted. Like New York City in 1975, New York State in SFY 2010 also was in financial crisis as the state remained in the grip of the Great Recession. (New York City had a financing crisis; New York State had a revenue crisis.) Each episode shone a light on an unfortunate history of bad fiscal policy and practice.

Defining the proceeds of long term borrowing for short term expenses as revenue is a counterproductive financial practice and can be pernicious. The wisdom of a constitutional requirement for a truly balanced budget both at enactment and at the close of the fiscal year thereby preventing deficit financing may be worthy of exploration by a constitutional convention. Provision would need to be made to afford policymakers flexibility to deal with inevitable economic booms and busts as well as financial emergencies. But if so, the state could end the annual experience of balanced budget illusion and govern in reality with accountability.

E. Supermajority Requirements

A debt restriction imposed in some states is the requirement that general obligation debt only can be issued if it is approved by a supermajority of the legislature, usually two-thirds. A variation is that a supermajority vote of the legislature is required for a general obligation debt proposition to be placed on a general election ballot. (New York requires a simple majority vote of the legislature to authorize a general obligation debt referendum.) Such a procedural restraint on the issuance of debt, general obligation or otherwise, might be a proposed topic of consideration at a constitutional convention. It should not be.

Supermajority requirements in New York are primarily limited to veto overrides. Such instances are very rare. (In 1980, Governor Hugh L. Carey vetoed the budget which was the first time in 116 years that a governor had vetoed the budget. Notwithstanding that the budget had passed by near unanimous votes in both houses of the legislature, the veto was sustained.) Supermajority requirements have an anti-democratic dimension because they tend to empower the minority, granting it a veto power not necessarily earned at the ballot box.

D. Roderick Kiewiet and Kristin Szakaly in their study "Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness" observe: "We find no evidence that supermajority requirements constrain the issuance of debt."[38] They also find that states that require guaranteed, i.e., general obligation, debt issues to be approved by both referendum and legislature supermajority actually carry more such debt than most other states in the referendum category. They state: "This is yet another indication that the legislative supermajority requirement imposes no real constraints on issuing debt."[39]

There would be little practical reason for a legislative supermajority requirement to be considered by a constitutional convention.

F. Judicial Approval

Courts throughout the nation, and very specifically in New York, have approved the numerous ways that constitutional restrictions on guaranteed debt have been evaded and avoided. As noted by constitutional scholar Richard Briffault, "There is an enormous gap between the written provisions of state constitutions and actual practice."[40] State courts read constitutional fiscal provisions narrowly, technically—more like bond indentures than as statements of important constitutional norms.[41] Courts perceive evasions of constitutional text as matters of ordinary politics, not constitutional principle.[42]

In *Schulz v. State of New York*,[43] former Chief Judge Kaye observed "modern ingenuity, even gimmickry," may have "stretched the words of the Constitution beyond the point of prudence."[44] Nevertheless, Judge Kaye said the "plea for reform in state borrowing practices and policy is appropriately directed to the public arena."[45] Former Chief Judge Brietel wrote in a similar vein in an important case that approved the tortured funding of the Municipal Assistance Corporation (MAC) during the New York City Fiscal Crisis by the proceeds of state short term notes. Judge Brietel said the state was at "the brink of valid practice."[46] An earlier decision approved the appropriations by the state and the city of New York to fund the New York City Stabilization Reserve Corporation (SRC), the failed predecessor of MAC that was hastily created to assist New York City in crisis. The court found the infusion of note proceeds to SRC to be "permissible gifts . . . rather than legal obligations."[47] Judge Jasen, dissenting, described the majority opinion as "judicial condonation of constitutional evasion" and called for a "sensible reappraisal" of constitutional limits.[48] The purchase of MAC notes by the SRC, pension funds and other state authorities was termed "irrational" since it amounted to the purchase of tax-exempt securities by tax-exempt organizations.[49] Nevertheless, expediency and deference by the courts to economic and political circumstances has trumped strict constitutional adherence in New York.

Constitutional proscriptions of debt, and fiscal restraints generally, are a function of reaction. They speak to efforts to limit spending, taxing and government activism. In some respects they are attempts, mostly futile, to change human nature and the impulse of elected officials to borrow to address the problems that confront them when they are exercising government power. Whether those problems are war, weather related calamity, economic distress or economic development, in order to act, governments must spend. In order to spend, governments must either borrow or tax. Borrowing is easier and far less politically daunting than taxing; borrow-

ing often is simply a tax on those who cannot vote and complain effectively in the present. In *People v. Westchester County National Bank*,[50] the Court of Appeals, in discussing the procedural limits on general obligation borrowing of the 1846 Constitution, said: "[G]reat expenditures may be lightly authorized if payment is postponed. To place the burden upon our children is easy. . . . Conscious of this human weakness, . . . the people thought it wise to limit the legislative power [to authorize debt]."[51] But they did not. As discussed, the legislature and the executive continue to find innumerable ways to borrow that the courts conclude is not state guaranteed debt even though it is the public fisc that is responsible for servicing and paying the debt.

The New York courts continue to exercise tremendous deference[52] to the legislature in matters of finance because, as scholar Richard Schragger has noted, public finance is "largely a matter of politics and not a matter of institutional design."[53] Public finance is also about promoting the public purpose and courts will reject government financing programs as unconstitutional "only if it is 'clear and palpable' that there can be no benefit to the public."[54] Fiscal constraints tend to shift power away from elected officials as a means of constraining their tendency to borrow. Fiscal constraints also represent an endeavor to shift ideological fights to the courts. But, as Schragger offers, "The political solution to fiscal crisis is complicated . . . for it implicates deeper questions about the relationship between democracy and debt."[55] The New York courts have recognized that in the realm of public finance it is not their role to limit government flexibility or to constrain democratic majorities. Constitutional fiscal constraints are limits on the regular representative political process.[56] Our courts permit that sparingly, recognizing the broader consensus that constitutional retrenchment rules make for poor fiscal policymaking.[57] Courts generally treat fiscal limits as ordinary legislation, not fundamental rights.[58]

A new constitutional convention, if there is one, should react not to perceived political abuse of the state's borrowing power, or to perceived but unproven spending profligacy by elected officials but, rather, to the caution of the courts in interfering with democratic processes. That caution is appropriate. Questions such as economic development are political and seldom judicial. Responding to extraordinary financial developments or just ordinary economic cycles of expansion and recession is the province of elected representatives and the voters. Constitutionalizing fiscal policy has not worked, notwithstanding that ordinary politics may fail to provide an effective check on debt incurrence decisions. Budget making cannot be

depoliticized. Thus, reluctance to constitutionalize politics may be the best course.

G. Too Much Debt?

Advocates for new constitutional restrictions on debt claim that the state has too much debt. Comptroller DiNapoli notes that New York's debt burden is "among the highest" of any state and that New York is too reliant on debt.[59] New York's debt burden ranks second to California. New Jersey is third. Of course, New York is the third most populous state and one of the oldest. The Citizen Budget Commission reports that New York is in the "danger zone" by incurring too much debt as determined by an Affordability Index the Commission designed.[60] Comptroller Hevesi often decried the state's dependency on debt.[61]

A corollary of the belief that the state is profligate and that debt and spending are leading to peril is the assumption that state government is poorly managed. I do not believe that it is; quite the contrary. New York has a mature government and an experienced cadre of qualified professional managers. The Albany professional class is broad and stable. Pride and dedication is evident. Some state agencies have had multiple generations from the same families as managers. There is genuine, sophisticated know-how. There is also an aggressive Albany press corps.

There are unwelcome notions of religiosity ingrained in government and public psyches about debt that obscure objective analyses. Thrift is considered virtuous and borrowing is often considered slothful. Nonpayment of debt is often viewed as sinful and a practice to be punished. When debt is repaid, it is "redeemed." We speak of debt forgiveness and debt "conversions." The national debt is often characterized as a disgrace (as in without "grace") and something for which we should be ashamed. A balanced budget is a symbol of rectitude (even though it is an illusion, a pretense, and a lie). In our political history the Gold Standard had the stature of the Golden Rule; William Jennings Bryan deemed the Gold Standard "as crucifixion on a cross of gold."[62]

Ancient religions all were skeptical about debt. Islam forbade it. Sharia law still does. Christ chased the "money changers" from the Temple. Shakespeare's "The Merchant of Venice" demonizes lenders. Protestant Evangelism religiously admonishes government spending and calls for "retribution" of liberal government activism.

An important debate about debt limits in the context of a constitutional convention vote never should be skewed by religious parlance that is ingrained in our culture. Debt should be discussed in a hard-headed, lawyerly way.

There is no reliable, objective measure to determine the optimum amount of government debt.[63] As Brian Stetson of the Rockefeller Institute of Government asked, "How much is too much?" New York debt has increased rapidly. Between 1990 and 2003 debt rose 215%. From 2003 to 2012 it grew nearly 71%, or an average of 6.1 percent annually.[64] The 2015 current outstanding amount of state-funded debt of $63 billion is projected by the Division of the Budget to be $68.3 billion in 2017. Much of this recent increase is attributable to education. Also, since the middle of the first decade of this century there has been an extremely low interest and inflation rate environment. This led the state, wisely, to refinance a lot of more expensive debt. That phenomenon extends and enlarges the amount of current debt.

New York's increase in debt is consistent with the increase of debt in other states. The gross amount of outstanding debt of the states per capita grew by almost 30 percent in real terms between the years 1977 and 2000. The gross amount of the states' debt tripled in the period 1975–1985 and reached more than double that amount in 2000. Also consistent is the fact that more liberal and older states borrow more relative to less liberal states. Many states emulated the example of New York in using debt to expand their economic base. One hundred years ago in 1916, one third of all the tax free debt in the United States was attributable to New York. And that was before the creation of the Port Authority of New York and New Jersey in 1921, the activism of Governor Al Smith and the rise of Robert Moses.

Analysts use different metrics to place debt in context. Some view debt as a percentage of gross state product, others as a percentage of spending or as a percentage of personal income. These data are dynamic and imbued with many variables. Perhaps the most important metric is that New York keeps on borrowing and lenders keep on lending. New York never has defaulted on a payment. Moreover, the various rating agencies consistently give New York debt strong, investment grade rates and, notably, did so even during the Great Recession years when New York was the epicenter of the near-total collapse of the nation's financial system and New York State's tax revenues declined to unprecedented lows. Despite the dire warnings of too much reliance on debt, most of it by authorities, by many commentators including elected Comptrollers, the voters do not

seem to care. New York's debt reflects voters' tastes. That also is a significant metric.

Yet another important metric might be the extent that New York has not borrowed in the face of massive needs. This is illustrated by the challenge of improving aged infrastructure that was developed in New York's initial stages of dramatic borrowing.

H. Infrastructure

New York State's Capital Assets at the beginning of Fiscal Year 2012 were valued at $93.2 billion. Infrastructure (primarily roads and bridges) was valued at $66.1 billion. As noted by the Task Force, there is no central assessment of New York's capital needs. The Federal Highway Administration reports 37 percent of New York bridges are structurally deficient or functionally obsolete, and only 29 percent of highway roads are in good or very good condition. In respect to dams, the U.S. Army Corp. of Engineers reports that the average American dam is about 53 years old but New York's average dam is more than 75 years old.[65] In 2009, the State Comptroller determined there was a $250 billion capital investment needed statewide over the following 20 years. That estimate did not include the Metropolitan Transportation Authority (MTA), the New York State Bridge Authority, and the New York Thruway Authority (and was before Superstorm Sandy.) The MTA requires about $129 billion in the next 20 years and at least several billion dollars is required for Thruway Authority assets. The Federal Environmental Protection Administration estimated that New York's 20-year infrastructure need for drinking water is $27 billion and is $30 billion for wastewater. All of these costs are beyond New York's capacity. Excluding possible approval of additional general obligation funding by a debt adverse electorate, debt capacity under the existing debt cap pursuant to the 2000 Debt Reform Act is projected to be just $2.4 billion in fiscal year 2016–2017. (The debt cap, a function of personal income, should increase with an expanding economy.)

These immense infrastructure needs are directly related to the state economy. Transportation infrastructure is the servant of economics and is essential to promote economic growth. As employment and population surge in New York City, the more than 100-year-old subway system carries about six million people a day and is strained to its limit. The Tappan Zee Bridge, currently being reconstructed at a projected final cost of about $5 billion, links the upstate and downstate economies. And transportation is only one part of the state's vast infrastructure needs.

The significance of this is that the state must be able to sell extensive debt to meet even its minimal infrastructure requirements. Arguably, then, the state does not have too much debt; it has too little.

III. CONCLUSION

When pondering constitutionalizing debt reform, the question inevitably reached is whether it is wise to trust the normal political processes to ensure that debt is issued responsibly or is it preferable to attempt to constitutionalize various restrictions on state debt incurrence. Many constitutional options have been proposed including, without limitation: hard limits on general obligation debt expressed as a percentage of personal income or budget spending; hard limits on authority debt; banning authority debt without full faith and credit; expanding the number of instances in any given year that a bond issue could be submitted to the electorate; permitting the governor and the legislature to authorize the issuance of general obligation debt up to a proscribed annual limit; and various and many procedural restraints including supermajorities and debt itemization.

However, the history of debt restraints and limits is that they do not work. Also, they can make the selling of essential debt more expensive and time inefficient. Anyone who has served in state government or observes it closely should realize that the capacity of the New York financial industry to devise innovative ways to issue and service new public debt is inexhaustible. There would be new methods of constitutional evasion which the courts probably would countenance. Also inexhaustible are the demands placed on government for funding. Not all such demands are reasonable or legitimate but that is not the case in respect of the staggering need for infrastructure improvements or the plight of the vulnerable. In respect of infrastructure, just the necessity to bring the state's existing transportation infrastructure to a state of good repair presents enormous and continuing costs. New infrastructure to combat the yet-to-be completely understood challenges of climate change, or to accommodate new technologies and growing populations, add very significant costs that rightly should be spread across current and future generations. Thus, it would be foolish now to set constitutional limits on debt to be issued in the future, just as it was pointless for debt limits to have been placed in state constitutions in the 1840s in reaction to the banking crisis of 1837 and its ensuing depression.

Debt will be issued regardless of constitutional restraints and, on the whole, that is reassuring. Normal legislative and political processes have resulted in unnecessary debt at times, for sure. Legislators have a "debt

reflex" too often, while the electorate is debt adverse too often. But a good balance is achievable and generally good decisions have been made through the political process. That government has met its obligations "suggests that our abiding skepticism of local political processes is unwarranted."[66] If there had not been evasion of the constitutional restraints on general obligation debt, the state may not have been able to build its enviable systems of parkways, highways, bridges and parks that expanded its economy so dramatically and improved quality of life. Nor would the state likely have built so rapidly its impressive university system that has brought wide opportunity and advance. Without innovation in debt issuance, New York City may not have been rescued in the mid-1970s when the capital debt markets abruptly closed to it; Big Mac still only would be a descriptive term for a less than nutritious meal. And without the flexibility of current arrangements and understandings, the state may not have been able to issue the emergency long-term debt it issued to address immediate needs following the 9/11 tragedy in 2001.

Unlike constitutional provisions, democratic institutions have the inherent capacity to be adaptable and flexible. Elected officials and policymakers are accountable to the electorate. The people always have a remedy as well as the capacity for mischief and mistake, but they can discern the difference between fiscal irresponsibility and bad luck.[67] That is especially true in New York State which has been activist and interventionist and tends to elect adventurous leaders. Why try to harness that governmental dynamism with reactive restrictions?

The fundamental criticism of the Debt Reform Act of 2000 is that it is legislative and not constitutional. Thus, it can be changed and "not withstood." That is a good thing. As current law, it limits debt to a percentage of income and requires long term state supported debt to be devoted to capital projects only. The Act reflects a political sentiment and consensus arrived at the beginning of the 21st century that state supported debt needed to be controlled. Should that consensus change due to new circumstances, the law can be changed by elected representatives who must answer to critics, advocates, scholars, the press, doomsayers and optimists in real time. The people pay attention in gubernatorial election years, and, in off years, to certain very contestable legislative elections. That is ample opportunity to change direction and to make new concerns salient.

Political decisions generally are made at the margins. So should decisions about debt. A democratic process permits that. In that sense, evasion of poorly conceived constitutional debt restraints is merely the workings of the democratic will. Rendering debt decision-making processes to the

sunshine would be the ideal debt restraint. But, the ideal is a function of politics, and not artificial limits and fiscal institutions. Issues that might be worthy of exploration by a constitutional convention preparatory commission should include whether there should be any constitutional substantive or procedural debt restraints at all. There cannot be a meaningful method to ascertain future capital needs. Nor can there be an effective constitutional means to balance the necessity of capital investments and equitable levels of taxation.[68] Those are legislative and political choices that need to be made on a regular basis. A preparatory commission also should ask whether specific voter approval is ever the right test for the issuance of long term debt. A constitutional convention should not be convened to focus on constitutionalizing debt limits or debt procedures.

1 N.Y. CONST. art. VII, § 11.

2 *See, e.g.*, Jackie Calmes & Carl Hulse, *As the Federal Government Hits the Debt Limit*, *Lawmakers Spar Over Solution*, N.Y. TIMES, May 16, 2011, at A19.

3 *Moody's Assigns Aa1 to New York State's $325 million GO Bonds*, MOODY'S INV'R SERV. (Mar. 6, 2015), https://www.moodys.com/research/Moodys-assigns-Aa1-to-New-York-States-325-million-GO--PR_320212.

4 Charles Brecher et al., *An Approach to Measuring the Affordability of State Debt*, 23 PUB. BUDGETING & FIN. 65, 66 (2003) (maintaining that the shift towards different forms of debt is the main consequence of debt limits).

5 *See, e.g.*, Paul G. Farnham, *Re-Examining Local Debt Limits: A Disaggregated Analysis*, 51 S. ECON. J. 1186, 1195 (1985).

6 Michael A. Pagano & David Perry, *Financing Infrastructure in the 21st Century City: "How Did I Get Stuck Holding the Bag?"* 6 (Great Cities Inst., Working Paper No. GCP-06-02 2006).

7 Newell v. People, 7 N.Y. 9 (1852).

8 *Id.* at 93.

9 Richard Briffault, Foreword, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 920–21 (2003).

10 *Id.* at 922.

11 Clean v. State, 928 P.2d 1054 (Wash. 1996).

12 *Id.* at 1061.

13 *Id.* at 1068–69.

14 Briffault, *supra* note 9, at 925; Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 870 (2012).

15 Briffault, *supra* note 9, at 925.

16 NEW YORK REPORT OF THE TASK FORCE ON THE STATE FISCAL CRISIS 49, http://www.statebudgetcrisis.org/wpcms/report/ny-report/.

17 *See* Briffault, *supra* note 9, at 926.

18 Maria Isabel Rodriguez Tejedo, State Fiscal Institutions: An Evolution 66 (2007) (unpublished Ph.D. dissertation, University of Maryland, College Park) (on file with the University Archives, University of Maryland, College Park).

19 Brecher et al, *supra* note 4, at 66.

20 Briffault, *supra* note 9, at 909.

21 *See* James M. Poterba & Kim Rueben, *State Fiscal Institutions and the U.S. Municipal Bond Market*, *in* FISCAL INSTITUTIONS AND FISCAL PERFORMANCE 181, 204 (James M. Poterba & Jurgen von Hagen, eds. 1999); Beverly S. Bunch, *The Effect of Constitutional Debt Limits on State Governments' Use of Public Authorities*, 68 PUB. CHOICE 57, 66–67 (1991); James Poterba, *State Responses to Fiscal Crises: The Effects of Budgetary Institutions and Politics*, 102 J. POL. ECON. 799, 818 (1994).

22 Briffault, *supra* note 9, at 43.

23 Rodriguez Tejedo, *supra* note 18, at 48.

24 ROBERT B. WARD, NEW YORK STATE GOVERNMENT 282 (2d ed. 2006).

25 Editorial Staff, *Voters Approve Most Bond Referendums—OK California's Prop 30*, BOND BUYER, Nov. 8, 2012, GALE|A307674878.

26 Claire Gorham Cohen, *Analyzing Governmental Credit*, *in* THE HANDBOOK OF MUNICIPAL BONDS AND PUBLIC FINANCE 131 (Robert Lamb et al., eds., 1993).

27 Bunch, *supra* note 21, at 57.

28 James Leigland, *Public Authorities and the Determinants of their Use by State and Local Governments*, 4 J. PUB. ADMIN RES. & THEORY 521, 541 (1994).

29 OFFICE OF THE N.Y. STATE COMPTROLLER, PUBLIC AUTHORITIES BY THE NUMBERS 4 (2014).

30 Leigland, *supra* note 29, at 529.

31 Poterba & Rueben, *supra* note 21, at 189.

32 44 states have a similar requirement. In thirty-seven states the legislature must enact a balanced budget. *Id.* at 191.

33 Rodriguez Tejedo, *supra* note 18, at 18 n.9.

34 Twenty-four states prohibit deficits. States in the Northeast and upper Midwest are less likely to prohibit deficits caused by changed circumstances.

35 The Comptroller's annual Comprehensive Annual Financial Report, which usually is published about six months after the end of the fiscal year, is prepared according to GAAP.

36 OFFICE OF THE N.Y. STATE COMPTROLLER, NEW YORK'S DEFICIT SHUFFLE 1 (2010).

37 OFFICE OF THE N.Y. STATE COMPTROLLER, DEBT IMPACT STUDY 9 (2013) [hereinafter DEBT IMPACT STUDY].

38 D. Roderick Kiewiet & Kristin Szakaly, *Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness*, 12 J.L. ECON. & ORG., 62, 64 (1996).

39 *Id.* at 79–80.

40 Briffault, *supra* note 9, at 909.

41 *Id.* at 910. Professor Briffault cites scholars who also treat constitutional fiscal limits dismissively.

42 *Id.* at 942.

43 Schulz v. State, 639 N.E.2d 1140 (N.Y. 1994).

44 *Id.* at 1149.

45 *Id.*; Briffault, *supra* note 9, at 9.

46 Wein v. State, 347 N.E.2d 586, 588 (N.Y. 1976).

47 Wein v. City of New York, 331 N.E.2d 514, 518 (N.Y. 1975).

48 *Id.* at 521 (Jasen, J. dissenting).

49 Michael D. Utevsky, *The Future of Nonguaranteed Bond Financing in New York*, 45 FORDHAM L. REV. 860, 862 n.20 (1977).

50 People v. Westchester Cnty. Nat'l Bank, 132 N.E. 241 (N.Y 1921).

51 *Id.* at 244.

52 *See* Briffault, *supra* note 9, at 921 n.69

53 Schragger, *supra* note 14, at 864.

54 *Jackson* v. *Benson*, 578 N.W.2d 602, 628 (Wis. 1998) (quoting State ex rel Hammermill Paper Co. v. La Plante, 205 N.W.2d 784, 798 (Wis. 1973)); Briffault, *supra* note 9, at 914.

55 Schragger, *supra* note 14, at 864.

56 *Id.* at 866.

57 *See* Briffault, *supra* note 9, at 942–43.

58 *Id.* at 939.

59 DEBT IMPACT STUDY, *supra* note 37, at 2.

60 *See, e.g.*, CITIZEN BUDGET COMM'N, NEW YORK'S PUBLIC AUTHORITIES: PROMOTING ACCOUNTABILITY AND TAMING DEBT 12 (2006).

61 OFFICE OF THE N.Y. STATE COMPTROLLER, NEW YORK STATE'S DEBT POLICY 3 (2005).

62 *Bryan's "Cross of Gold" Speech: Mesmerizing the Masses*, HISTORY MATTERS (last visited Mar. 7, 2016), http://historymatters.gmu.edu/d/5354/.

63 ROBERT S. AMDURSKY & CLAYTON P. GILLETTE, MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE 171 (1992).

64 DEBT IMPACT STUDY, *supra* note 37, at 8.

65 TASK FORCE, *supra* note 16, at n.139.

66 Schragger, *supra* note 14, at 865.

67 *Id.* at 883

68 Briffault, *supra* note 9, at 949.

CHAPTER TEN

SHOULD THE INDEBTED SUPPORT A STATE CONSTITUTIONAL AMENDMENT TO RESTRICT PUBLIC AUTHORITY BORROWING?

Scott N. Fein

Double entendres may not be held in high regard in literature, but can be effective in illustrating irony. Public authorities have given rise to more than 95 percent of New York's debt, none of which was ever authorized by the voting public. We, the public, are indebted to them to the tune of $13,000 per man, woman, and child in New York State. Yet while we are indebted fiscally, we are also deeply in their debt. Without the funds provided public authorities, our state could not have developed nor sustained its public colleges, public housing and hospitals, trains, highways, airports, or almost every other improvement necessary for our society to function. This duality, the concurrence of the two types of debt, is at the root of a great debate. Should the public seek to place restrictions in our state Constitution on the ability of public authorities to borrow additional money, or shall we simply accept that tinkering with the status quo is too perilous? This chapter examines the issue.

Since the early 1900s, in the absence of voter approval or often knowledge, the state's public authorities have given rise to more than 95 percent of the state's aggregate debt and assumed responsibility for 85 percent of our infrastructure. They serve, many have suggested, as a shadow government. Good government organizations have increasingly urged adoption of a state constitutional amendment to place limits on the ability of the public authorities to borrow in the absence of voter approval. Others respond that fiscal limitations on entities responsible for sustaining the state's solvency would be ill conceived and could catastrophically impair the state's access to the capital markets. This chapter examines the issue.

I. BACKGROUND

Public authorities do not fit neatly into the framework of government, nor are they discussed in high school civics classes or even given a passing reference in college political science curriculum. Yet, they play an important role ensuring that there are sufficient revenues to support key government functions and allow those functions to be managed and operated by professionals while, in some measure, minimizing the political influence on operations.

Public authorities have a long and storied history. Despite popular perception, public authorities were not created to circumvent New York state's constitutional requirement for voter approval of state debt. Public authorities or their precursors have roots which extend back more than 500 years. European monarchs realized that they did not have the funds to prosecute and defend wars, underwrite global exploration and live in high style. They turned to crown corporations, essentially private corporations

chartered by a monarch to manufacture weapons, liquor, snuff, textiles, and underwrite exploration. At the behest of financially struggling sovereigns, these private corporations agreed to borrow money from the private sources and undertake exploration, including provisioning ships and paying seamen, in exchange for a monopoly on trade from any newly discovered lands. The sovereign would then colonize newly discovered land and the charted corporation would use trade revenue to pay off the incurred debt and enjoy profit as the volume of trade increased. The Dutch East India Company, Hudson Bay, and Plymouth Bay Company were among the more noteworthy of these private-public partnerships. For the next 150 years, the public authority model largely fell into disuse. As an agrarian society, our infrastructure needs were modest and could be supported by local taxes.

This changed in the early 1800s. The United States found itself confronting unprecedented industrial expansion and western migration. Railroads and canals needed to be constructed, banks established, and infrastructure created. Absent raising taxes to unsustainable levels, there was inadequate revenue to support westward expansion. The federal and state governments turned to the public authority model (or as referred to at that time chartered private corporations) to raise debt to finance the canals, railroad, roads, and other improvements, and then applied revenue generated by the new infrastructure to defray their debt. Unfortunately, in several notable instances the revenue earned by the public authorities proved insufficient to pay their debt, and default and bankruptcy of the distressed authorities followed. At approximately the same time, the nation fell into a recession which caused more than 50 percent of state governments to default on their debt, much of which was the product of state guaranteed public authority borrowing. Citizens were astounded—how could so much money be borrowed without their approval? The financial chaos that followed prompted voters in many states to impose limits on future state borrowing. In New York, this limitation took the form of an amendment to the state Constitution, which provided that no debt may be contracted on behalf of the state, unless such debt shall be authorized by law for some single purpose and be approved by a majority of the votes cast by the electorate. New York State subsequently enacted a provision expressly barring loans and gifts to private entities. The fiscal discipline imposed by these constitutional restrictions largely succeeded in reducing the state's debt and, by the turn of the century, New York State was on relatively stable fiscal footing.

However, the economic pressures of supporting a modern society grew. With increased immigration and the migration from rural areas to the cities, urban demands increased. Water, sewers, fire and police protection could not be sustained on a limited tax base. Beginning in the 1900s, public authorities, in New York and elsewhere, became the mechanism of choice to provide services. Often referred to as special districts or public benefit corporations these entities often borrowed money and imposed service charges on users to defray their debt. Many of these same special districts and public benefit corporations exist today.

The public authority model was adapted to braid range of circumstances over the next 40 years. For example, during World War I, public authorities were relied upon to construct and operate a merchant fleet, acquire and sell sugar and grain, and pay for housing, among other tasks. In the 1930s, the Public Works Administration, Tennessee Valley Authority, Federal Deposit Insurance Corporation, and the Federal Savings and Loan Corporation were among the new federal public authorities. In New York, the Port Authority of New York and New Jersey and the New York Power Authority were added to the list.

Through the 1930s, public authorities in New York were largely revenue neutral. They borrowed money to provide for public services, and charged tolls, fees, and rents to pay the debt. The approach largely obviated the need to seek tax increases to pay for the service provided by the public authorities. Robert Moses, the often celebrated sometimes decried urban planner, saw public authorities as money generating machines which, properly harnessed, could be used to create parks and recreation areas, expand transportation infrastructure and power generation, and enhance urban renewal. Using the revenue generated by the Triborough Bridge and Tunnel Authority, Moses largely remade the transportation and recreation infrastructure of New York City and Long Island.

To raise the revenue necessary to participate in World War II, the federal government turned to new public authorities, including the Defense Plant Authority which owned over 2,000 factories. In 1944, New York State entered into the first lease-purchase financing agreement with the New York State Dormitory Authority. The Dormitory Authority was obliged to issue bonds for the construction of dormitories and the state would annually appropriate money to pay the debt service. Since the state was not deemed bound to pay the debt service, it was, on its face, lawful.

Beginning in the 1960s, Governor Nelson A. Rockefeller promoted new debt practices which forever changed the nature of public authorities.

Upon taking office, the governor confronted a state university system that lagged behind those of other large states, urban blight, and a deteriorating transportation infrastructure. Rockefeller, aware that he had to comply with the state's constitutional provision requiring voter approval of new debt, proposed a number of public referenda to raise money to fund improvements. In relatively short order, the public repeatedly rejected Rockefeller's proposals to raise money for housing, transportation, and higher education. The governor was unsettled that the public would reject his initiatives and directed that his staff develop an alternative. With the assistance of John Mitchell, a New York City bond attorney and somewhat later the U.S. Attorney General, the governor's staff developed an innovative approach to the issuance of public authority debt which would allow the authorities to borrow money without seeking the public's approval. This new approach allowed the authorities to issue tax exempt bonds which would be paid for by fees and rents. The debt would not be considered state-issued debt, and thus not subject to the constitutional requirement for public approval. To make the debt attractive to investors, the state fashioned the bonds as tax exempt instruments and agreed that the state would have a moral obligation to pay the debt service if the public authority defaulted on the obligation. The moral obligation and tax free aspects of the authority bonds fueled their growth beyond expectation. Within a few years, other states adopted the "Rockefeller formula" to use public authorities to provide for public services and the number and scope of authorities grew dramatically.

Throughout the late 1970s and 1980s, state and local elected officials were confronted by an increased demand for public services, opposition to additional taxes, subsidies to promote economic developments and continuing rejection of public referenda necessary to fund the improvements and services. Faced with unfunded needs, New York State's elected officials increasingly relied on public authorities to supplement the state's general fund. Detractors commonly refer to such public authority debt as backdoor borrowing. Unlike most of the earlier models of public authority debt which relied upon self-generating revenue generated from tolls or lease payments or other operations to repay the debt, state-supported debt requires public authorities, at the legislature's and governor's behest, to simply issue bonds. Typically, to issue bonds without approval of the electorate for purposes that often had little relationship to the mission of the public authority. The proceeds of the bonds are then used to pay for capital costs that historically would have been paid by taxes and referenced in the state budget. The state, using annual appropriations, then pays debt service on the moral obligation bonds issued by the public authority.

Public authority state-directed debt issuance continued to climb through the 1980s. Voters resisted tax increases, as did their elected representatives. Deterioration of the transportation infrastructure, environmental protection, housing stock, and primary and secondary education were increasingly discussed. "Do more with less" became the fiscal direction given to state agencies. Nationwide, states turned to public authorities' appropriation-backed moral obligation bonds to generate off-budget revenue.

When pressed for a justification for using government appropriations to underwrite public authority bond offerings, the elected officials responded that most of the authority bond revenue is used for improvements that are intended to last 30 years or more, and the upfront cost would, if paid from the state's general fund, make it almost certain that the budget would not be in balance. However compelling the rationale, appropriation-backed borrowing has become the single largest state funding mechanism for both the state's capital and operational needs.

New York State is not alone in its use of public authorities to supplement the general fund. It is estimated that nationwide there are more than 35,000 state, local, and federal public authorities that rely upon this same model. Internationally, the concept has taken root. Japan has more than 3,000 public authorities, Germany 5,000, and Canada more than 400. It is difficult to find a country that in one form or another has not embraced public authority financing to supplement the traditional tax based budget. Most recently, the public authority approach has been used by developing nations to access capital markets.

II. IS THERE A NEED FOR A CONSTITUTIONAL AMENDMENT?

The concern expressed by government reform groups and commentators is that the state supported public authority bonding process has so dramatically increased the state's accumulated debt that in the absence of voter approval, there must be a sea of change. A constitutional amendment, in their view, may be necessary to eliminate state supported borrowing or provide for the imposition of a rigid cap on public authority debt. Failing that the electorate will have lost all control over state borrowing and finances.

This view is compelling. New York State now relies upon public authorities to undertake most borrowing on its behalf. Public authority debt supported by appropriations taken from personal income tax reserves

(referred to as PIT bonds) has grown dramatically. PIT bonds are currently graded higher, that is, require smaller interest payments, than the state's conventional public approved debt, referred to as General Obligation ("GO") state debt. Currently, GO debt constitutes 12 percent of state-supported debt, while appropriation-backed debt constitutes 23 percent of the state's supported debt. Statewide, elected officials have increasingly looked to appropriation-backed bonds for short term operational needs, in addition to capital projects, including short term borrowing for school districts and support of localities.

The growth of state public authorities has been nothing short of explosive. Annually, state authorities report expenditures between $36 and $38 billion, and employ approximately 104,000 employees. Ninety-five percent of all state funded debt is now issued by public authorities. State-funded public authority debt continues to grow despite recent efforts to reform the state's debt policies.

In 2000, recognizing that the state's debt practices needed enhanced management; the legislature enacted a New York State Debt Reform Act. The Act sought to cap new state debt at a specific level and provided that debt could only be used for capital works or purposes and could not have a maturity longer than 30 years. The Act had one material weakness. The legislature omitted appropriation-backed public authority debt from the definition of "debt" in the Act.[1] Because appropriation-backed public authority debt constitutes the largest component of state debt, the omission undermined the effectiveness of the Act.

In the face of uncontrolled growth in debt, commentators have suggested that the state constitution should be amended to: (i) impose new numerical limits on state and municipal debt, and (ii) limit the issuance of appropriation-backed borrowing by state public authorities absent voter approval. The details of the proposed amendment differ, but generally there is a call for an affordability analysis of state and municipal indebtedness by an independent board. The objective would be to establish rolling, multiyear limits for debt based upon fiscal resources, trends, needs, and patterns of debt by analogous jurisdictions.

While the proposal is attractive, the question is whether, even if enacted, it is likely to cause a meaningful change in the manner and scope to which the legislature relies on public authorities to issue debt. Two prior constitutional amendments restricting non-voter approved borrowing and prohibiting the state from assuming financial liability for public authority borrowing have largely been ignored by our elected officials. Of

equal concern, as discussed in the following section, our state courts, have not been inclined to enforce constitutional amendments in any circumstance which might unsettle the state's finances.

III. JUDICIAL RELUCTANCE TO ENFORCE CERTAIN CONSTITUTIONAL LIMITATIONS

The two existing constitutional provisions prohibiting state borrowing in the absence of public approval appear unambiguous and self-executing. No further clarification or implementing legislation should be required to give the provisions force and effect. Yet, these provisions have been largely ignored.

As discussed, New York and other states sought to mitigate the problem of growing indebtedness by enacting limitations on the manner in which the state could issue debt, particularly as would pertain to state public authorities. In New York, Article VII, § 9 of the state Constitution was amended to provide "[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation." In addition, § 12 of the same article of the state Constitution was amended to provide that "[n]o such law [which creates debt] shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election." In 1938, responding to a concern about the increasing number of public authorities and the state's liability for public authority debt, the 1938 state Constitution was amended to provide that public authorities were to be created by a special act of the legislature, required the state comptroller to supervise the accounts of public authorities, and stated that public authority debts were not an obligation of the state or local governments. The collective importance of the 1846 and 1938 constitutional amendments was unambiguous—no indebtedness without statewide voter approval.

Yet, New York State courts were not persuaded. Cases decided by the state courts at every level reflect the judiciary's reluctance to meddle with legislative action involving public authority bonding critical to sustaining public services. Several cases merit mention.

In 1955, the city of Elmira agreed to pay the debt service for the Elmira Parking Authority. The agreement was challenged as contravening the state constitution. The New York State Court of Appeals, affirming the arrangement, concluded, "[w]e should not strain ourselves to find illegality in such programs. The problems of a modern city can never be solved

unless arrangements like th[is] . . . are upheld, unless they are patently illegal."[2] "Since the city cannot itself meet the requirements of the situation, the only alternative is for the State, in the exercise of its police power, to provide a method of constructing the improvements and of financing their cost."[3]

In 1971, the voters rejected a proposed $2.5 billion transportation bond issue. The following year, the legislature directed the Thruway Authority to issue bonds, the proceeds of which would reimburse the state for the same expenditures previously rejected by the voters. The state would then appropriate money to pay for the debt service on the bonds. The New York state comptroller opined that "this financing scheme is a thinly veiled indebtedness of the State." "If the form of the scheme prevails and the indebtedness is treated as that of the Thruway Authority, it is quite clear that State tax revenues will be the source of payment of the obligations issued by the Thruway Authority, raising a question of constitutionality [of the action]." Despite the opinion, when confronted with the implications of nullifying the Thruway bond issuance, the comptroller relented and supported the bond issue. The decision to issue the bonds was subsequently affirmed by the courts.

In 1975, in the midst of the fiscal crisis, New York City was unable to raise money in the capital markets. To ensure there were funds available to the city, the state created the Stabilization Reserve Corporation (SRC). The SRC was directed to sell over $580 million in bonds and turn the money over to New York City. The creation of the SRC was challenged as contrary to the state Constitution. The state Court of Appeals concluded that the SRC was lawful.

In 1981, voters rejected a $500 million bond referendum for prison construction. Given the expanding prison population, the governor and legislature concluded that the rejected referendum could not be the final word. Choosing the public authority revenue raising model, they turned to the Urban Development Corporation (UDC) to finance the prison construction. The UDC was directed to issue tax exempt bonds to pay for the prison construction. The constructed prisons would be leased to the state Department of Correctional Services. Annual appropriations from the legislature would pay the UDC's debt service. The use of the UDC for these purposes was challenged as a violation of the state constitutional requirement that state debt be subject to voter approval. The state Appellate Division affirmed the legislative decision, holding that:

> where, as here, we are called upon to deal with an intricate scheme for public financing or for public expenditures designed to meet a public interest, the court must proceed in its review with much caution. It is the Legislature which is mandated to make policy decisions in such areas and the court may not invalidate its decisions, enacted into law, out of a mere preference for a different or more restrained approach.

In 1993, the state enacted a four-year $20 billion program designed to enhance transportation and the related infrastructure. The Thruway Authority and Metropolitan Transportation Authority were directed to issue bonds to be supported by state appropriations. The financing approach was challenged as allowing debt to issue in the absence of voter approval in violation of the state constitution. The Court of Appeals, appearing to ignore the reality of the situation, concluded that there could not be a violation of the constitution because the enabling statute prepared by the legislature stated that there was no requirement for the legislature to make an appropriation to satisfy the debt service. That statement of legislative intent, although wholly inconsistent with the actual financing arrangement was, for the Court, dispositive of the matter.

While it is true that New York courts have a poor record of defending the constitutional requirement of voter approval of debt, the courts have considerable company. In virtually all of the states, the courts have declined to enforce the provisions, including the highest courts of Massachusetts, Wisconsin, California, Texas, Michigan, Maine, and North Carolina.

The judiciary's hesitancy appears less the product of political pressure than concern that tinkering with a financing scheme could destabilize our government and its services. Timing also plays a role. Cases may take more than a year to wind their way to a state's highest court. Often, if the legislative directive is not stayed by a lower court, public authority bonds will issue and revenue will be received before the highest court has the opportunity to opine. The prospect of a court overruling a legislative action and directing that the bonds be clawed back and proceeds returned may dissuade the boldest judge. A court confronted this precise dilemma in 1984. The New York State Urban Development Corporation had already sold nearly $300 million in bonds for prison construction before the case contesting the sale reached the State Appellate Division. Mindful of the delay, the court noted any adverse judicial action at this point would "cause unacceptable disorder and confusion."[4]

IV. THE ALTERNATIVE

Given the backdrop, could a third state constitutional amendment constrain public authority borrowing? Assume for a moment that following a constitutional convention in 2019 the public approves a new amendment to the state Constitution which makes unambiguous the prohibition on any additional borrowing by or on behalf of the state for services related to state infrastructure or operating costs. Several scenarios may follow.

Best case, the public understands that infrastructure services will now have to be funded out of current tax receipts or approved debt. The consequence would likely either: (i) increase personal and corporate tax burden by more than 275 percent, or (ii) result in a deterioration of our state's infrastructure. The collective impact would dissuade companies and individuals from moving to New York and hasten exodus from the state, further eroding the tax base.

Worst case, the legislature continues to ignore the constitution but the courts, emboldened by the new amendment, conclude in response to a citizens' lawsuit that "no means no" and bar further backdoor borrowing. With one opinion, the court could effectively close the door to the state's ability to access capital markets. The most likely case in the aftermath of a new amendment? The legislature and creative bond lawyers will midwife innovative and opaque financing schemes to maneuver around the new constitutional prohibition—schemes which likely would take years to unravel and further exacerbate our fiscal condition.

In New York, appropriation-backed public authority debt is the reality and likely here to stay. It is imperfect and suspect. It will burden future generations with, at this point, almost immeasurable debt. It is in the long term unsustainable, but in the immortal words of Pogo, "We have met the enemy and he is us." And "us" does not regrettably have the discipline to curb our fiscal appetite.

An alternative to a constitutional amendment extinguishing appropriation-backed public authority debt may be for the state to adopt statutory changes to provide for greater transparency, more careful coordination of the debt, and evaluation of the projects the debt is intended to service. For the past 20 years statutory reforms have been suggested which, individually and certainly collectively, would introduce sunlight into the process and perhaps give rise to new reforms not now contemplated. The statutory reforms that have been suggested include:

- Placing state supported public authority debt within the definition of state debt for purposes of and future cap of financial reforms.

- Ensuring the executive budget details the nature, amount and justification for state supported public authority debt.

- Prioritizing potential issuance of debt in a comprehensive five-year capital plan.

- Confirming that public authority debt is coordinated with state agencies to minimize duplication.

- Providing a thorough review of the candidate projects to ensure they are, to whatever extent feasible, financially self-sustaining and the revenue projections in accord with accepted accounting standards.

- Eliminating the Public Authority Control Board and replacing it with more comprehensive capital planning and project feasibility analysis to ensure borrowing is part of the long term capital plan.

- Centralizing the issuance of public authority debt to take advantage of market conditions.

- Continuing to insure that public authorities are making available to elected officials and the public performance and fiscal measures.

- Taking heed when the public rejects a funding referendum; deem it is an expression of concern rather than acquiescence in an off-books funding strategy.

One last observation merits comment. While New York State has created the modern public authority financing model, it has also taken the lead in establishing procedures to enhance public understanding and control of public authorities. Beginning in 2005, with the enactment of the Public Authority Accountability Act (PAAA), followed in 2009 by the Public Authority Reform Act (PARA), New York State has sought to illuminate the operations of its more than 600 state and local public authorities. Together, the Acts provide for the establishment of an independent agency to collect data from all state and local public authorities who will post collected data on a publicly accessible website. This new oversight entity requires submission of independent audits, and projected budgets including debt issuance, operational plans, and governance policies. While neither PAAA, PARA, nor the new oversight agency can reduce the issuance of debt, by widely disseminating the information and enhancing

transparency these agencies will allow the public and elected officials to insist upon greater accountability.

1 § 2.

2 Comereski v. Elmira, 125 N.E.2d 241, 244 (N.Y. 1955).

3 *Id*.

4 Gen. Bldg. Contractors, Inc. v. Egan, 483 N.Y.S.2d 746, 748 (N.Y. App. Div. 1984).

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CHAPTER ELEVEN

NEW FRONTIERS FOR NEW YORK CONSTITUTIONAL FINANCE LAW IN THE TWENTY-FIRST CENTURY

Kenneth W. Bond

> The Government is not the insurer of its citizens against the hazards of the elements. We shall always have flood and drought, heat and cold, earthquake and wind, lightning and tidal wave, which are all too constant in their afflictions. The Government does not undertake to reimburse citizens for loss and damage incurred under such circumstances**. It is chargeable, however, with the rebuilding of public works and the humanitarian duty of relieving its citizens of distress.**
>
> —Calvin Coolidge, 1927 Annual Message to Congress.

I. INTRODUCTION

Constitutional debt limits are regarded as important instruments for the promotion of economy in the operations of states and local governments and for the protection of public sector credit. Constitutional debt restraints are intended to prevent state and local government extravagance more effectively and add greater strength to public sector credit than do mere statutory regulations.[1] But it hasn't worked out that way since the constitutional provisions on state and local government debt and tax restraint were enacted by the people in 1846, 1894 and 1938. The real significance of constitutional fiscal limits is that they have not actually controlled state and local government finances: state legislatures and local governments have repeatedly sought to expand the scope of "public purpose" (for which tax-supported debt may be issued) and slip the restraints of tax and debt limits.[2] When challenged, courts have upheld novel financing schemes as too complex to figure out or as proper exercises of discretion the "wisdom" of which is not before the courts to judge. Why has the Empire State which, early on, placed in its Constitution rigorous limits on debt and taxes subject to voter approval, accumulated one of the highest per capita debt levels in the nation (to say nothing of taxes) from which its citizens are fleeing,[3] issued mostly by entities accountable only to politicians elected to office and for all purposes unknown (and virtually unknowable) by the voters? The more important question is will the voters exercise the power granted to them in the Constitution to demand a constitutional convention to fix this or be watching reruns of the Kardashians?

II. THE NEW YORK CONSTITUTION: THE PEOPLE'S LAW

The 18th century origins of the New York Constitution embody the principle that state government is responsible to the people. This is exemplified in Article XIX, § 2 of the Constitution, which requires that in 1957 and every 20 years thereafter the people may approve the following ballot proposition: "Shall there be a convention to revise the constitution and amend the same?" Since 1938, only one convention has been held: in 1967, the results of which the voters rejected. Opportunities in 1977 and 1997 to amend the Constitution by convention were also rejected by the voters. Thus, New York, like many states, conducts its state and local government finance activities under organic law adopted in the 19th and early 20th centuries. By failing to substantially revise Article VII (State Finances) and Article VIII (Local Finances), among other articles, the state operates under a bizarre system of government finance which (i) ignores the Constitution with judicial impunity, (ii) relies upon public benefit corporations, also known as public authorities (which are indirectly referred to only once in the Constitution) to finance billions of dollars of state bonds outside constitutional restraints, subject only to the discretion of the legislature, and (iii) encourages dubious local government and economic development financing in an attempt to stimulate the state's sad economy.

But the very mention of the state Constitution itself, let alone its substantial revision and amendment, generates widespread resistance and anxiety. Most involved in government, policy and politics don't want to discuss it, and certainly not change it, out of fear that any change, especially a major overhaul, would disenfranchise important constituencies of valuable benefits, such as those which make public employee pension and retirement benefits a guaranty by the state and its "civil divisions" which cannot be "diminished or impaired."[4] A convention, they say, would be a Pandora's Box no one would dare pry open lest chaos ensue.

III. THE LAYOUT OF THE 1938 STATE CONSTITUTION

Any discussion of the current finance provisions of the state Constitution must be placed in the context of the 1938 Constitutional Convention out of which they emerged. Strongly influenced by former four-term Governor Alfred B. Smith, the revisions to the 1894 Constitution adopted by the 1938 convention and approved by the voters later that year were trans-

formational. The convention advanced then-Governor Herbert Lehman's "Little New Deal," the state's version of the New Deal that had been implemented at the national level by former Governor (and then-President) Franklin Roosevelt, initiating the now-familiar proto-social welfare state we live in. The changes made by the 1938 convention were a dramatic departure from prior state constitutions, as the state adopted new and expanded powers to cope with the socio-economic conditions of the Great Depression, then in its sixth year. What had been the conservative organic law of New York consisting of 15 articles largely placing restraints on state action became a pro–active government action document with 20 articles. Rather than restraining state government action, these new provisions gave enhanced powers to the state to serve and provide for its people, including, President Coolidge might observe, to "reimburse citizens for loss and damage incurred under such circumstances," i.e., the Great Depression. Protecting them from the state itself seemed less important in the face of challenges requiring state activism. The constitutional revisions adopted in 1938 were an early state version of the Stimulus Act of 2009[5]—putting government money to work to soften the impact of perceived economic hardships.

The state Constitution today closely resembles that which existed at the conclusion of the 1938 convention, and is a product of the thinking of that era. Several sections of the Constitution commit state resources in ways which bring them into tension with other sections:

1. *The guaranty of state employee pensions without diminution or impairment*. Article V, § 7 of the Constitution, which prohibits the diminution or impairment of public pensions, is intended to protect public employees against loss of retirement benefits during economic downturns.[6]

2. *Home Rule.* Article IX of the Constitution, adopted in 1963 but the product of many earlier revisions in 1923, 1935 and by the 1938 convention, sets the ground rules for initiatives by local governments. Although earlier constitutions had placed some minor limits on local and special laws, the Home Rule Article goes much further in providing a bill of rights for local governments and by requiring the state in most instances to obtain the approval of the local legislative body before adopting special laws relating to "the property, affairs or government of any local government."[7]

3. *Adirondack Park.* Article XIV was originally added to the Constitution by the 1894 convention to preserve forests and wilderness

areas. The noble intentions of keeping the Adirondack Park "forever wild," however, takes 30 percent of the state's land area and renders it useless for economic growth and generation of government revenues.

4. *State Taxes.* Far from being a restriction on state government, Article XVI constitutionalized the sovereign power of the state to levy taxes. We would need them, and still do, to pay for the mandates imposed on state government, particularly in the next two new articles. These Great Depression articles provide for proactive state assistance, not restraint, in providing social health and welfare and housing.

5. *Social Welfare.* Article XVII, the Social Welfare Article, provides that the "aid, care and support of the needy" and the "protection and promotion of the health of the inhabitants of the state" are both matters of statewide public concern.[8]

6. *Public Housing.* Article XVIII, the Housing Article, authorizes public housing and nursing homes, housing authorities, state loans for low-income housing, local government debt for low-income housing and loan guaranties—in other words, housing projects.[9]

IV. CONSTITUTIONAL FINANCE PROVISIONS

It should not have come as a surprise to the 1938 convention delegates that these mandates for state action to promote public health and welfare, housing, and wilderness preservation would require a lot of money, most of it borrowed. So it is a puzzlement that the Constitution's 19th century restrictions on state and local debt, grounded on voter approval, Article VII, § 11, and real property values, Article VIII, § 4, respectively, were not loosened. Imagine Congress enacting the New Deal but prohibiting the United States from issuing Treasury bills without voter approval.

Instead of amending the Constitution, the legislature invented "public benefit corporations" (PBCs), with the expectation that these authorities would escape constitutional debt restrictions. It was not long after the establishment of the Port Authority of New York and New Jersey in 1921 that the legislature began to enact laws establishing several PBCs to build mandated facilities and fund government operations, each with the power to issue debt without voter approval or debt limits of any kind.[10] To illustrate, as New York City was growing and about to exceed its debt limit in the early 20th century, the legislature proposed and voters approved a con-

stitutional amendment increasing the city's debt limit. But in the 1990s when New York City again faced the likelihood of exceeding its constitutional debt limit, the legislature simply created a separate authority for water facilities and a "temporary" PBC to finance city infrastructure with revenue bonds secured by pledging income taxes and sales taxes.[11] Authorized and issued without voter approval, that debt is limited only by policies of the legislature and modest administrative oversight by an Authorities Budget Office.[12] Not surprising, of the total state and state-related debt as of March 2013, 92.5 percent was not approved by the voters.[13]

The finance provisions for state debt are contained in Article VII, some dating back to the Constitution of 1846. Voter approval is ostensibly required before the state can incur debt, and any debt incurred must be for "some single work or purpose."[14] Although there is no "faith and credit" pledge on state debt, Article VII, § 16 requires the state comptroller to pay principal and interest on state debt without an appropriation of the legislature, creating a *de facto* faith and credit pledge. The "credit" of the state, including the proceeds of state bonds, may not be given or lent to any person or entity (including municipalities and other public corporations).[15] The state may also not give or loan its "money" to any "private corporation or association, or private undertaking."[16] A series of exceptions to these prohibitions exist; among them: (i) the state may loan money or credit to "provide" for various public health and welfare purposes and for public employee pensions, and (ii) state money or credit may be lent to a "public corporation" (i.e., an entity established under the Public Authorities Law) to guaranty loans made by banks and for the construction and rehabilitation of industrial and manufacturing facilities.[17]

Considering the powers granted the state in Articles XIV, XVI, XVII and XVIII, it is difficult in hindsight to understand why the 1938 convention continued the restraints and limitations on state debt.[18] Why does the 1938 Constitution ignore the availability of revenue bonds, well-known in the public finance business by the 1920s, or the concept of limited obligation bonds payable from a "special fund"?[19]

Likewise, the local government finance provisions of the Constitution that existed at the time of the 1938 convention remain largely intact today in Article VIII.[20] Local government debt can be authorized only for the purpose of the particular local government under Article VIII, § 2, and like Article VII, no local government may give or loan "credit" to any entity other than the local government itself, or give or loan money to any individual, private corporation or association, or private undertaking.[21]

The restraint on local government debt involves (1) voter approval in certain cases,[22] and (2) a limit on the amount of debt which a local government may have outstanding based on a percentage of "average full valuation of taxable real estate" and referred to as the local government's "constitutional debt limit."[23] Article VIII contains a robust "faith and credit" pledge for payment of local government debt, backed up by a requirement that the "first revenues" received by the local government be allocated to payment of debt if such payment is not appropriated by the local government.[24] What "faith and credit" and "first revenues" mean for owners of local general obligation bonds under state law has been interpreted by the Court of Appeals to make municipal bonds secured transactions and real estate taxes the equivalent of pledged receipts.[25] Unlike Article VII, Article VIII does not recognize "public corporations" as financing agencies of or established by local governments.[26]

V. THE PRACTICES OF STATE FINANCE UNDER THE CURRENT CONSTITUTION

Since 1938 only one constitutional convention has been held. The 1967 convention produced an entirely new Constitution (rejected by the voters) which would have expanded the powers of both the state and local governments. In considering amendments to Article VII in a prospective convention, the recommendations of the 1967 convention should be revisited. The basic view of the 1967 body was that the constitutional provisions concerning both state and local government finance, intended to secure the state's fiscal health, are excessively detailed and restrictive.[27] Many of the 1967 recommendations for Article VII dealt with procedural hurdles to adopting the state budget and the lack of a "balanced budget" requirement.[28] Nonetheless, today were a convention to undertake a review of Article VII, adding a balanced budget requirement might reverse the Court of Appeals' holding that a budget in balance when adopted does not go out of balance in succeeding years because the state engages in short-term revenue and tax note financing for several years.[29]

The debt provisions of Article VII came under fire at the 1967 convention. Both the public referendum requirement with its narrow (and largely meaningless) exceptions noted above and the "gift and loan" prohibitions were criticized as forcing the state into "off-the-books" financing with PBCs like the Dormitory Authority of the State of New York, the New York State Thruway Authority and the Empire State Development Corporation (ESDC). As noted in numerous reports on the state's financial health, over 90 percent of the state's "debt" for which legislative appropri-

ations are available, is non-voted PBC debt with no or legislatively flexible debt limits, hardly the sort of thing the 1938 convention delegates would seem to abide.[30]

The proposed 1967 Constitution eliminated restrictions on the use of public funds to provide financial assistance for "economic and community development." Historically, neither statutes nor courts in New York have recognized "economic development" as a public purpose—and governments can only incur debt for a public purpose. The proposed 1967 Constitution would have determined "economic development" to be a public purpose and would have permitted the state both to loan its money and to authorize and issue debt for economic and community development purposes without voter approval. With voter rejection of the proposed 1967 Constitution, proliferation of PBC debt grew substantially throughout the 1970s and has continued unabated, despite numerous court challenges. How the courts have dealt with PBCs may inform how a new convention should address changing their role, if at all, in the constitution.

Courts distinguish PBCs according to the source of funding their debt service. A PBC that issues debt secured by revenues generated from the public enterprise (e.g., water rates, sewer rents, highway tolls, various user fees) gives no offense to state constitutional provisions which require voter approval to authorize state debt.[31] The theory which supports these "revenue bonds" is the Special Fund Doctrine, i.e., project revenues as collected are placed in a segregated fund with debt service having a prior lien on the money in the fund. Here, no taxes are required or pledged and constitutional restrictions are not violated. The problem arises when the Special Fund Doctrine is expanded to include legislative appropriations from any source, including, of course, taxes.

In the 1993 case of *Winkler v. West Virginia*,[32] the West Virginia Supreme Court held that PBC debt payable from legislative appropriations does not meet the requirements of the Special Fund Doctrine and therefore offended the constitutional voter approval requirement to authorize state debt. Nine years later, the New Jersey Supreme Court held in *Lonegan v. State*[33] that its state Constitution allowed education finance authority bonds to be paid from general appropriations. The court held that: (i) the education provision in the New Jersey Constitution is of equal importance to the debt restriction alleged to have been violated, (ii) given the essential nature of education, it is highly unlikely the authority bonds would default even though debt service must be appropriated annually, (iii) the issuing authority for the bonds is independent of the state, and (iv) modern sophisticated financing techniques require issuer flexibility, i.e., if

the market will buy the bonds, ignore constitutional restraints. In New York, the Court of Appeals took the view in *Wein v. City of New York*[34] that an appropriation-backed obligation between the City of New York and a PBC was no more than an annual gift.[35] The Court found that this arrangement did not violate the Constitution because (i) the Stabilization Reserve Corporation, the entity issuing the bonds in question, was an independent agency according to Article X of the constitution (even though New York City appropriated money to this PBC), and (ii) both the state and New York City can make gifts to PBCs—gifts by and between the governments is not prohibited in the gift and loan clauses of Article VII or Article VIII.

For all the handwringing over whether successive annual appropriations for PBC bonds made these obligations *de facto* state bonds subject to voter approval, Chief Judge Kaye in *Schulz v. State of New York* lamented: "The wisdom of legislation, of course, is not a matter for the courts."[36] And there the matter stands. PBC bonds today have universal market acceptance and in some cases bear higher ratings from the national credit rating agencies than state debt subject to voter approval. For all the fuss in the courts over constitutional violations, PBC bonds have been structured with statutory intercepts of state taxes to make them synthetic faith and credit bonds. Moreover, where the state appropriates funds to a PBC which is authorized by statute to make "economic development" gifts or loans to private entities, the constitutional analysis stops with the legal appropriation to the PBC, not with the ultimate private sector recipient of state money—sorry, gift and loan prohibition enthusiasts.[37]

By the mid-1990s, the mounting debt of PBCs, the proliferation of these entities, and concerns about their extracurricular activities and qualifications of their board members gave cause for the legislature to enact "authority reform." In 2000, the legislature imposed debt limits on PBC debt backed by state legislative appropriations measured against a percentage of state receipts, including taxes.[38] An "independent" Authorities Budget Office (ABO) was created in 2005 to review PBC practices and compliance with applicable law, assist in training and managing board members, and provide information to the comptroller and the legislature.[39] In 2009, the powers of the ABO were expanded, including, *inter alia,* the authority to seek an order of the supreme court that a recalcitrant PBC provide information.[40] The ABO may not be a perfect substitute for voter approval, but many would argue it is better. To tinker with the Constitution to force PBC debt back into the restrictions of Article VII would be a fool's errand. However, how much PBC debt—particularly the

"appropriation-backed debt" the *Winkler* court frowned upon—should be outstanding or how much of the state budget should be devoted to debt service on PBC debt in consideration of the state's financial health is another matter, and conspicuous in its absence from authority reform legislation.[41]

VI. THE PRACTICES OF LOCAL FINANCE UNDER THE CURRENT CONSTITUTION

The 1967 convention focused on the anomaly that restrictions on local government debt through limits based on a percentage of real property values and the requirement that local government taxes can only be authorized by the legislature were outdated and inhibited economic development, and importantly, infringed on home rule powers afforded by Article IX of the Constitution. The primary reform in the proposed 1967 Constitution was removal from the debt limit for loans to private entities for "economic and community development" and the authorization for cities to guarantee loans of public corporations for economic development projects located therein. Commentators on the local finance article in the 1960s leading up to the 1967 convention were torn between appreciating that tax and debt limits and restraints on local government debt had prevented financial irresponsibility and frustration with the straightjacket local governments found themselves in to finance economic development with public funds. Also of concern was the lack of mechanisms in the Constitution to permit consolidation of political subdivisions and the creation of financially strong metropolitan governments similar to New York City.

A serious analysis of Article VIII was not taken up again (nor has it been since) until the Association of the Bar of the City of New York (ABCNY) issued a report in 1978 recommending constitutional amendments to "strengthen local finance laws" in the state.[42] The report's guiding principle was "local government can give or loan money, property or credit only when authorized by the Legislature for a public purpose." If acted upon, that principle would have (i) removed debt restrictions from the Constitution and placed them in the hands of legislators, and (ii) opened the door to expand the finance law definition of "public purpose." The report recommended the elimination of the "gift and loan" prohibition with respect to private entities such that debt could be incurred and public funds expended for economic development—a concept similar to the rejected 1967 proposed Constitution. It observed that the "gift and loan" prohibition had been circumvented by the establishment of PBCs

which are not subject to a constitutional debt limit. In addition, the report urged that constitutional debt limits based on a percentage of assessed value of taxable real property be eliminated and substituted with legislative indicia reflecting the local government's ability to pay debt service, i.e., a percentage of annual revenues. But while encouraging the expansion of "public purpose" by the legislature and eliminating debt limits tied to real property values, the report urged the maintenance of the faith and credit pledge on all local government debt. Go figure.

The principles of the report never resulted in any proposed constitutional amendments. However, the report, together with the proposed 1967 Constitution, fleshed out issues with Article VIII that should be addressed through constitutional amendment. These include: (i) the inclusion of economic development as a "public purpose;" (ii) the utility of the "gift and loan" prohibition; (iii) the application and value of the faith and credit pledge; and (iv) the establishment of limits on local government indebtedness that relate to economic conditions.

A. Public Purpose

Although public purpose is not defined anywhere in the Constitution, Article VIII appears to restrict the concept to purposes of the respective local government, i.e., providing municipal or educational services and facilities. The law assumes that the local government owns, maintains and operates its facilities and services for the general public and may finance their capital costs through taxation on the real property where the services and facilities are provided. This concept reflects the world of the 19th century where municipal services were basic and direct (e.g., water, sewer, streets, parks, police and fire). It is still the basic principle in determining a purpose of local government general obligation bonds.

The post-World War II movement to bring local governments into economic development financing was addressed by the legislature when it established separate PBCs known as "industrial development agencies" (IDAs) to operate within the bounds of a particular local government.[43] Because IDAs, as public corporations, are independent of the state they are addressed in the Constitution only under the general provision of Article X, § 5. But economic development and urban renewal through government financial assistance[44] have been on the minds of public officials since the 1938 convention and particularly since the 1970s when the state's economy began to hemorrhage private sector businesses and skilled labor to southern states and developing countries. The Constitution excludes local governments from economic development actions, save

modest budgetary appropriations to IDAs, and attempts to recoup lost real estate taxes when projects become tax-exempt owing to IDA ownership through amorphous "payment-in-lieu-of-taxes" agreements (PILOTs).

In contrast, other state courts have expanded public purpose to permit local government borrowing to encompass economic development.[45] Alas, there is no legal mechanism under the Constitution for local governments to incur tax-supported debt or revenue bonds for economic development.[46] Or is there? A combination of increasing IRS restrictions on the use of tax-exempt debt issued by IDAs and the elimination of non-profit healthcare and education finance as IDA purposes forged a marriage local governments and special not-for-profit corporations known as local development corporations (LDCs) to finance economic development and basic public purposes without incurring debt under the Constitution.[47] The constitutional convention should examine whether the *de facto* status of LDCs as revenue bond agencies of local governments should be memorialized. If the people do nothing, the definition of "public purpose" within the chokehold of Article VIII, § 2, will send projects off to IDAs or LDCs for "off-the-books" financing in the hands of smart lawyers and less smart public officials. An amendment to the Constitution making clear that economic development is a public purpose for which debt may be undertaken would normalize and regulate what is developing into rather grotesque local government revenue bond financing.

B. Gift and Loan Prohibition

It has been quite a few years—almost two centuries, to be exact—since the state and local governments pledged their money and credit to finance railroads and canal companies. The fear that the state or local governments would repeat these not-so-transparent investments with tax-supported debt is today highly unlikely not only because the canal has long been filled in and the surviving railroads taken over by federal or state agencies, but because of the market-based requirement of transparency for municipal securities and heightened enforcement of disclosure rules by the U.S. Securities and Exchange Commission (SEC) to "protect investors." Given the new world of Internet-based market transparency, the absolute restraint in Article VIII, § 1 on gifts and loans—intended to protect taxpayers—is no longer required and simply serves as an obstacle to financing economic development and infrastructure in the 21st century.

If a public purpose is achieved by the issuance of debt, courts in New York[48] and other states tend to ignore the gift and loan prohibition in their state constitutions. If the gift or loan prohibition is to remain in the Con-

stitution, something akin to PBCs, accepted at the state level, should be made available at the local government level as well to foster economic and community development without fear of butting into the Constitution.[49]

The gift or loan prohibition most noticeably stands as a roadblock to the state's enacting legislation to engage in "public–private partnership" (P3) financing.[50] The transfer or sharing of ownership and financial risk, the hallmark of P3, is blocked by the gift and loan prohibition in both Article VII and Article VIII. P3 is today the dominant form of infrastructure finance on the rest of the planet outside the United States. It attracts global corporations with immense technical and financial resources to engage in large-scale projects, i.e., bridges, highways, regional water and sewer systems, regional healthcare centers. New York is handicapped in pursuing major infrastructure projects without a P3 statutory regime which can only come about by ditching the gift or loan prohibition from the Constitution.

C. Faith and Credit

In a World War II-era case, the U.S. Supreme Court held in *Faitoute Iron & Steel Co. v. City of Asbury Park*[51] that the term "full faith and credit" meant that bondholders are general creditors of the local government and must share pro-rata the available revenues with other general creditors. When New York City defaulted on notes in 1975, the meaning of this phrase in the Constitution was tested in the Court of Appeals. Article VIII, § 2, contains an unusual provision in defining faith and credit: if monies are not appropriated for payment of debt service on general obligations, bondholders must be paid in full from the "first revenues" received by the defaulting local government.[52] The "first revenues" pledge predates provisions of the Uniform Commercial Code (UCC) and the Bankruptcy Code. Reading these provisions together leads to conflicting views as to the protection the faith and credit pledge actually provides. In recent municipal bankruptcy cases under Chapter 9 of the Bankruptcy Code, decisions have ignored state constitutional and statutory protections for bondholders (bankruptcy judges may "impair contracts" with impunity), holding that absent the grant of a security interest in tax revenues under UCC standards, a state constitutional faith and credit pledge does not raise taxes to the status of a pledged receipt.[53]

The faith and credit pledge has also been undermined by state law that attempts to limit real property tax levy increases. The "tax levy limit law" adopted in 2011[54] does not make an exception for taxes required to pay

debt service on outstanding debt. This disregard of debt service flies in the face of the Constitution, which requires real property taxes be levied "without limit as to rate or amount" to satisfy the faith and credit pledge.[55] Similarly, in the state's effort to implement "tax increment financing" (TIF) in the 1980s, Article XVI was amended to except "incremental" real property taxes from the constitutional faith and credit pledge.[56] TIF is an important economic development financing device which permits "TIF bonds" to be issued and secured by "incremental" increases in real property taxes over the life of the bonds reflecting the increased value of the re-developed property.[57]

D. Debt Limits

The Constitution limits state debt by the voter approval requirement.[58] The constitution takes a completely different approach to limiting local government debt. Article VIII imposes limits on the principal amount of debt outstanding based on a percentage of "average full valuation of taxable real estate."[59] This index for debt levels was rational in the social-economic context of 19th-century New York. First, the real property tax was the exclusive tax for local governments; there were no other significant local taxes or revenues 150 years ago. Measuring a liability (debt) against a revenue stream (real property taxes) rather than against an asset seems unusual in accounting terms today, but until recently, state and local government assets were rarely appraised or assigned values. Second, the Constitution authorizes no other local government debt but for that secured by real property taxes (faith and credit pledge). Revenue bonds are forbidden (unless one ventures into LDC financing).[60]

Some commentators have suggested that debt limits were inserted in the Constitution to protect property owners against increases to meet the needs of rising cities along the canal route.[61] The debt of most local governments rarely approaches their constitutional limits, even with the decline of taxable real property values during the Great Recession. It is unlikely any local government's bond ratings have been downgraded by a nationally recognized credit rating agency because its debt limit decreased. As discussed below, debt limits might be removed from the Constitution simply because they serve no purpose in restraining local government debt. If a local government's limit is being approached, the legislature is available to provide a PBC without a debt limit whose purpose is to finance the municipality's infrastructure. The real debt limit in effect today is statutory—the TLLL. It forces local governments to curtail capital projects, hence debt, to avoid exceeding the cap on the tax levy imposed by the TLLL. To date, no appellate court has ruled on the consti-

tutionality of the TLLL, although Article VIII, § 12 clearly states: "The legislature shall not, however, restrict the power to levy taxes on real estate for the payment of interest on or principal of indebtedness theretofore contracted."[62] Read literally, the TLLL violates the Constitution.

One other form of debt limit should be noted—the unavailability of issuing debt to pay for an annual budget expense which exceeds constitutional tax limits. In addition to debt limits based on a percentage of real property value, § 10 of Article VIII prescribes real property tax limits also based upon a percentage of real property value.[63] Taxes raised for appropriations for capital expenditures or improvements are excluded from these limits.[64] In a series of cases during the 1970s, the Court of Appeals held that statutory attempts to define debt issued to pay annual expenses (here, retirement fund contributions) as "capital expenditures" and thus excepted from the tax limits were unconstitutional under Article VIII because debt financing is available only for capital purposes (i.e., something having a useful life in excess of one year), not operating costs.[65] Importantly, Article VII does not make that distinction, nor has a court read the distinction into that article: the state finances annual expenses with impunity; so why not local governments?

VII. PROPOSED AMENDMENTS TO THE FINANCE ARTICLES

Between the rise of radical terrorism and the fall of political correctness, voting for a convention in the aftermath of a presidential election in an off-year to amend the Constitution may be as important as responding to a notice from the sewer company that they're coming to clean your pipes. Yet, keeping the old bones of the finance provisions of the Constitution and skirting around them with hoped-for impunity is not smart: it makes New York appear to have a backwater finance law regime on the global platform for infrastructure development. Article VII (State Finance) and Article VIII (Local Finance), as well as finance-related sections of Article V (Comptroller), Article IX (Home Rule) and Article XVI (Taxation) need remedial attention.[66]

A. Article VII—State Finance

Little needs to be done to Article VII other than:

1. make clear that PBCs are independent financing agencies that carry out public purposes whose debt may be paid from a variety

of revenues, either under the Special Fund Doctrine for revenue-producing projects or through state general fund appropriations;

2. prescribe a quantitative constitutional debt limit for PBC appropriation-backed debt—such limit is best determined with respect to the annual general fund revenues of the state.[67] Clearly, fiscal health can be maintained based on ratios of annual debt service or principal amount of outstanding appropriation-backed debt to such revenues. This debt limit belongs in the Constitution, notwithstanding the good intentions of the 2000 Debt Reform Act, so that the legislature is without discretion to bankrupt the state in future;

3. require that the annual state budget remain in balance *throughout the fiscal year*. This requirement would overturn the ruling of *Schultz I* that multi-year cash-flow financing is not unconstitutional debt simply because the annual budget was balanced when adopted;

4. exempt from the gift and loan prohibitions of the Constitution economic development projects that use a P3 statutory model—this amendment would require corresponding enabling to establish a P3 statutory and regulatory regime for which the proceedings of the 1967 convention would provide guidance; and

5. require that state mandates for local government expenditures be met with corresponding revenues from the state to relieve perennial budget imbalances—provisions increasingly found in other states' laws.[68]

B. Article VIII—Local Finance

This article needs the most remediation to make local government finance fiscally healthy and effective. In particular:

1. transfer to local governments economic development finance powers (thus supplementing the powers of IDAs) and make clear that LDCs have powers of local government public improvement authorities established under general law, with the power to issue revenue bonds both for traditional local government public purposes and for economic development;

2. measure debt limits as ratios of general funds revenues, either as to annual debt service or principal amount of debt outstanding for the

state's largest metropolitan areas and large projects generally as an alternative to debt limits based on a percentage of assessed value of taxable property;

3. empower local governments to issue revenue bonds directly for utility projects in lieu of the debt exclusion mechanism for tax-supported general obligations currently in Article VIII; and

4. as similarly recommended for Article VII, exempt from the gift and loan prohibition economic development projects that use a P3 statutory model.

These amendments would: (i) relax the strictures of the gift and loan prohibitions to avoid "extraconstitutional financing" for economic development, (ii) eliminate debt limits based on a percentage of the value of taxable real property for large, complex project finance, (iii) retain the faith and credit pledge to be used when appropriate, and (iv) require voter approval to authorize debt where real property taxes are the primary source of debt service. These amendments are consistent with producing market-acceptable municipal debt, preserving state and local fiscal health, stimulating local and regional economies through financing, and relieving the strain on the real property tax as the sole source of debt repayment. They are also consistent with extending reasonable home rule powers in the area of community development financing. However, in reducing the real property tax burden, local governments need to be empowered to impose assessments and user fees beyond the powers in the Town Law and County Law for utility districts. In that regard, Article VIII, § 12, should be amended to permit local governments to impose such assessments and fees pursuant to general law. Granting this power to local governments is required to overcome the holding in *Albany Home Builders Assn. v. Town of Guilderland*[69] where the court of appeals prohibited local law-enacted impact fees imposed on developers because the fees were not charged under a general state law.

C. Article IX—Home Rule

Article IX, § 2 instructs the legislature to create and organize the state's local governments. One of the observations of the 1967 convention was the lack of metropolitan government. This observation was echoed in the 2009 New NY Government Reorganization and Citizen Empowerment Act (NYGRCEA),[70] which authorizes towns and villages to combine, voluntarily, and to engage in "shared services" arrangements. It has long been the case that the state's multiplicity of overlapping local govern-

ments and PBCs has contributed to an excess of governments, costly overlapping government in the area of real property taxation and roadblocks in developing major projects at the whim of small local governments. This condition has abetted the disintegration of old brick-and-mortar economy upstate cities by denying these urban areas the real property tax bases of surrounding suburban towns and villages. The result has been *de facto* racial and wealth segregation: the poor, dependent and minorities living in cities with crumbling infrastructure and vacant downtown buildings, and the affluent, white families living in suburban residential towns and villages with trendy shopping centers. That this has been tolerated by the courts as not being a violation of equal protection rights in the delivery of municipal and public education services is disgraceful.[71] As a result, upstate New York is an economically depressed landscape, its once-proud industrial cities a global embarrassment, notwithstanding Start-Up NY and the razzle-dazzle of incubating private sector businesses on SUNY campuses.

Article IX could be amended to *mandate* (with appropriate state financial incentives) consolidation of upstate cities and surrounding towns and villages into metropolitan governments and to limit the new financing powers and alternate debt limits under Article VIII, suggested above, only to such metropolitan governments. This process would be politically painful but it would lay the foundation for regional, consolidated urban centers, much like New York City, which have the resources to plan for and finance large-scale global economic development.

Article IX could further be amended to require in § 1(d) that annexation is not subject to voter approval where the governing boards of adjacent municipalities determine that consolidation advances large-scale economic development or infrastructure projects.[72]

D. Article V—Comptroller

The comptroller functions primarily as an auditor of the financial statements of the state, its PBCs and local governments.[73] He or she makes recommendations for best government accounting practices in audit reports and special reports on topics like state debt, the functions of PBCs and the proper use of LDCs. The comptroller has limited power to "approve" the issuance of local government debt with certain exceptions. The delegates to the 1938 convention could not have known that the municipal securities market, unregulated by the SEC in the 1930s, would be one of the most rigorously examined capital markets through regulation of investment banks in the 21st century. Accordingly, comptroller

oversight of transparency and disclosure of material information to investors in municipal bonds, once considered a necessary element of the comptroller's constitutional supervisorial duty, is unnecessary; that role has been pre-empted by federal and market based regulation.[74] However, Article V should be amended to provide that the comptroller: (A) (1) shall approve all issues of local government debt in excess of a threshold principal amount, and (2) shall appoint a manager to operate the financial affairs of any local government in distress, with a charge to the legislature to enact debt approval procedures similar to those of the Local Finance Board in New Jersey[75] and the North Carolina Local Government Commission,[76] and (B) shall establish fiscal management procedures similar to those of Michigan.[77] Such approval is required if P3, economic development and revenue bond financing is permitted under an amended Article VIII. As to the state and its PBCs, the ABO combined with debt limits as suggested above is sufficient to regulate those debt issuers with the amendments suggested to Article VII.

E. Article XVI—Taxation

Section 1 of Article XVI provides for the general exemption from real property taxation of not-for-profit entities and government institutions.[78] This section should be amended to provide that those entities shall be subject to special assessments and user charges for municipal services of any kind from which such entities receive a benefit.[79] Local governments and their not-for-profit institutions would no longer need to haggle over voluntary PILOTs to recoup lost real property taxes. Assessments and user fees for not-for-profit entities and government institutions would be established by municipal ordinances under general laws and enforced with civil penalties.

Section 6 attempts to make the "incremental tax" levied for municipal redevelopment bonds under Article 18-C of the General Municipal Law (i.e., TIF Bond Law) not subject to the faith and credit and "first revenues" provisions of Article VIII.[80] But a clearer statement is required in the section: incremental real property taxes levied for and pledged to the payment of TIF Bonds are not real property taxes subject to the provisions of Article VIII. Further, § 6 should include "school districts" in the list of local governments included in this section to reflect 2012 amendments to the TIF Bond Law which added school districts as entities which may elect to pledge their incremental taxes to the payment of TIF Bonds.

VIII. STATE CONSTITUTIONS MATTER

We are in the era of identifying groups and things that "matter." Do state constitutions matter? The politically correct answer is "no." Democracy, the argument goes, is a political process best left to the wisdom of the legislature. But our legislature is corrupt, its recent leaders convicted of white collar crimes and headed to jail. The drafters of the Constitution had the democratic process in mind nearly 150 years ago when they embedded in the document the people's right to call a convention every 20 years to fix the thing. Will the people squander that right again in 2017? Will we be left with a legislative fiscal caliphate free to tax and spend and incur debt and burden those who have not fled with their person and treasure?

The proceedings of the 1938 convention and the amended Constitution produced by that body were a noble achievement for its time. But for well over a half century New York has lacked the economic resources to insure its citizens against the hazards of life as the 1938 Constitution aspires to do.[81] Certainly, with modern technology available to us today, convention delegates and their staff could spend four or five months in Albany to rewrite the venerable but badly outdated and largely ignored Constitution. The concepts for amending the state and local government financing articles of the Constitution, and for amending related articles, are not new or radical ideas; many of these ideas are embodied in the constitutions of other states.

Every organization, public or private, periodically refreshes its organic documents so that they are relevant to the shared existing conditions of its members, whether by-laws, a city code, or a corporate charter. Only works like the Bible, the Torah or the Koran do not change because they are written by a higher authority and we strive to follow their absolute teachings. But men (and a few women) made and approved the Constitution. They can change it.

Lawyers, bankers, state pensioners, public employees, businessmen, and most people might say we are on the same sinking ship—that we all have more to lose by keeping the constitutional *status quo* than we did a few years ago. After 1938, New York's economy blossomed in the wartime economy and new taxes and spending afforded the Constitution's social reform mandates. But there are no more steel mills in Lackawanna, or manufacturers in Syracuse, or any air force bases in Plattsburgh, Rome or Newburgh. How New York survives and succeeds or fails in the global economy over the next few years may be a function of whether we collec-

tively have the foresight and the courage to revise and amend our Constitution.

1 N.Y. Temp. Comm'n on the Revision and Simplification of the Constitution, Rep. on Constitutional Debt Limits for Local Gov'ts, R. 32, at 56 (1960).

2 Richard Briffault, Foreword, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L. J. 907, 909 (2003).

3 E.J. McMahon, New Yorkers Keep Heading for the Exits, Empire Center 1–2 (2015) ("The latest [U.S. Census Bureau] estimates bring New York's total 'net domestic migration' loss since the 2010 census to 653,071 people—the largest such decrease of any state, both in absolute terms and as a percentage of estimated population as of the start of the decade.").

4 N.Y. Const. art. V, § 7.

5 American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 (2009).

6 The funding of the state's retirement system to provide expanded benefits gained through public sector unions exacts a heavy price from state and local government revenues, especially during periods such as the Great Recession of 2008–10. These well-intended, guaranteed, protections of public employees, replicated in other state constitutions, have contributed to the fiscal undoing of multiple urban centers in recent years, the leading example being Detroit and its well-publicized bankruptcy. *See generally* Jack M. Beermann, *The Public Pension Crisis*, 70 Wash. & Lee L. Rev. 3 (2013).

7 N.Y. CONST. art. IX, §§ 1, 2. Although the article's embodiment of a democratic, grass roots approach to government is admirable, its annexation provisions giving every small village veto power over attempts at consolidating local government units, hinders larger, regional economic development and infrastructure crucial to competing in the modern global economy. Home Rule concepts are nearly unheard of in the context of regional economic development. They are noticeably absent from the constitutions of the southern and western states, which have helped those states outmaneuver New York and other urbanized states in attracting large-scale global economic development. *See* K. Bond*, Some Observations on Annexation, and a Hearty Welcome to the Asian Century*, NYSBA Gov't, L. & Pol. J., Winter 2007, at 2.

8 *Id.* (discussing wide ranging system of state social welfare—from jails, to mental health facilities, to public hospitals, to public welfare, including the construction of necessary facilities and state loans to pay for them, all of which has led to today's most expensive state medical assistance system in the nation); N.Y. Const. art. XVII, §§ 1, 3.

9 While these provisions led to the creation of thousands of affordable housing units, the high cost of subsidies which accompany new construction have made implementation of the article expensive for state taxpayers. Bond, *supra* note 7, at 2.

10 87 N.Y. Jur. *Public Debt Limitations* §§ 1, 17 (2014) (explaining that certain PBCs have statutory debt limits specific to their enabling law).

11 N.Y. Pub Auth. §§ 2799-AA- 2799-UU (McKinney 2016); Schultz v. State, 578 N.Y.S.2d 822, 824 (1991) (upholding the constitutionality of bonds of this PBC).

12 N.Y. Pub Auth. § 6 (McKinney 2016).

13 N.Y. Office of the State Comptroller, State, Public Authority, and Localities Debt (Mar. 31, 2015), http://www.osc.state.ny.us/debt/debtspreadsheet.pdf.

14 N.Y. Const. art. VII, § 11.

15 N.Y. Const. art. VII, § 8.

16 *Id.*

17 *Id.*

18 Nowhere in the 1938 constitutional convention debates is there a discussion of granting local governments the powers to issue revenue bonds or to create local revenue bond authorities. In fact, the local government authority to issue water revenue bonds established by the 1894 convention was repealed by the 1938 convention. Nowhere in the convention proceedings is there discussion as to whether it continued to make sense to measure debt limits and tax limits based solely on real property tax values—what about general revenues, household income, gross domestic product (GDP), or other modern indicia of an entity's carrying capacity for debt*?* N.Y. Constitutional Convention Committee, Proposed Constitutional Amendment, No. 583 (1938); s*ee also* N.J. Stat. Ann. § 40A:12A-65 (West 2016); N.J. Stat. Ann. § 40:37A-44 (West 2016).

19 *See* Mandelker et al., State and local Government in a Federal System 339–49 (2014) (discussing the Special Fund Doctrine).

20 It should be remembered that until 1886, cities, counties, town, villages and school districts ("local governments") could not contract debt under a general law; they needed a special act of the legislature. Robert W. Cockren et al., *Local Finance: A Brief Constitutional History*, 8 Fordham Urb. L.J. 135, 140–42 (1979).

21 N.Y. Const. art. VIII, § 1.

22 *See*, *e.g.*, N.Y. Const. art. VIII, § 4(h).

23 N.Y. Const. art. VIII, § 4. Debt for water and sewer purposes, and debt for any public improvements yielding "net revenue" are "excluded" from the constitutional debt limit on the theory that such debt is paid through water rents, sewer rents or user fees, respectively, not real property taxes. This debt exclusion is the constitution's only nod to acknowledge revenue bonds and debt payable from a source other than real property taxes. N.Y. Const. art. VIII, § 5.

24 N.Y. Const. art. VIII, § 2.

25 Flushing Nat'l Bank v. Mun. Assistance Corp., 358 N.E.2d 848, 850 (1976). This view has not been shared by a federal bankruptcy court. *See* In re City of Detroit, 504 B.R. 191, 225 (Bankr. E.D. Mich. 2013) (where tax-supported general obligation bonds, similar to those issued under Article VII of the Constitution, received 74 percent of the par amount of debt in settlement of the case because the court ruled such bondholders to be general creditors of Detroit, the faith and credit pledge under Michigan law impaired and ineffective as a guaranty debt repayment in full).

26 N.Y. Const. art. X, § 5 (requiring that any agency that finances a tax-supported local government purpose must be established by the legislature).

27 *Report of the Task Force on the New York State Constitutional Convention*, 52 Rec. 523, 605 (1993).

28 Saxton v. Carey*,* 378 N.E.2d 95, 96 (N.Y. 1978*)* (The Court of Appeals, in a series of decisions beginning in 1978 and spanning a quarter century, has clarified most aspects of the state budgetary process—courts won't interfere to determine if governor's budget sufficiently itemized); Oneida v. Berle, 404 N.E.2d 133, 136 (N.Y. 1980) (no balanced budget requirement; thus governor may not exclude payment of an appropriation to reduce state expenditures); New York Ass'n for Retarded Children v. Carey, 631 F.2d 162 (2nd Cir. 1980) (executive expenditures by governor limited to appropriations, even if mandated to pay in a consent decree); Anderson v. Regan, 425 N.E.2d 792 (N.Y. 1981) (federal funds deposited into state treasury cannot be spent by governor unless first appropriated through the budget process); Silver v. Pakati, 755 N.E.2d 842 (N.Y. 2001) (Legislature has standing to sue and capacity on question of whether governor can veto non-appropriation bills; but still governor's budget); Pataki v. New York Assembly, 824 N.E.2d 898 (N.Y. 2004) (The Legislature may not rewrite the governor's budget; but the Legislature is not excluded by separation of powers doctrine because no budget can be effective until adopted by the Legislature).

29 *See* Schultz v. State, 585 N.Y.S.2d 801 (1992) (requiring that the budget be balanced at the beginning *and* at the end of the fiscal year might reduce the use of financial gimmickry to hide structural deficits) [hereinafter *Schultz I*]; Richard Ravitch, A Five-Year Plan to Address the New York State Budget Deficit (Mar. 10, 2010), http://www.rockinst.org/pdf/budgetary_balance_ny/2010-03-10-LG_FYFP.pdf.

30 *Moody's assigns Aa1 to New York State's $325 million GO bonds*, Moody's (Mar. 6, 2015), https://www.moodys.com/research/Moodys-assigns-Aa1-to-New-York-States-325-million-GO--PR_320212.

31 Cockren et al., *supra* note 20 (Unlike most states, New York constitutional and statutory finance law does not embraced the Special Fund Doctrine, except for water revenue bonds in the late 19th century).

32 Winkler v. State Sch. Bldg. Auth., 434 S.E.2d 420 (W. Va. 1993).

33 Lonegan v. New Jersey, 819 A.2d 395 (N.J. 2003).

34 Wein v. New York, 331 N.E.2d 514 (N.Y. 1975).

35 Comeresky v. Elmira, 125 N.E.2d 241 (N.Y. 1955) (It is unlikely the judges in 1955 intended to excuse the hundreds of billions of dollars of future PBC debt from any form of constitutional debt restraint on debt in their opinion that the City of Elmira could subsidize the underwater bonds of its parking authority as a permitted gift under the constitution).

36 Shultz v. State, 639 N.E.2d 1140, 1147 (N.Y. 1994).

37 Bordeleau v. State, 960 N.E.2d 917, 924 (N.Y. 2011) (Pigott, J., dissenting) ("Defendants' assertion that the appropriations serve the 'public purpose of promoting economic development' contravenes not only our case law but the underlying purpose of the Gift Clause itself. Our State Constitution's prohibition against giving or loaning money to private corporations dates back to 1874.").

38 S.B. 7833, 223rd Leg. Sess., Reg. Sess. (N.Y. 2000).

39 Public Authorities Accountability Act of 2005, ch. 766, § 1, 2005 N.Y. Laws 3630.

40 Act of Dec. 11, 2009, ch. 506, 2009 N.Y. Laws. 1363.

41 *See* Kenneth W. Bond, *Conduit Financing: A Primer and Look Around the Corner*, NYSBA Gov't, L. & Pol. J., Fall 2009, at 68.

42 *See* Eugene W. Harper, *The Fordham Symposium on the Local Finance Project of the Association of the Bar of the City of New York: An Introductory Essay*, 8 Fordham Urb. L.J. 1, 2 (1979).

43 N.Y. Gen. Mun. art. 18-A (McKinney 2016).

44 N.Y. Gen. Mun. arts. 15, 15-A (McKinney 2016) (providing extensive statutory authority for urban renewal and housing financing, and the creation of urban renewal agencies as PBCs by the Legislature); N.Y. Gen. Mun. art. 18-C (McKinney 2016) (absent State and federal funding, these provisions have laid dormant for decades but are the precursors for industrial development agencies under Gen. Mun. L. Article 18-A and tax increment financing).

45 The Florida Supreme Court has determined that public purpose is achieved even if a private benefit inures. Connecticut has held that public purpose is achieved if a project promotes the welfare of the state. South Carolina has deemed financing of blighted areas with debt to be a public purpose. Maine has found economic development to be a public purpose. New York has not decided whether general obligations may finance economic development as a public purpose, most likely because IDAs and ESDC fulfill that role.

46 *See* Kenneth W. Bond, *Toward Revenue Bonds for N.Y. Municipal Finance*, N.Y.L.J., Sept. 1983, at 21.

47 N.Y. Not-For Profit Corp. § 1411 (McKinney 2016) (A local government may create a special non-for-profit corporation that undertakes economic development and urban renewal-type purposes to "lessen[] the burdens of government and act[] in the public interest."); Griffiss Local Dev. Corp. v. Auth. Budget Office, 925 N.Y.S.2d 712 (App. Div. 2011) (the appellate division ruled that LDCs are subject to regulation by ABO and the 2009 authority reform legislation referred to LDCs as "local PBCs" and that LDCs are created by local governments rather than the legislature does no offense to Article X because they do not contract debt under Article VIII or levy real estate taxes).

48 S.B. 7833, s*upra* note 38.

49 Other states recognize local agencies which financially benefit the private sector for economic development without infringing on the gift or loan prohibition: e.g., New Jersey law, permits counties to establish improvement authorities which may issue revenue bonds, and further authorizes local governments to issue "redevelopment area bonds," revenue bonds for economic development. Ohio permits its cities to establish "new community authorities" and "port authorities" under procedures prescribed in general laws without resort to the state legislature.

50 For several years New York bar associations and policy groups have addressed the inefficiency of state procurement and finance laws which make public facilities financing expensive relative to other states. "Design build" and "life cycle" procurement and financing statutes, elements of P3, have been adopted in 35 states to bypass bidding and prevailing wage requirements. At the heart of P3 is the concept of "ownership" of the public facility by a "consortium" composed of private sector investors and contractors, as well as the public sector entity.

51 Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942).

52 N.Y. Const. art. VIII, § 2; Flushing Nat'l Bank v. Mun. Assistance Corp., 358 N.E.2d 848, 850 (N.Y. 1976) (the court read this provision as if, in secured transactions terms, municipal revenues are a "pledged receipt" for the benefit of bondholders); s*ee also* Quirk v. Mun. Assistance Corp., 41 N.Y. 2d 644, 647 (1977) (modifying its position to provide that the "first revenues" pledge did not require the segregation of all taxes for debt service, and in dicta, the court said, the real property tax is in fact the only "pledged revenue" the constitution has in mind).

53 If *Flushing National Bank* were decided today, a court could borrow from the Bankruptcy Court (even without the municipality having to file under Chapter 9) and revert to the holding in *Asbury Park*, and might well do so to avoid calling up a state PBC to bail out a local government as in the New York City case. Flushing Nat'l Bank v. Mun. Assistance Corp., 358 N.E.2d 848 (1976)

54 Act of June 24, 2011, ch. 97, pt. A, 2011 N.Y. Laws 753.

55 N.Y. Const. art. VIII, § 2.

56 N.Y. Const. art. XVI, § 6.

57 David Callies & Andrew W. Gowder, Tax Increment Financing (2014).

58 N.Y. Const. art. VII, § 11.

59 N.Y. Const. art. VIII, § 4.

60 The self-supporting debt of utilities may be excluded from the calculation of the municipality's debt limit (if the utility generates a "net revenue" available for debt service but only after paying operating costs), but such quasi-revenue bonds must still carry the faith and credit pledge and the "net revenues" may not be pledged to debt service.

61 Frank J. Macchiarola, *Local Finances Under the New York State Constitution with an Emphasis on New York City*, 35 Fordham L.Rev. 263 (1966).

62 N.Y. Const. art. VIII, § 12.

63 N.Y. Const. art. VIII, § 10.

64 N.Y. Const. art. VIII, § 11.

65 Hurd v. Buffalo, 311 N.E.2d 504 (N.Y. 1974); Bethlehem Steel Corp. v. Bd. of Educ., 378 N.E.2d 115 (N.Y. 1978).

66 In crafting amendments, it is useful to consider the relevant developments in public finance over the past 80 years which should be reflected in any new or amended finance articles. Among others, they include (1) uniform accounting standards, (2) market transparency and SEC oversight, (3) market acceptance of appropriation-backed debt for essential public facilities, (4) the efficiency of large, metropolitan local governments to accommodate large infrastructure projects, and (5) a trend toward paying for state and local government facilities and services through benefit assessments and user fees (under cost/benefit analysis) to reduce the pressure on increasing real property taxes to pay for ever rising government expenses.

67 For example, in Connecticut, C.G.S. § 3-21 imposes a ceiling on the total amount of general obligation bonds the General Assembly that may be outstanding; to wit, 1.6 times total state general fund projected tax receipts in the fiscal year in which the bonds are authorized. Conn. Gen. Stat. § 3-21 (2016).

68 *See generally* Robert M. M. Schaffer, Comment, *Unfunded State Mandates and Local Governments*, 64 U. Cin. L. Rev. 1057 (1996).

69 Albany Area Builders Ass'n v. Guilderland, 546 N.E.2d 920 (N.Y. 1989).

70 N.Y. Gen. Mun. art. 17-A (McKinney 2016).

71 Milliken v. Bradley, 433 U.S. 267 (1977) (holding that a plan to enlarge Detroit's school district into the surrounding suburbs could not be upheld under equal protection analysis when the segregation was *de facto* rather than *de jure*); *accord* Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (holding that wealth is a suspect classification under strict scrutiny equal protection analysis in allocating state aid for public education).

72 One reason why international automobile manufacturers locate their U.S factories in southern and western states is because, in many of these states, either "unincorporated areas" of counties cannot oppose annexation of territory by cities expanding to enable economic development or adjacent communities cannot object to annexation for economic development purposes. Bond, *supra* note 7.

73 The legislature may assign to the comptroller duties as to local governments, including: (1) supervision of the accounts of any political subdivision of the state, and (2) powers and duties pertaining to or connected with the assessment and taxation of real estate. N.Y. Const. art. V, § 1.

74 The Government Accounting Standards Board, created in 1984, which establishes national best practices in government accounting, and the Government Finance Officers Association, the municipal finance industry professional association which began setting national government accounting standards in 1973, were not available to guide the drafters of the 1938 Constitution. Since the enactment of the Tower Amendments to the Securities and Exchange Act of 1934, municipal securities disclosure oversight to "protect investors" has been standardized on a national level and is now vigorously enforced by the SEC through the Wall Street Reform and Consumer Protection Act of 2011 (Dodd-Frank), mooting the need for the constitution to focus on these matters as proposed in: Donald H. Elliott, *Proposed Fiscal Monitoring Legislation in New York: A Comparative Analysis*, 8 Fordham Urb. L.J. 109 (1979).

75 N.J. Stat. Ann. § 52:27D-18.2 (West 2016).

76 N.C. Gen. Stat. § 159-153 (2016).

77 Mich. Comp. Laws §§ 141.1541-1575 (2016).

78 N.Y. Const. art. XVI, § 1.

79 *See* Amanda A. Godkin & Mathew K. Mobilia, *Emerging Equities in Paying for Municipal Services – The Problem with the Real Property Tax*, NYSBA Bus. L. J., Summer 2015, at 59; *see also* Fields v. Trustees of Princeton Univ., 28 N.J. Tax 574 (N.J. Tax Ct. 2015) (requiring nonprofits to pay for municipal services and New Jersey Senate Bill 3299 (introduced 12/07/15) memorializing the ruling in *Fields*. This amendment is required on account of the growing number of not-for-profit entities in the healthcare and education industries, and would allow municipalities to recoup revenues lost from the real property tax exemption on the theory that all persons and entities should pay for the benefits received from municipal services).

80 N.Y. Const. art. XVI, § 6.

81 Kenneth W. Bond, Presentation, *Transforming New York Local Governments from the 18th to the 21st Century . . . The Carrot Before the Stick* (Oct. 25, 2006).

CHAPTER TWELVE

SAFE AT HOME: CONSIDERING A RIGHT TO COUNSEL IN CIVIL CASES AS A STATE CONSTITUTIONAL MATTER

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INTRODUCTION

New York has long prided itself on its court system and its history of leaders from the legal profession assuming leadership roles in our government. From its adopted son, Alexander Hamilton, to its native daughter, Justice Sonia Sotomayor, New York is a source of innovation and innovators in the law and governance. The state's legal community also has a rich tradition of promoting professionalism within the bench and bar and playing a prominent role in legal education with some of the oldest and most prestigious law schools found within its borders. What the state also has is a significant economic divide between the haves and the have nots, and, despite a fairly large professional bar, too many New Yorkers face their legal problems without a lawyer. Indeed, as recently as 2010, over 2 million individuals and families passed through the state's courts without legal representation, mostly for lack of resources to defend themselves in such cases where fundamental human needs were at stake, like evictions, foreclosures, and access to health care and subsistence.[1]

In contrast to the civil context, the right to counsel in criminal cases in New York State has been referred to by the courts as "indelibly attached."[2] It is grounded in Article 1, § 6, of the New York State Constitution, found within the document's "Bill of Rights." Courts have interpreted the right in the criminal context to go beyond the right to counsel protected by the U.S. Constitution. Indeed, the right attaches whenever an accusatory statement is filed by law enforcement, including the filing of a criminal complaint and requesting a warrant, whether the accused has asked for an attorney or not.[3]

The express language of the N.Y.S. Constitution refers to the right to counsel in criminal cases in reference to that in civil cases. The text of the constitution reads as follows:

> In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel *as in civil actions* and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her.[4]

It would appear clear, by this express language, that the constitution protects the right to counsel the same in criminal cases as in civil cases. To date, however, the courts of New York State have yet to recognize a broad right to counsel in civil cases in the state's courts. Although such a right has been recognized in select legal contexts in New York State, as

described more fully in § III., *infra*, no court has yet to recognize that the constitutional provision mentioning the right to counsel in both criminal and civil matters should be applied equally in both. While the right to counsel is "indelible" in the former, it is porous in the latter, with the overwhelming majority of civil contexts slipping through its protections, even ones where fundamental human needs are at stake, like shelter, food, and health care. This chapter explores the legal and policy arguments for a right to counsel in civil cases and suggests that, should the people of the State of New York decide upon holding a constitutional convention through the 2017 referendum vote, their representatives at such a convention should consider including an express right to counsel in civil cases in those situations where fundamental human needs are at stake in any final product of that convention.

With these thoughts in mind, this chapter proceeds as follows. Part I discusses the importance of the right to counsel in civil cases. Part II surveys the national landscape for a civil right to counsel. Part III discusses the history of attempts to establish a right to counsel through litigation in New York, both under the state constitution and statutory claims. Part IV explores why the people of New York should consider ensuring that there is no doubt with respect to the right to counsel: the constitution should guarantee it in civil cases in which fundamental needs are at stake just as it does in criminal cases.

I. WHY A RIGHT TO COUNSEL IN CIVIL CASES IN WHICH BASIC HUMAN NEEDS ARE AT STAKE?

We live in a society of laws, where the regulatory and governmental systems that society creates are the loci where fundamental human needs and interests are determined and adjudicated. Given today's complex world, with our regulatory and legal system adding to that complexity, access to these needs and our ability to protect our interests and rights are routinely the subject of regulatory and judicial oversight. Given that such rights are mediated in a complex legal sphere, the need for experienced and skilled guidance through these systems is paramount for human flourishing in the 21st century. This necessity of legal assistance when a fundamental human need like liberty is at stake is recognized, for the most part, in the criminal context, where one is subject to criminal penalties, including incarceration and even death. But the consequences of a lack of counsel in many civil contexts—where one's home is at stake, one's income, one's relationship to one's family—are no less important, and it is difficult to create a hierarchy of human needs where we engage in "lifeboat

ethics" or in some Orwellian calculus: where some fundamental human needs are more fundamental than others.[5]

Recognizing the difficulty in engaging in such an assessment, in 2006, the American Bar Association adopted a resolution recognizing a right to counsel, at government expense, for those who cannot afford one, in cases where one's "shelter, sustenance, safety, health and child custody" is at risk.[6] Across the country, bar associations, legislative bodies, and leaders in the judiciary have endorsed this approach, often recognizing that in such categories of fundamental human needs, counsel is essential to safeguard critical rights and interests.[7] Most recently, in 2015, the National Conference of Chief Justices and the Conference of State Court Administrators passed a resolution expressing support for "the aspirational goal of 100 percent access to effective assistance for essential civil legal needs."[8]

As in the criminal context, the unfairness of situations where one's essential human needs are at stake yet one does not have the assistance of counsel is apparent. Furthermore, numerous commentators, including leaders of the bench, bar, and academia, have highlighted the threat to the legitimacy of our democratic institutions where there is such asymmetry of access to justice in the civil context.[9] In the words of Stanford's Deborah Rhode: "Not only does access to legal services help prevent erroneous decisions, it also affirms a respect for human dignity and procedural fairness that are core democratic ideals."[10]

Despite the lofty pronouncements about the importance of a right to counsel in civil matters where fundamental human needs are at stake, according to Rhode, it is "estimated that more than four-fifths of the individual legal needs of the poor and a majority of the needs of middle-income Americans remain unmet."[11] Throughout New York State, especially in certain critical subject matter areas, the need is even more pronounced. According to the 2015 report of New York's Permanent Commission on Access to Justice,[12] the following are some striking figures. In New York City, 91 percent of petitioners and 92 percent of respondents in child support matters in family court went without counsel. In addition, 96 percent of defendants in consumer credit cases and 99 percent of tenants in housing court were unrepresented. Outside New York City, 87 percent of petitioners and 86 percent of respondents in child support matters in family court went without counsel and 97 percent of defendants in consumer credit cases were unrepresented.[13]

II. THE RIGHT TO COUNSEL, CONSTITUTIONAL PROTECTIONS AND THE NATIONAL LANDSCAPE

To date, when a right to counsel in certain civil cases is recognized, it is usually through constitutional protections of due process and/or equal protection, or express statutory grants. So far, no court or legislature has recognized a categorical right to counsel in all civil cases, or even those in which fundamental human rights are at stake. The following offers an overview of how claims to a right to counsel in civil cases are grounded in due process or equal protection theories.[14]

Discussions considering a right to counsel in civil cases must start with a discussion of how the right is recognized in the criminal context. In *Gideon v. Wainwright*,[15] the U.S. Supreme Court recognized a right to free legal representation in all state court felony cases. *Gideon* was the ultimate product of a line of cases that began to recognize the right in criminal cases, first in capital cases and then in federal felony cases.[16] The bases for the Court's decision in *Gideon* were the Sixth Amendment's guarantee of a right to the "assistance of counsel,"[17] as well as principles of fundamental fairness and procedural justice. Recognizing the centrality of counsel to such ideals, the Court found as follows:

> The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[18]

Supreme Court opinions after *Gideon* upholding and expanding the right to counsel in criminal cases stressed the fundamental fairness arguments under a due process analysis as opposed to the Sixth Amendment's guarantee of the right to counsel.[19] Based on this shift toward a due process analysis, the Court, to those interested in a civil right to counsel, appeared to signal its support for extending the right in civil cases as well, where unrepresented litigants pose similar threats to the integrity of the procedural safeguards in place. Such support has proven elusive, however.

Arguments seeking a right to counsel in a civil context obviously cannot rest on Sixth Amendment guarantees.[20] Instead, advocates have sought to enlist procedural due process as a means of obtaining the right to counsel in the civil context.[21] The Supreme Court's first foray into extending *Gideon* to the civil context occurred in *In re Gault.*[22] There, a juvenile litigant's liberty was at stake where he faced detention through a civil delinquency proceeding without counsel. Given the nature of the right at stake—the youth's liberty—the Court concluded due process protections under the 14th Amendment to the U.S. Constitution ensured an array of protections, including that counsel should be provided in this context.[23]

Any federal due process analysis must begin with the Court's opinion of *Mathews v. Eldridge*,[24] where it set forth the balancing test to apply when assessing the protections afforded through the Due Process Clause to a particular context where it might hold force.[25] When an individual faces the loss of life, liberty, or property at the hands of the state, the following factors should be weighed:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[26]

Following *Mathews*, in *Lassiter v. Department of Social Services*, the Court assessed the claims of an indigent parent seeking appointed counsel in a termination of parental rights proceeding.[27] The Court found there was a presumption against a right to counsel in cases where there was no personal liberty interest at stake, such as termination cases. Going further, the Court determined that the due process analysis did not warrant the appointment of counsel with respect to the litigant before the Court.[28] Nevertheless, the Court did say that courts must apply the *Mathews* test on a case-by-case basis to assess the validity of right to counsel claims in the context of cases terminating parental rights.[29]

Arguments for the right to counsel under the *Mathews* test, whether in termination of parental rights or other civil contexts where liberty might not appear to be at stake, attempt to balance the following: the importance of the interest at stake (and whether the proceeding could ultimately or

indirectly lead to incarceration or institutionalization, such as where a neglect proceeding could lead to later criminal child abuse charges); the risk of erroneous deprivation in complex legal systems where a litigant might not know or be able to protect his or her rights; the inadequacy of any existing procedural safeguards; the cost of providing counsel as compared to the cost to the state of providing the social services, housing services, and other supports to individuals who face the loss of home, income, or medical care in the absence of counsel; and the broader benefits to the state and society of having counsel provided in such cases.[30] The Court's invitation in *Lassiter* to engage in a case-by-case analysis in cases involving the termination of parental rights has led to a similar approach, but this one a "context-by-context" analysis, for cases utilizing the *Mathews* balancing test to argue for the importance of counsel in different substantive areas of law. Such context-by-context efforts have achieved some success to date.[31]

III. THE RIGHT TO COUNSEL IN NEW YORK STATE

Efforts to establish a right to counsel in civil proceedings in New York State have followed this context-by-context approach, pursuing claims not just under the state and federal constitutions, but also under state statutory protections. The constitutional and statutory claims are discussed, in turn, below.

A. Constitutional Protections

The first setting in New York in which advocates filed a due process challenge to the denial of the right to counsel was in the context of an eviction proceeding. In the early 1970s, an intermediate appellate court found that an indigent tenant in housing court could pursue a right to counsel as a part of her application for relief *in forma pauperis*.[32] Shortly thereafter, however, the New York Court of Appeals found that the due process protections of the U.S. and New York constitutions did not require the provision of counsel in "private cases," where "the risk of loss of liberty or grievous forfeiture" is not present at the hands of the state.[33] Similarly, the court rejected a claim for counsel in matrimonial actions, finding not just that there was no basis for the claim but also that courts would overstep their constitutional authority to issue orders to provide counsel that infringed upon the budgetary authority of other branches of government.[34] Moreover, the court raised fears that allowing counsel in matrimonial actions would invite a flood of cases asserting a right to counsel: that is, courts would be asked to engage in a context-by-context analysis of the right to counsel.[35] Following this decision, the prior case

recognizing an avenue for the appointment of counsel through *in forma pauperis* relief was quietly overruled.[36]

Despite these rulings in these contexts, courts in New York have gone ahead and ruled on a context-by-context basis to determine whether and when to provide low-income litigants a right to counsel under either state and/or federal due process or equal protection arguments. For example, in *Brown v. Lavine*,[37] the Court of Appeals found no right to counsel in welfare termination hearings. At the same time, when a parent faces the loss of child custody in a state-initiated neglect proceeding, he or she is constitutionally entitled to representation provided by the state.[38] In a limited number of civil contexts, courts in New York have recognized a right to counsel where they found fundamental rights were at stake, as when proceedings have been instituted for the appointment of a guardian,[39] or where incarceration is a possible result of civil contempt proceedings.[40] Still no court has yet determined that the state or federal constitutions guarantee a categorical right to counsel in all civil cases in the state, or even in those where fundamental interests were at stake.[41]

B. Statutory Arguments

In New York State, as in many other states, there are also statutory "hooks" that can support an argument for the appointment of counsel in civil cases. For example, through New York's Civil Practice Law and Rules 1102(a) (CPLR), a court, when faced with an application by a litigant seeking leave to proceed as a "poor person . . . may assign an attorney" to represent that litigant.[42] Just as in the *Swinick* case discussed above, where advocates sought a constitutional right to counsel in a housing case, tenant advocates sought to obtain a right to counsel in the housing context under this CPLR provision, arguing that it requires courts to appoint counsel to the indigent in civil cases. That case, *Donaldson v. City of New York*,[43] became bogged down in procedural questions and was ultimately withdrawn.[44] In subsequent cases seeking to establish a right to counsel under this provision, courts have been somewhat reluctant to mandate the provision of counsel under the statute.[45]

IV. WHY EMBED A RIGHT TO COUNSEL IN BASIC HUMAN NEEDS CIVIL CASES IN THE CONSTITUTION?

Despite the plain language of New York's Constitution, which recognizes parity between the right to counsel in civil and criminal cases, courts

seem reluctant to honor the civil right to counsel where fundamental human needs are at stake. Because of this, should the people of the state decide to hold a constitutional convention in their vote in 2017, the process that follows should consider the inclusion of language that places it beyond doubt that the right to counsel in civil cases in which fundamental human needs are at stake is a core right of the people of the state. For the following reasons, such an effort would not just make good moral and political sense, it would make good fiscal sense, and would represent an enlightened approach to governance. It could also establish New York State as one of the unquestioned leaders in the effort to recognize a civil right to counsel.

A. A Statement of First Principles

Constitutions establish the core principles of governance. They create the structure of the government and set forth the rights upon which the government cannot infringe. State constitutions in the American system are far more detailed than the federal Constitution, which is a by-product of the compact that created the federal system as one of limited and enumerated powers as described in that document. With the federal government so constrained to act only where authorized, state governments, which administer more of the day-to-day operations of governance—ensuring the education of the state's children, providing essentials such as water and sewer service—have a far more expansive role to play, and the different constitutions of the states generally reflect that.[46] At the same time that state governments are responsible for more of the quotidian functions of governance, each state, through its constitution, can express the will of its people to stand for particular rights and privileges, even when they exceed the statement of rights, or their interpretation, contained in the federal Constitution.

New York's Constitution has been interpreted to ensure that those accused of criminal offenses are guaranteed a right to counsel at the point that they stand so accused, extending the right beyond the scope of the U.S. Constitution's protections. This right is a product of judicial interpretation of the state Constitution's guarantee of a right to counsel in criminal proceedings, but the state Constitution does not make a distinction between the right to counsel in criminal proceedings and a right to counsel in civil matters. Indeed, the expression of the right to counsel in criminal proceedings is made in reference to the right to counsel in civil proceedings, and, the constitution says, effectively, that both should be protected. Despite this apparent parity between the right to counsel in criminal and civil proceedings, New York's courts have only granted the

right to counsel in civil proceedings as a product of the constitutional guarantee in extremely limited circumstances.

As a statement of first principles, the New York Constitution would seem to protect the right to counsel in civil proceedings to the extent it protects the right to counsel in criminal proceedings, yet no court has interpreted the right to be as broad as that guaranteed the criminally accused. Regardless of the intent of the framers of the New York Constitution or the voters who voted on it, the plain language would appear to grant a categorical right to counsel in both types of proceedings as opposed to a broad right in one and a narrow right, in limited circumstances, in another.

Nevertheless, regardless of the intent behind Article 1, § 6, as currently drafted in the last Constitutional Convention and interpreted by the courts thereafter, New Yorkers have the opportunity to express their collective will and state clearly that the right applies to all critical cases, civil and criminal. Such an expression would reflect an enlightened understanding of the importance of counsel in all cases, regardless of the nature of the case. It would embody a collective understanding of the importance of law to the normal ordering of society; that the rule of law requires equal justice; that when some can access justice and others cannot, there is no rule of law; and the normal functioning of an adversarial system of justice that relies on procedural protections to ensure, to the fullest extent possible, we can achieve a just result is invalid substantively if all litigants facing a loss of critical rights before the court cannot exercise their procedural rights and protect their interests.

By becoming the first state in the nation to recognize a full and categorical right to counsel in basic human needs civil proceedings, and enshrining that right in the state's constitution, New York, a state that prides itself on the rule of law, equality before the law, and enlightened government, would make a strong statement about the importance of counsel in all proceedings, civil and criminal. It would signal to the rest of the nation, and the world, that by recognizing a right to counsel in all types of proceedings in which human needs are at stake, it is also recognizing the importance of counsel in the functioning of the government, the administration of justice, and the rule of law.

B. Insulation from Shifting Political Winds

By embedding the right to counsel in basic human needs civil proceedings in the state constitution, New Yorkers would affirm the importance of

the right and express their collective will that the right should not be the subject of political whims, budget expedience, or partisan politics. We have seen over the last 40 years, almost from the minute the federal Legal Services Corporation (LSC) was created, that politicians can target lawyers for the poor because they might undermine the interests of those politicians' donors, supporters, or base. President Nixon targeted LSC funding for the budget ax when lawyers for the poor were taking aggressive stances in court to protect welfare rights. President Reagan, angered by the efforts of legal services lawyers in California to take him to court when he was governor there, sought to eliminate the LSC's budget in the early 1980s. The Republican-controlled 104th Congress in the mid-1990s targeted LSC for drastic cuts and, under President Obama, a Republican Congress has sought to do the same, reducing the LSC's budget by over 25 percent in just the last few years.

While many of these examples are of battles waged at the national level, partisan camps can form at the state level, and we often see national disputes play out on smaller stages, but in more extreme ways. Fights over funding for abortion access, the rights of public employees, and the rights of the LGBTQ communities are often more intense and acute at the state level. While New Yorkers are probably insulated, for now, from such pitched battles, there is no guarantee that increased polarization at the national level will not filter down to New York. Of late, we have seen partisan disputes arise around politically charged topics like marriage equality, regulation of firearms, and raising the minimum wage. There is no guarantee that such disputes will not arise around providing a right to counsel in basic human needs civil cases.

Indeed, although the courts have never interpreted the state constitution in New York to guarantee a right to counsel in all civil cases, the legislature has never pressed for such a right either, although, recently, the state legislature did pass a resolution endorsing the right to counsel in civil matters where fundamental human needs are at risk.[47] The budgetary impact of guaranteeing such a right would likely be significant (although potentially offset by significant savings in avoided safety net costs, as noted below) and legislators do not like to have their hands tied. But that is expressly the point. The legislature and the governor's hands *should* be tied so that the right to counsel will not be the subject of political winds, fortunes, and whims. It is just too important.

C. Good Governance and Enlightened, Cost-Effective Budgeting

If the moral and policy arguments for why a right to counsel in basic human needs civil cases are not enough to convince the public that such a right should be grounded in the New York State Constitution, there is another reason, one that highlights the fact that the right to counsel also makes fiscal sense—long-term fiscal sense. And just as the political winds can shift to make budgetary fights the subject of partisan battles, elected officials of all stripes can be subject to short-term expedient thinking, and sometimes find it difficult to make investments that pay off in the long run. The right to counsel in civil cases is one of those investments. Study after study shows that investment in a civil right to counsel does not just carry with it moral authority, it makes long-term fiscal sense, paying significant financial dividends in a number of areas, from cost saving to investment and economic development.[48]

In just one context, a right to counsel to stave off evictions, research shows that the fiscal benefits of providing counsel in such situations is profound. In the eviction context, lawyers can make a difference by defending tenants in housing court and preventing homelessness. The housing laws in New York have been compared by the "impenetrable thicket, confusing not only to laymen but to lawyers."[49] Tenants can have defenses and affirmative claims that are complicated to present, and those tenants may forfeit rights without knowledge of their existence, the ability to raise them, or the wherewithal to get to court to present them. As stated above, in a staggering 99 percent of cases in housing court in New York City, tenants go unrepresented. Given the connection between the housing court and eviction proceedings and families heading into the shelter system, the importance of lawyers in the housing context cannot be exaggerated. Indeed, when anyone has attempted to calculate the costs associated with providing counsel to low-income tenants and the related cost savings of doing so, the fiscal case could not be clearer of the wisdom of a right to counsel in the housing context.

Indeed, every study that has engaged in a cost-benefit analysis of the costs associated with providing a lawyer in an eviction proceeding to those who cannot afford one has shown that the long-term savings of such an investment are considerable. The greatest cost saving comes simply from the avoidance of the expense of providing shelter to a family that becomes homeless as a result of an eviction proceeding.

In the mid-2000s, the Vera Institute of Justice followed up on a study conducted in New York City and Philadelphia in the 1990s,[50] and attempted to identify the characteristics of families entering the New York City shelter system.[51] The researchers interviewed hundreds of families entering the shelter system in New York City and found that 47 percent of those families had "experienced an informal or formal eviction episode in the five years before they entered [the] shelter [system]."[52] Different analysis of the New York City Department of Homeless Services data from Fiscal Year 2003 revealed that 19 percent of the thousands of families that entered the city's shelter system were "recently evicted" families that had been leaseholders in the apartment from which they were evicted. Even this high figure probably does not accurately reflect the true impact of evictions on homelessness, however.[53]

Since there appears to be a direct relationship between families being evicted through housing court and ending up in a shelter, it is easy to posit that the provision of counsel to defend against an eviction would likely result in preventing families from entering the shelter system. A range of studies over the last 25 years have assessed the financial impact of providing counsel to families facing eviction in New York City. Their findings show that the cost *savings* associated with providing lawyers in housing court are profound.

- A study from 1990[54] prepared by the New York City Department of Social Services estimated for every one dollar spent on providing attorneys to indigent tenants in housing court, the city saved four dollars in the costs typically associated with homelessness;

- In 1992, another report calculated the cost to the City of New York of providing services to homeless people and compared that to the cost of providing legal services to indigent families and estimated the city could save nearly $67 million at the time by doing so;[55]

- A 2005 study found that preventing even 10 percent of the 25,000 evictions emanating from the housing courts of the City of New York would "yield a savings to the City of roughly $75 million in direct shelter costs alone;"[56]

- Just this April, a new study of the potential benefits of providing lawyers for tenants in New York City earning up to 200 percent of the poverty line found that a roughly $200 million investment in providing representation in housing court in New York City to eligible tenants

would return over half a billion dollars in cost savings, resulting in a net savings of $320 million.[57]

While these savings are profound, nothing can really calculate the full financial cost of homelessness, let alone its human costs. If individuals in the family are employed, they can lose days of work or lose their jobs entirely because of the disruption of having to navigate the streets or the homeless shelter system, or because of the psychological trauma of the eviction. Children experience extreme trauma, miss days of school, and have their routines disrupted, making it difficult to learn and leaving lasting psychological scars that can impair their future earnings potential. Eviction can lead to lengthy custody disputes that are costly to the individuals and a drain on the court's resources. These costs can be difficult to quantify, but that does not make them any less real. Tenants in New York State, and particularly New York City, have defenses to eviction proceedings and a lawyer can often present a meaningful defense that either preserves the family in the home, or at least negotiates more time to arrange for alternate living arrangements to avoid eviction and homelessness.

Apart from simply preventing homelessness in the context of eviction, and its homeownership corollary, foreclosure, the right to counsel in civil cases can have broader societal and economic impacts. Lawyers can help obtain desperately needed child support and veterans' assistance; can help secure more stable sources of income through seeking benefits through the Social Security Administration, unemployment insurance, and workers compensation benefits; and can pursue unpaid wages and back pay. These are just a few contexts in which the right to counsel can have profound economic impact on the lives of the clients who are served in these ways.[58]

Just as in the housing context, the economic benefits of providing a right to counsel in a wide range of important civil contexts are significant. According to testimony received by New York's Permanent Commission on Access to Justice, it is estimated that the roughly $300 million spent on civil legal services returns roughly $3 billion. This translates to each dollar spent returning $10 into the state of New York through savings on, among other things, housing the homeless, collection of unpaid wages and unpaid child support, and by helping to generate job opportunities.[59]

Thus, while the human costs of eviction, homelessness, loss of custody of a child, or loss of income to pay for the necessities of life are incalculable, the fiscal costs to government of these types of tragedies does appear to be something we can assess, at least in part. And the cost of providing a

right to counsel to avoid them is similarly something we can calculate. When you compare that fiscal cost of the harm caused by the absence of counsel to the benefits that accrue when counsel is made available, the numbers are overwhelming. Thus, investment in a civil right to counsel makes moral sense, while it also makes obvious long-term fiscal sense, and reflects principles of effective governance; in other words, it is a matter worthy of inclusion in a state's constitution.

CONCLUSION

The right to counsel in most criminal contexts in New York State is enshrined in the state's Bill of Rights, alongside similar language about a right to counsel in civil cases. Indeed, the language with respect to the criminal right to counsel is guaranteed "as in civil actions."[60] Nevertheless, to date, the courts in New York have never recognized a right to counsel for all civil cases where important rights and human needs are at stake. Creating parity between the criminal and civil right to counsel in the state constitution would elevate the status of the former to a place that is beyond the shifting winds of partisan politics and would make a profound statement of the will of the people about the importance of counsel in both types of cases. It would move the issue from politics to governance. It would also make fiscal sense.

For these reasons, should the people of the State of New York express an appetite for constitutional change in the state, one of the issues that a convention should consider would be to make clear that New York recognizes a right to counsel in all civil cases in which fundamental human needs are at stake. Such a statement would be the first of its kind in the nation, a fitting symbol of New York's leadership in the nation's system of law and justice.

1 TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 20 (2014) [hereinafter 2014 Annual Report], available at http://www.nycourts.gov/ accesstojusticecommission/PDF/CLS%20TaskForce%20Report%202014.pdf.

2 People v. Settles, 46 N.Y.2d 154 (1978).

3 People v. Samuels, 49 N.Y.2d 218 (1980).

4 New York State Constitution, Art. 1, §6 (emphasis added).

5 Indeed, it is at times impossible to distinguish the ultimate effects of a lack of counsel in the criminal and civil contexts: both can lead to institutionalization, whether it is arrest for vagrancy, petty crimes or inpatient psychiatric services. John Pollock, *It's All About Justice: Gideon and the Right to Counsel in Civil Cases*, 27 MIE JOURNAL 5 (Winter 2013), available at http://mielegalaid.org/sites/default/files/images/miejournalwtr2013sample.pdf.

6 American Bar Association House of Delegates, *Task Force on Access to Civil Justice*, 112A (Aug. 7, 2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

7 *See* Paul Marvy, *Advocacy for a Civil Right to Counsel: An Update*, CLEARINGHOUSE REV. (2008) (reviewing state efforts to secure a right to counsel).

8 Resolution 5, Reaffirming the Commitment to Meaningful Access to Justice for All, National Conference of Chief Justices and the Conference of State Court Administrators, available at https://www.ncsc.org/~/media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20All_final.ashx. Admittedly, this Resolution call for "assistance" as opposed to full access to a lawyer.

9 For a sample of these commentators, *see* Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 655 (1981); The Honorable Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y. REV. 503 (1998); LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AM. 17-18 (2007) [hereinafter LEGAL SERV. CORP.]; Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 387-88 (2004)(hereinafter "Connecting Principles to Practice"); Deborah Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1818 (2001). Professor Rhode describes the issue succinctly:

> It is a national disgrace that civil legal aid programs now reflect less than 1% of the nation's legal expenditures. And it is a professional disgrace that pro bono service occupies less than 1% of lawyers' working hours. We can and must do more, and our greatest challenge lies in persuading the public and the profession to share that view.

Id. at 1819 (citations omitted).

10 Rhode, *Connecting Principles to Practice*, *supra* note 9, at 376.

11 Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013). *See also*, LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 13 (September 2009)(synthesizing latest studies to show that one in five low-income Americans faced their legal problems without a lawyer) available at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf.

12 PERMANENT COMMISSION ON ACCESS TO JUSTICE: REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (November 2015).

13 *Id.* at 24.

14 Since statutory claims are much more narrow, express, explicit, varied on a state-by-state basis, and the product of legislative endorsement of the right in such circumstances, an analysis of those instances where legislatures may have passed such narrow protections is beyond the scope of this paper. I will take up the extent to which statutory claims have been pressed in New York State, however, in a subsequent part. *See infra* § III., B.

15 372 U.S. 335 (1963).

16 *See e.g.,* Smith v. O'Grady, 312 U.S. 329 (1941), Avery v. Alabama, 308 U.S. 444 (1940), Johnson v. Zerbst, 304 U.S. 458 (1938), Grosjean v. Am. Press Co., 297 U.S. 233 (1936); and Powell v. Alabama, 287 U.S. 45 (1932)).

17 U.S. CONST. amend. VI.

18 *Gideon*, 372 U.S. at 344.

19 *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (probation and parole revocation hearings.); Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972) (misdemeanor offenses where incarceration is a threat in order "to insure [sic] the accused a fair trial.")

20 See *Turner v. Rogers*, 131 S.Ct. 2507 (2011) ("[T]he Sixth Amendment does not govern civil cases.")

21 *See, e.g.*, Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988).

22 387 U.S. 1 (1967).

23 At the same time, the Supreme Court, prior to *Lassiter*, ruled that a mentally ill prisoner is entitled to legal "assistance" as opposed to an attorney, when transferred from a prison to a mental health facility. Vitek v. Jones, 445 U.S. 480 (1979).

24 424 U.S. 319 (1976). While many state courts follow the *Mathews* balancing test, it is not universal in the states.

25 *Id*.

26 *Id.* at 335.

27 452 U.S. 18, 20-21 (1981).

28 *Id.* at 26-27.

29 *Id.* at 27, 32.

30 *See, e.g.,* Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 Colum. J. L. & Soc. Probs. 527, 532-33 (1991) (describing harmful effects of homelessness).

31 For a critique of the case-by-case approach endorsed in *Lassiter*, and a collection of the contexts in which a categorical right has been recognized in certain contexts, see John Pollock, *The Case against Case-by-Case: Courts Identifying Categorical Rights in Basic Human Needs Civil Cases*, 61 DRAKE L. REV. 763 (2013).

32 Hotel Martha Washington Mgmt. Co. v. Swinick, 322 N.Y.S.2d 139, 142-43 (App. Div. 1st Dep't 1971).

33 *In re* Smiley, 330 N.E.2d 53, 55 (N.Y. 1975) (rejecting claim for right to counsel in matrimonial actions).

34 *Id.* at 57.

35 *Id*.

36 N.Y. City Hous. Auth. v. Johnson, 565 N.Y.S.2d 362, 364 (App. Term 1st Dep't 1990)(holding indigent tenant not entitled to representation in housing court). *See, also*, Brown v. Popolizio, 569 N.Y.S.2d 615 (App. Div. 1991)(same).

37 333 N.E.2d 374 (N.Y. 1975).

38 In re Ella B., 285 N.E.2d 288 (N.Y. 1972).

39 In re St. Luke's-Roosevelt Hosp. Ctr, 607 N.Y.S.2d 574 (Sup. Ct. 1993).

40 Hickland v. Hickland, 393 N.Y.S.2d 192 (App. Div. 1977).

41 For a collection of the cases dealing with the right to counsel in New York State, see American Bar Association, STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, DIRECTORY OF LAW GOVERNING APPOINTMENT OF COUNSEL IN STATE CIVIL PROCEEDINGS: NEW YORK (2014).

42 N.Y. C.P.L.R. 1102(a) (McKinney 1997).

43 Donaldson v. New York, 548 N.Y.S.2d 676, 678 (App. Div. 1st Dep't 1989).

44 *Id.* at 678-79.

45 Courts have typically denied requests for the assignment of counsel under C.P.L.R. 1102(a). *See, e.g*., Hinckson v. Selsky, 687 N.Y.S.2d 200 (N.Y. App. Div. 3d Dep't 1999) (applying the abuse of discretion standard when upholding a lower court's refusal to provide counsel under C.P.L.R. 1102(a) in proceeding under Article 78 of the C.P.L.R.); Khedouri Ezair Corp. v. Kosatka, 591 N.Y.S.2d 773 (N.Y. App. Div. 1st Dep't 1992) (upholding denial of application for appointment of counsel under C.P.L.R. 1102(a)). *See, also,* N.Y. City Hous. Auth. v. Johnson, 565 N.Y.S.2d 362, 364 (N.Y. App. Term 1st Dep't 1990) (confirming discretionary nature of C.P.L.R. 1102(a)). *But, cf.,* Morgenthau v. Garcia, 561 N.Y.S.2d 867, 869 (N.Y. Sup. Ct. 1990)(suggesting that the test for appointment under § 1102 is where an "indigent civil litigants face grievous forfeiture or loss of a fundamental right."). Courts have also rejected claims in certain contexts for a right to counsel under the N.Y. constitution. 170 W. 85th St. Tenants Ass'n v. Cruz, 569 N.Y.S.2d 705, 707 (N.Y. App. Div. 1st Dep't 1991) (holding no statutory or constitutional right to counsel in eviction proceedings); *In re* Brown v. Popolizio, 569 N.Y.S.2d 615, 620 (N.Y. App. Div. 1st Dep't 1991) (finding no constitutional right to counsel in eviction proceedings). N.Y. City Hous. Auth. v. Johnson, 565 N.Y.S.2d 362, 364 (N.Y. App. Term 1st Dep't 1990) (confirming discretionary nature of C.P.L.R. 1102(a)).

46 *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1655-1659 (2014)(comparing brevity of U.S. Constitution to length of U.S. state constitutions).

47 Joel Stashenko, *Legislature's Resolution Supports Civil* Gideon, N.Y.L.J. (June 29, 2015).

48 Laura Abel, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139 (Fall–Winter 2010).

49 In re 89 Christopher, Inc. v. Joy, 318 N.E.2d 776, 780 (N.Y. 1974).

50 Dennis P. Culhane et al., *Where the Homeless Come From: A Study of the Prior Address Distribution of Families Admitted to Public Shelters in New York City and Philadelphia.*, 7 HOUS. POL'Y DEBATE 327 (1996).

51 Vera Inst. Of Justice, Understanding Family Homelessness in New York City: An In-Depth Study of Families' Experiences Before & After Shelter (2005) [hereinafter VERA INST.], available at http://www.nyc.gov/html/dhs/downloads/pdf/VERA%20Study.pdf. The goal of the study was to "help the [City of New York] better understand why families become homeless and to provide the city with the information needed to shift away from operating costly shelter toward more cost-effective and preventive approaches to homelessness, which are less disruptive for families." *Id*. at exec. sum., i.

52 These episodes could include vacating an apartment upon receipt of pre-litigation notices from their landlord, losing a litigated eviction proceeding, or honoring a landlord's request to vacate the apartment. *Id.* at 13.

53 The report also found as follows: "Of course, many more evicted families double up with family members and/or friends before applying for shelter and the [19% figure] undercounts the number and percent of families whose eviction eventually leads to a shelter application and entry." FAMILY HOMELESSNESS PREVENTION PROGRAM, NEW YORK CITY FAMILY HOMELESSNESS PREVENTION REPORT 23 (2003). Similarly, when asked by the Vera Institute researchers whether an eviction had anything to do with the loss of their homes, eighty percent of the families interviewed responded "a lot." VERA INST., *supra* note 51, at 26.

54 LEGAL SERVICES PROJECT, REPORT TO THE CHIEF JUDGE: FUNDING CIVIL LEGAL SERVICES FOR THE POOR (1998) available at https://www.nycourts.gov/reports/misc/legalservpoor.pdf

55 NEW YORK STATE, *ET AL.*, HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL (1992) available at http://books.google.com/books/about/Housing_Court_Evictions_and_Homelessness.html?id=-evGZwEACAAJ.

56 NEW YORK COUNTY LAWYERS' ASSOCIATION, THE NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT? (October 2005) available at http://cwtfhc.org/wp-content/uploads/2009/06/NYCLA_HC_in_21st_Cent.pdf.

57 Such studies are not limited to the effect of providing lawyers in eviction proceedings in New York City alone. Another study conducted by a bar association in Massachusetts found that for every dollar spent providing representation to families and individuals in housing court, the State of Massachusetts would save $2.69 in costs associated with providing services to those benefited by representation. BOSTON BAR ASSOCIATION STATEWIDE TASK FORCE TO EXPAND LEGAL AID IN MASSACHUSETTS, INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVES FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS (October 2014 available at http://www.bostonbar.org/DOCS/DEFAULT-DOCUMENT-LIBRARY/STATEWIDE-TASK-FORCE-TO-EXPAND-CIVIL-LEGAL-AID-IN-MA---INVESTING-IN-JUSTICE.PDF

58 See, THE TASK FORCE TO EXPAND ACCESS TO LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 21-23 (November 2014) available at https://www.nycourts.gov/accesstojusticecommission/PDF/CLS%20TaskForce%20Report%202014.pdf.

59 PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 25-26 (2015)(citation omitted) available at http://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Report-V5.pdf.

60 N.Y. State Constitution, Art. I, § 6 (emphasis supplied).

CHAPTER THIRTEEN

REPORT AND RECOMMENDATIONS

CONCERNING

CONSTITUTIONAL HOME RULE

ADOPTED BY
THE COMMITTEE ON THE
NEW YORK STATE CONSTITUTION

MEMBERSHIP OF THE NEW YORK STATE BAR ASSOCIATION'S COMMITTEE ON THE NEW YORK STATE CONSTITUTION

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INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20 years voters are asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such mandatory referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning Constitutional Home Rule.

In New York State, local government has a greater impact on the day-to-day lives of the public than any tier of government. Our thousands of towns, villages, counties, cities, boroughs, school districts, special districts, authorities, commissions and the like play a vital governance role. They are responsible for drinking water, social services, sewerage, zoning, schools, roads, parks, police, courts, jails, trash disposal — and more. Without local government, public services often taken for granted would not be delivered.

Befitting its stature and importance, local government is a longstanding constitutional concern.[2] Indeed, since the 19th Century, "Home Rule" — the authority of local governments to exercise self-government — has been a matter of constitutional principle in New York.[3] The continuing dilemma has been to strike the right balance of furthering strong local governments but leaving the State strong enough to meet the problems that transcend local boundaries.[4] The competing considerations were

1 N.Y. CONST. art. XIX, § 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. . . . .").

2 Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL'Y SYMP. 79, 79 (1996) ("A longstanding constitutional concern in New York is local government and the relations between local governments and the State.").

3 *See Kamhi v. Town of Yorktown,* 74 N.Y.2d 423, 428, 548 N.Y.S.2d 144, 146, 547 N.E.2d 346, 348 (1989) (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century").

4 *Id.* at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348.

aptly summarized by the commission tasked with preparing for the last Constitutional Convention held in New York in 1967:

> On the one hand, there is the question of how to leave a legislature free to cope with possible problems of state-wide concern and to intervene in local affairs when, in the judgment of the legislature, they reach a point of state-wide concern. On the other, is the question of how to determine the responsibilities appropriate for local governments, the powers needed for carrying out those responsibilities and the kind of protection from state legislative intervention that should be provided to permit and sustain responsive and responsible local self-government.[5]

Article IX, the so-called "Home Rule" article, contains protections for local government that are more extensive than those in many other states.[6] Constitutional Home Rule is established by granting local governments affirmative lawmaking powers, while carving out a sphere of local autonomy free from State interference.

Despite Article IX's intent to expand the authority of local governments, Home Rule in practice has produced only a modest degree of local autonomy. The powers of local governments have been significantly restricted by two legal doctrines developed through decades of litigation ("preemption" and "State concern"). Local governments must also follow mandates enacted by the State Legislature.

The preemption doctrine is a fundamental limitation on the power of local governments to adopt local laws. Under the preemption doctrine, a local law is unenforceable when it collides with a State statute; that is, the local law prohibits what a State statute allows, or the State statute prohibits what the local law allows. But even in the absence of an outright conflict between State and local law, a local government may not act where the State has acted comprehensively in the same area.

5 N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT 11 (Mar. 31, 1967) [hereinafter LOCAL GOVERNMENT].

6 *See* ROBERT B. WARD, NEW YORK STATE GOVERNMENT 545 (2d ed. 2006) ("New York's constitutional and statutory provisions regarding home rule are more extensive than those in many states.").

The State concern doctrine represents an exception to the constitutional limitations on the State Legislature's authority to enact special laws targeted at one or more, but not all local governments. Under this doctrine, the State Legislature is empowered to regulate local matters, yet which also relate to State concerns, such as waste disposal on Long Island, sewers in Buffalo, and taxicabs in New York City.

Home Rule is further limited by the State Legislature's imposition of mandates that compel local governments to provide specific services and meet minimum State standards, often without providing fully supporting funds necessary to comply with such mandates. New York imposes more unfunded mandates on localities than any other state in the nation.[7]

Blue ribbon panels and local government scholars have called for revisions to Article IX's Home Rule provisions. Nevertheless, a half-century has passed since the State has had a serious discussion on this subject. The time to do so again is long overdue. This is especially so, given the myriad challenges facing local government today.

This report is divided into four sections. Part I summarizes the background of the Committee on the New York State Constitution and the issuance of this report. Part II provides an overview of Constitutional Home Rule. Part III describes legal doctrines and laws that restrict the ambit of Home Rule. Part IV concludes that New Yorkers would benefit from a thorough consideration of Constitutional Home Rule and potential reforms that would strengthen and clarify it.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and promote initiatives designed to educate the legal community and public about the State Constitution.

7 PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 279 (2D ED. 2012) [hereinafter THE NEW YORK STATE CONSTITUTION].

On October 8, 2015, the Committee issued its first report and recommendations, entitled *"The Establishment of a Preparatory State Commission on a Constitutional Convention."*[8] The Committee recommended that, in advance of the 2017 referendum on a Constitutional Convention, the State should establish a non-partisan preparatory commission, as it has done in the past. The commission's duties should include: (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

On November 7, 2015, the State Bar's House of Delegates unanimously adopted the Committee's report and recommendations.[9] Two months later, during his State of the State Address, Governor Andrew M. Cuomo proposed as part of his Executive Budget the creation of a preparatory commission on a Constitutional Convention. The Governor proposed investing $1 million to create the commission to develop a blueprint for a convention. The commission would also be authorized to recommend fixes to the current Convention delegate selection process.[10]

The Committee has now turned its attention to the subject of Constitutional Home Rule. At its meeting on December 17, 2015, the Committee heard a presentation from Professor Richard Briffault, the Joseph P. Chamberlin Professor of Legislation at Columbia Law School, and a nationally respected authority on local government. At its next meeting, on January 27, 2016, the Committee heard from another eminent authority on local government, Michael A. Cardozo, a partner at the law firm of Proskauer Rose and the former Corporation Counsel for the City of New

8 N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMM'N ON A CONSTITUTIONAL CONVENTION (2015), *available at* http://www.nysba.org/nysconstitutionreport/ (last visited on Mar. 6, 2016).

9 Press Release, N.Y. State Bar Assn., *New York State Bar Association Calls on State Government to Prepare Now for Statewide Vote on State Constitution in 2017* (Nov. 13, 2015), *available at* http://www.nysba.org/NYSConstitutionVote/ (last visited on Mar. 6, 2016).

10 Press Release, N.Y. State Div. of Budget, *Governor Cuomo Outlines 2016 Agenda: Signature Proposals Ensuring That New York is — and Will Continue to Be Built to Lead* (Jan. 13, 2016), *available at* http://www.budget.ny.gov/pubs/press/2016/pressRelease16_eBudget.html (last visited on Mar. 6, 2016).

York from 2002 through 2013. As the City's 77th and longest serving Corporation Counsel, Mr. Cardozo was the City's chief legal officer, headed the City's Law Department of more than 700 lawyers, and served as legal counsel to Mayor Michael Bloomberg, elected officials, the City and its agencies.

After further discussion and review, the Committee concluded that the public and legal profession would be well served to have a serious conversation about, and debate over, whether the Home Rule provisions in Article IX of the State Constitution should be clarified and strengthened. This position is set forth and elaborated on in this report, which was unanimously approved by the Committee at a meeting held on March 10, 2016.

CONSTITUTIONAL HOME RULE — GENERALLY

Home rule — the right of localities to exercise control over matters of local concern[11] — has long "been a matter of constitutional principle"[12] in New York State. Beginning in the 19th Century, the home rule movement represented a determined effort to provide local governments with autonomy over local affairs and freedom from State legislative interference.[13] The path of home rule has been "unsettled and tortuous" through the years, reflecting "the difficult problem of furthering strong local governments but leaving the State just as strong to meet the problems that transcend local boundaries, interests and motivations."[14]

11 *See People ex. rel. Metropolitan St. Ry. Co. v. State Board of Tax Comm'rs,* 174 N.Y. 417, 431, 67 N.E. 69, 70 (1903), *aff'd,* 199 U.S. 1 (1905) ("The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution."); *see also* John R. Nolon, *The Erosion of Home Rule Through The Emergence of State-Interests in Land Use Control,* 10 PACE ENVTL. LAW REV. 497, 505 (1993) ("[Home Rule's] purpose is to permit local control over matters that are best handled locally and without state interference."); James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 713 n.1 (1985) ("'home rule' can be described as a method by which a state government can transfer a portion of its governmental power to a local government") [hereinafter *Ghost of Home Rule*].

12 *See Kamhi,* 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century").

13 Note, *Home Rule and the New York Constitution,* 66 COLUM. L. REV. 1145, 1145 (1966).

14 *Kamhi,* 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (internal quotation marks & citations omitted).

New York's basic system of local governance is set forth in Article IX of the State Constitution. Adopted in 1963 with high hopes,[15] Article IX was intended to expand and secure the powers enjoyed by local governments.[16] Governor Nelson A. Rockefeller predicted at the time that Article IX and its implementing legislation would "strengthen the governments closest to the people so that they may meet the present and emerging needs of our times."[17]

Article IX declares "[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state";[18] creates a "Bill of Rights" for local governments to secure certain enumerated "rights, powers, privileges and immunities";[19] and vests in the State Legislature the power to create and organize local governments.[20]

15 *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 266 (Article IX was "meant to embody a new concept in state-local relationships by constitutionally recognizing that the 'expansion of powers for effective local self-government' is a purpose of the people of the state.") (citation omitted).

16 *See Wambat Realty Corp. v. State of New York,* 41 N.Y.2d 490, 496, 393 N.Y.S.2d 949, 953, 362 N.E.2d 581, 585 (1977) ("Undoubtedly the 1963 home rule amendment was intended to expand and secure the powers enjoyed by local governments."); *Matter of Town of E. Hampton v. State of New York,* 263 A.D.2d 94, 96, 699 N.Y.S.2d 838, 839 (3d Dep't 1999) ("The unquestioned purpose behind the home rule amendment was to expand and secure the powers enjoyed by local governments.") (internal quotation marks omitted); James L. Magavern, *Fundamental Shifts Have Altered the Role of Local Government*, N.Y. ST. B.J., Jan. 2001, at 52, 53 (the Home Rule Amendments to the State Constitution were "presented as 'a significant new contribution to the principle that local problems can best be solved by those familiar with them and most concerned with them'") (quoting N.Y. STATE OFFICE FOR LOCAL GOVERNMENT, NEWSLETTER, No. 15, Sept. 18, 1963).

17 Ward, THE NEW YORK STATE GOVERNMENT, *supra* note 6, at 547 (quoting Governor Rockefeller's memorandum of approval of Article IX's implementing legislation, the Municipal Home Rule Law (L. 1963, ch. 843 & 844), upon its adoption on Apr. 30, 1963).

18 N.Y. CONST. art. IX, § 1. "Local government" is defined in Article IX to consist of counties, cities, towns, and villages. *Id.* § 3(d)(2).

19 *Id.* § 1. The local government Bill of Rights sought to lay the groundwork for stronger and more effective local government. *See Town of Black Brook v. State of New York*, 41 N.Y.2d 486, 488-89, 393 N.Y.S.2d 946, 362 N.E.2d 579, 581 (1977). It lists various rights, amongst which are: the right to have an elective body with authority to adopt local laws; the right to elect and appoint local residents or officers; the power to agree, as authorized by the Legislature, with the federal government, a State or other government to provide cooperatively governmental services and facilities; the power of eminent domain; the power to make a fair return on the value or property used in the operation of certain utility services, and the right to use the profits therefrom for refunds or any other lawful purpose; and the power to apportion costs of governmental services of functions upon portions of local areas as authorized by the Legislature. N.Y. CONST. art. IX, §§ (1)(a)-(b), (c), (e)-(g).

20 *Id.* § 2(a) ("The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.").

Constitutional home rule is established through two assertions of local government power in Article IX.[21] One is affirmative grants of power to local governments to manage their affairs through the adoption of local laws. The other restricts the State Legislature from intruding upon matters of local, rather than State, concern, except as provided in the Constitution.[22] Each is described more fully in turn.

A. Grants of Lawmaking Authority

Section 1 of Article IX declares that "[e]very local government shall have power to adopt local laws as provided by this article."[23] Section 2(c) — the "center of home rule powers"[24] — elaborates on the lawmaking power, by providing that local governments "shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government."[25]

Section 2 also confers on local governments the power to adopt local laws regarding ten specified areas, regardless of whether or not they relate to the local government's property, affairs or government.[26] These ten areas include: membership and composition of the local legislative

21 *See* James D. Cole, *Local Authority to Supersede State Statutes,* N.Y. ST. B.J., Oct. 1991, 34, 34 ("Under Article IX of the State Constitution, home rule in New York has two basic components.").

22 *See City of New York v. Patrolmen's Benevolent Assn. of City of New York,* 89 N.Y.2d 380, 385-86, 654 N.Y.S.2d 85, 87, 88, 676 N.E.2d 847, 849 (1996) ("Article IX, § 2 of the State Constitution grants significant autonomy to local governments to act with respect to local matters. Correspondingly, it limits the authority of the State Legislature to intrude in local affairs. . . ."); *Kamhi*, 74 N.Y.2d at 428-29, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 ("two-part model for home rule: limitations on State intrusion into matters of local concern and affirmative grants of power to local governments").

23 N.Y. CONST. ART. IX, § 1(A).

24 PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 290 (1996) [hereinafter ORDERED LIBERTY].

25 N.Y. CONST. art. IX, § 2(c)(i). The phrase "property, affairs or government" was first codified in the 1894 State Constitution, and has been at the center of the Home Rule dialogue ever since. "Although, literally construed, it might cover an extremely broad area, it has never been accorded its literal significance but has been treated as excluding all matters of state concern." N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67. *See also Adler v. Deegan,* 251 N.Y. 467, 473, 167 N.E. 705, 707 (1929) ("When the people put these words in . . . the Constitution, they put them there with a Court of Appeals' definition, not that of Webster's Dictionary.").

26 RICHARD BRIFFAULT, *Intergovernmental Relations* [hereinafter *Intergovernmental Relations*], in DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 156-57 (Gerald Benjamin & Hendrik N. Dullea eds., 1997); GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

body;[27] powers, duties, qualifications, number, mode of selection, and removal of officers and employees;[28] transaction of the local government's business;[29] the incurring of obligations;[30] presentation, ascertainment and discharge of claims against the local government;[31] acquisition, care, management and use of highways, roads, streets, avenues and property;[32] acquisition of transit facilities and the ownership and operation thereof;[33] levying and collecting local taxes;[34] wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for the local government;[35] and the government, protection, order, conduct, safety, health and well-being of persons or property therein.[36]

Outside of the ten enumerated subjects, the State government retains all power otherwise delegated to it by law.[37] Unlike the State government, local governments are not sovereigns in their own right.[38] Accordingly, local governments have only the lawmaking powers delegated by the State Constitution and Legislature.[39]

Article IX requires the State Legislature to enact a "statute of local governments" granting local governments additional powers "including

27 N.Y. CONST. art. IX, § 2(c)(ii)(2).

28 *Id.* §§ 2(c)(ii)(1).

29 *Id.* § 2(c)(ii)(3).

30 *Id.* § 2(c)(ii)(4).

31 *Id.* § 2(c)(ii)(5).

32 *Id.* § 2(c)(ii)(6).

33 *Id.* § 2(c)(ii)(7).

34 *Id.* § 2(c)(ii)(8).

35 *Id.* § 2(c)(ii)(9).

36 *Id.* § 2(c)(ii)(10).

37 *See id.* § 3(a)(3) ("Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to: . . . [m]atters other than the property, affairs or government of a local government.").

38 *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 265 ("In American constitutional theory, there is no inherent right of local self-government. Local Government units are creatures of the state.").

39 *See Kamhi,* 74 N.Y.2d at 427, 548 N.Y.S.2d at 145, 547 N.E.2d at 347 ("In general, towns have only the lawmaking powers the Legislature confers on them . . . . Without legislative grant, an attempt to exercise such authority is ultra vires and void.").

but not limited to" matters of local legislation and administration.[40] A power granted in such statute has quasi-constitutional protection against challenge, because it can be "repealed, diminished, impaired or suspended" only by a law passed and approved by the Governor in each of two successive calendar years.[41] In 1964, the Legislature complied with the constitutional directive and enacted a Statute of Local Government,[42] as well as the Municipal Home Rule Law,[43] both of which are to be liberally construed.[44]

The Legislature may confer on local governments powers not relating to their property, affairs or government and not limited to local legislation

40 *See* N.Y. CONST. art. IX, § 2(b)(1) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (l) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article.").

41 *Id.* § 2(b)(1) ("A power granted in such statute [of local governments] may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year."); *see also Wambat Realty Corp.*, 41 N.Y.2d at 496, 393 N.Y.S.2d at 953-54, 362 N.E.2d at 586 ("In particular, the direction to enact a Statute of Local Government, including the innovative double enactment procedure to impede encroachment on the granted local powers, was expressly aimed at 'proving a reservoir of selected significant powers.'") (citations omitted); GALIE, ORDERED LIBERTY, *supra* note 24, at 290 ("although it was not feasible to grant the home rule powers contained in the statute constitutional status, the statute provided quasi-constitutional protection for these powers").

42 *Wambat Realty Corp.*, 41 N.Y.2d at 490, 393 N.Y.S.2d at 951, 362 N.E.2d at 583. The powers in the Statute of Local Governments include the ability to acquire real and personal property, adopt, amend, and repeal ordinances, resolutions, etc., acquire, construct, and operate recreational facilities, and levy, impose, collect, and administer rents, charges and fees. N.Y. STAT. LOCAL GOV. § 10. The Legislature also made certain reservations, and if State legislation which impinged on a power granted to local governments by the statute is within the ambit created by those reservations, the change can be achieved by ordinary legislative process. *Id.* § 11. In the view of an eminent constitutional scholar, the powers granted local governments by the Legislature in the Statute of Local Governments are not significant. GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

43 *See DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 94, 725 N.Y.S.2d 622, 625, 749 N.E.2d 186, 189 (2001) ("To implement Article IX, the Legislature enacted the Municipal Home Rule Law."). The Municipal Home Rule Law put in one place and organized, for the first time, the statutory provisions relating to Home Rule for various types of local government. This replaced Home Rule provisions previously contained in the City Home Rule Law, the Village Home Rule Law, the Town Law, the County Law and a number of other laws. N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68; *see also* N.Y. MUN. HOME RULE L. § 10 (describing general powers of local governments to adopt and amend local laws).

44 *See* N.Y. MUN. HOME RULE LAW § 51 (providing that home rule powers "shall be liberally construed"); N.Y. STAT. LOCAL GOV. § 20(5) (same).

and administration "in addition to those otherwise granted by or pursuant to this article" and may withdraw or restrict such additional powers.[45]

Other constitutional provisions authorize the Legislature to grant additional powers to local governments.[46] For example, the Legislature may grant the power to apportion the cost of a government service or function upon any portion of the area within the local government's jurisdiction and exercise of eminent domain outside local boundaries.[47] The Legislature is also authorized to grant various powers to cities, towns and villages for the financing of low-rent housing and nursing home accommodations for persons of low income.[48]

Article IX, Section 3(c) provides that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."[49]

B. Immunity from Legislative Interference

At the same time that Article IX authorizes local governments to adopt local laws in a wide range of fields, it also sets procedural limits on the ability of the State Legislature to impinge on local authority. Specifically, Section 2(b)(2) of Article IX — the so called "Home Rule clause" — limits the State Legislature's power to enact laws regulating matters that fall within the purview of local government. The Home Rule clause states as follows:

> [T]he legislature . . . [s]hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive offi-

45 N.Y. CONST. art. IX, § 2(b)(3) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.").

46 BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158.

47 *See* N.Y. CONST. art. IX, §§ 1(e) ("The legislature may authorize and regulate the exercise of the power of eminent domain and excess condemnation by a local government outside its boundaries."), (g) ("A local government shall have power to apportion its cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature.").

48 BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 158 (citing N.Y. CONST. art. XVIII).

49 N.Y. CONST. art. IX, § 3(c).

> cer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.[50]

Under this provision, the State Legislature may freely regulate the property, affairs or government of local governments through the enactment of a "general law" that "in its terms and in effect applies to all counties . . .[,] all cities, all towns or all villages."[51] However, if the Legislature seeks to enact a special law that would apply to one or more, but not all local governments,[52] it must follow one of two procedures intended to protect the Home Rule powers of the affected localities.[53] The State Legislature must receive either (1) a request of two-thirds of the total membership of the local legislative body or of the local chief executive officer concurred in by a majority of the membership of the local legislature; or (2) a certificate of necessity from the Governor reciting facts that constitute an emergency requiring enactment of such law and the concurrence of two-thirds of each house of the State legislature.[54] The first option's directives are commonly referred to as the "Home Rule message" requirement "because whenever a special law is enacted it should be at the locality's request."[55] "The second option — the Governor's emergency message and legislative super-majority — is unavailable for special laws concerning New York City."[56]

50 N.Y. CONST. art. IX, § 2(b)(2).

51 *See id.* § 3(d)(1) ("'General law.' A law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.").

52 *See id.* § 3(d)(4) ("'Special law.' A law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages.").

53 *Id.* § 2(b)(2).

54 BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 158 (construing Home Rule clause).

55 *Greater N.Y. Taxi Assn. v. State of New York*, 21 N.Y.3d 289, 301, 993 N.E.2d 970 N.Y.S.2d 907, 914, 993 N.E.2d 393, 400 (2013).

56 BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 158-59 (citing N.Y. CONST. art. IX, § 2(b)(2)).

A particularly striking example of special laws enacted pursuant to either Home Rule message or Gubernatorial message of necessity are State legislative enactments establishing emergency financial control boards for distressed municipalities, which effectively allow the State government to temporarily assume control of these municipalities' finances and daily operations.[57]

RESTRICTIONS ON HOME RULE

While Home Rule is provided for in Article IX, it has been left to the State's judiciary to interpret the constitutional Home Rule provisions. Drawing lines between what is properly the domain of local government under Home Rule and the State's ability to legislate has been a recurring role for the courts.[58] Home rule "reflects a far-flung effort over more than a century's time" to find meaning in the ambiguous phrases "property, affairs or government" and "matters of state concern."[59] "The result of these efforts has been a highly developed, and still developing, case law . . . ."[60]

Indeed, the current status of Home Rule in New York has been largely shaped by the judicial development of two legal doctrines: (1) the State preemption doctrine and (2) the State concern doctrine. The former represents a fundamental limitation on local government's lawmaking powers; the latter carves out an exception to the constitutional limitations on the State Legislature's authority to enact special laws. The impact of each on the relationship between the State and local governments cannot be overstated. The same can be said for the stresses placed on local governments by unfunded State mandates.

57 *See, e.g.*, City of Yonkers Financial Emergency Act, L. 1975, ch. 871, § 5 (legislation passed on both message of necessity and Home Rule message establishing emergency financial control board for City of Yonkers).

58 Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENVER L. REV. 1337, 1338 (2009) [hereinafter *Constitutional Home Rule*]; *see also* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67 ("The duty of determining whether particular matters pertain to the property, affairs or government of local governments or are matters of state concern has devolved upon the judiciary with, at least to many persons, unsatisfactory results.").

59 Baker & Rodriguez, *Constitutional Home Rule, supra* note 58, at 1338.

60 *Id.*

A. The Preemption Doctrine

As noted, the State preemption doctrine is a "fundamental limitation on home rule powers."[61] Although Article IX vests local governments with substantial lawmaking powers by affirmative grant, "the overriding limitation" of the preemption doctrine embodies "the untrammeled primacy of the Legislature to act with respect to matters of State concern."[62]

In general, preemption occurs in one of two ways; first, when a local government adopts a law that directly conflicts with a State statute; and second, when a local government legislates in a field for which the State legislature has assumed full regulatory responsibility.[63] Conflict preemption represents an outright conflict or "head-on collision" between a local law and State statute.[64] A local law is unenforceable if it prohibits what a State statute explicitly allows, or if the State statute prohibits what the local law explicitly allows.[65]

But even in the absence of an outright conflict, a local law is preempted if the State Legislature "has evidenced its intent to occupy the field."[66] Field preemption occurs when "a local law regulating the same subject matter as a state law is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute."[67] "Such local laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the

61 *Albany Area Builders Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d. 627, 629 546 N.E.2d 920, 922 (1989).

62 *Id.*; *see also Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96, 524 N.Y.S.2d 8, 10, 518 N.E.2d 903, 905 (1987) ("although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State"); BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 171 ("The sources of home rule authority generally provide that local enactments must not be inconsistent with the Constitution or genera laws. In other words, although a subject may fall within the grant of home rule authority, local action may be preempted by state law.").

63 *DJL Rest. Corp.*, 96 N.Y.2d at 95, 725 N.Y.S.2d at 625, 749 N.E.2d at 190 (internal quotations omitted).

64 *See Lansdown Entertainment Corp. v. N.Y.C. Dep't of Cons. Affairs*, 74 N.Y.2d 761, 764, 545 N.Y.S.2d 82, 83, 543 N.E. 2d 725, 726 (1989).

65 *Sunrise Check Cashing & Payroll Servs., Inc.*, 91 A.D.3d 126, 134, 933 N.Y.S.2d 388, 395 (2d Dep't 2011) (internal quotation marks and citations omitted).

66 *Albany Area Builders Assn.*, 74 N.Y.2d at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

67 *Id.* (internal quotation marks, alteration, and citations omitted).

State's general law and thereby thwart the operation of the State's overriding policy concerns."[68]

Field preemption may be express or implied. Express field preemption occurs when a State statute explicitly provides that it preempts all local laws on the subject.[69] Field preemption is implied when "either the purpose and scope of the regulatory scheme will be so detailed or the nature of the subject of regulation will be such that the court may infer a legislative intent to preempt, even in the absence of an express statement of preemption."[70]

Examples of local laws that have been found to be impliedly preempted include the following activities:

- Residency restrictions for sex offenders;[71]
- Minimum wage laws;[72]
- Regulating local taxation for roadway construction;[73]

68 *Id.* at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

69 *See Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 468 N.Y.S.2d 596, 599 456 N.E.2d 487, 490 (1983).

70 Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOKLYN L. REV. 321, 349 (1999) (citations omitted).

71 *See People v. Diack,* 24 N.Y.3d 674, 681, 3 N.Y.S.3d 296, 26 N.E.3d 1151 (2015) (holding that design and purpose of State laws regulating registered sex offenders evidenced intent to preempt subject of sex offender residency restriction legislation and to "occupy the entire field" so as to prohibit local governments from doing so).

72 *See Wholesale Laundry Bd. of Trade, Inc. v. City of New York,* 17 A.D.2d 327, 329, 234 N.Y.S.2d 862, 865 (1st Dep't 1962), *aff'd,* 12 N.Y.2d 998, 239 N.Y.S.2d 128, 189 N.E.2d 623 (1963) (invalidating New York City minimum wage law which set a rate higher than that set in the State minimum wage law; "it is entirely clear that the state law indicates a purpose to occupy the entire field").

73 *Albany Area Builders Assn.,* 74 N.Y.2d at 377-78, 547 N.Y.S.2d at 629, 546 N.E.2d at 922 (invalidating local law regulating taxation for roadway construction, where State's "elaborate budget system" provided for how towns were to budget for roadway improvements and repairs, and the State explicitly regulated at local level amount of taxes collectible for roadway improvements and the expenditure of such funds).

- Hours of operations of taverns and bars;[74]
- Regulating where abortions may be performed;[75] and,
- Power plant siting.[76]

Implied preemption has provided a fertile ground for litigation. By no means are all challenges to local laws based on implied preemption successful.[77] However, because the dispositive inquiry turns on interpreting the State Legislature's intent, it is often difficult to predict whether a given local law will or will not withstand judicial scrutiny. As one commentator has explained:

> The Legislature rarely makes a clear declaration of policy. The courts therefore have no clear standard for determining whether the extent and nature of state regulation of an area is "comprehensive," and therefore preemptive, or "piecemeal," and therefore not preemptive. The result

74 *People v. DeJesus*, 54 N.Y.2d 465, 468-70, 446 N.Y.S.2d 207, 210, 430 N.E.2d 1260, 1263 (1981) (holding that State's Alcohol Beverage Control Act was "exclusive and statewide in scope, thus, no local government could legislate in field of regulation of establishments which sell alcoholic beverages"). *Cf., Vatore v. Commissioner of Consumer Affairs of City of New York*, 83 N.Y.2d 645, 650, 612 N.Y.S.2d 357, 359, 634 N.E.2d 958, 960 (1994) (upholding City of New York's ability to regulate the location of tobacco vending machines, including within taverns).

75 *See Robin v. Village of Hempstead,* 30 N.Y.2d 347, 350-351, 285 N.E.2d 285, 287, 334 N.Y.S.2d 129, 132 (1972) (holding that State law preempted local law regulating where abortions may be perform because of the scope and detail of State medical and hospital regulation).

76 *See Consolidated Edison Co.,* 60 N.Y.2d at 105, 468 N.Y.S.2d at 599, 456 N.E.2d at 490 (holding that a local zoning ordinance was preempted partially based on State law's establishment of a Siting Board that "is required to determine whether any municipal laws or regulations governing the construction or operation of a proposed generating facility are unreasonably restrictive, and has the power to waive compliance with such municipal regulations").

77 *See, e.g*., *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 691-92, 16 N.Y.S.3d 25, 30, 37 N.E.3d 82, 87 (2015) (finding "no express conflict between the broad authority accorded to [New York] courts to regulate attorneys under the [New York] Judiciary Law and the licensing of individuals as attorneys who are engaged in debt collection activity falling outside of the practice of law," and further finding that the "authority to regulate attorney conduct does not evince an intent to preempt the field of regulating non-legal services rendered by attorneys"); *Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.2d 1188 (2014) (holding that State Oil and Gas Law did not preempt town zoning ordinances banning hydrofracking); *New York State Club Assn. v. New York*, 69 N.Y.2d 211, 221-22, 513 N.Y.S.2d 349, 354, 505 N.E.2d 915, 920 (1987) (upholding New York City law prohibiting discrimination in private clubs; State's Human Rights Law's failure to define "distinctly private" suggested "an intent to allow local government to act"); *People v. Judiz*, 38 N.Y.2d 529, 531-32, 381 N.Y.S.2d 467, 469, 344 N.E.2d 399, 401 (1976) (upholding a local ordinance prohibiting possession of an "imitation pistol" despite a State statute covering the same subject area).

> is ad hoc judicial decision making and considerable uncertainty as to when state legislation will be considered preemptive of local action.[78]

The implied preemption doctrine has drawn its share of critics. Local government scholars have cautioned that the ever-present, seemingly inchoate possibility that a court may find implied preemption "casts a shadow over local autonomy, often leading local governments to question whether they have the authority to act,"[79] and, therefore, imposing "severe constraints on local policy innovation and choice."[80]

In 2008, the New York State Commission on Local Government Efficiency and Competitiveness, chaired by former Lieutenant Governor Stanley N. Lundine, noted that the implied preemption doctrine does not appear in the State Constitution,[81] and has created "confusion and uncertainty" for local governments when exercising their home rule powers.[82] The Lundine Commission called for a constitutional amendment prohibiting the judicial application of implied preemption.[83] Such an amendment, the Lundine Commission explained, "would allow local governments to act except where state law has expressly declared state authority in the area to be exclusive or has specifically limited local governments' ability to act in that area or field."[84]

78 Briffault, *Intergovernmental Relations, supra* note 26, at 173.

79 *See* Briffault, *Local Government and the New York State Constitution*, *supra* note 2, at 90. *See also* Paul Diller, *Intrastate Preemption*, 87 BOSTON UNIV. L. REV. 1113, 1133 (2007) (arguing that field preemption can be a "tool of interest groups," through which particular focused groups "seek relief from the local laws they dislike by turning to the courts, rather than — or in addition to — pursuing other options to further their interests.").

80 *See* Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 639-40 (2001).

81 N.Y. STATE COMM'N ON LOCAL GOVT. EFFICIENCY & COMPETITIVENESS, 21ST CENTURY LOCAL GOVERNMENT 36 (Apr. 2008), *available at* http://www.greaterohio.org/files/policy-research/new-york-final-report.pdf.

82 *Id.* at 37.

83 *Id.* at 3, 36-37.

84 *Id*. at 36. The State of Illinois is an example of a State that has followed this approach. The Home Rule provision in the Illinois State Constitution allows for preemption only when the Legislature expressly so provides in legislation. *See* ILL. CONST. 1970, art. VII, § 6(i) ("Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."). *See also* Alaska CONST. art X, § 11 ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.").

In a similar vein, one local government scholar has called for the establishment in New York of a judicial presumption against preemption.[85] And, a court of last resort in another state has adopted a default rule that the state legislature has not occupied the field unless it has said so explicitly.[86]

Whatever one may think of such proposals, the fact remains that implied preemption is a significant constraint on local authority, even when a local government acts well within the sphere of specific Home Rule powers.[87] It has also generated considerable litigation, with often unpredictable results, creating confusion and uncertainty for local governments.

B. The State Concern Doctrine

Article IX's Home Rule clause carves out a sphere of autonomy for local governments over their "property, affairs or government" by limiting the State Legislature's power to act with respect to such local matters through special legislation. However, the Home Rule clause is subject to a significant limitation — the "State concern" doctrine — derived from the case of *Adler v. Deegan*[88] in 1929.

In *Adler,* the New York Court of Appeals addressed the power of the Legislature to enact the Multiple Dwelling Law,[89] which required housing to comply with minimum standards for fire-prevention, light, air and sani-

85 *See* Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 648 (2014) ("Article IX, section 3(c) of the New York Constitution requires that the home rule powers of municipalities be 'liberally construed.' Such liberal construction, this article suggests, requires a qualified presumption against preemption: Unless statutory text manifestly and unambiguously supersedes local law, courts should presume that state law does not preempt local laws. This presumption is not irrebuttable: it can be overcome where local laws encroach on some substantial state interest that local residents are likely to ignore.").

86 *See Municipality of Anchorage v. Repasky,* 34 P.3d 302, 311 (Alaska 2001) ("In general, for state law to preempt local authority, it is not enough for state law to occupy the field. Rather, if the legislature wishes to preempt an entire field, it must so state.') (internal quotation marks, citation & brackets omitted). *See also, e.g., City of Ocala v. Nye,* 608 So.2d 15, 17 (Fla. 1992) (implying in dicta that Florida does not recognize field preemption); *Cincinnati Bell Tel. Co. v. City of Cincinnati,* 693 N.E.2d 212, 218 (Ohio 1998) ("(T)here is no constitutional basis that supports the continued application of the doctrine of implied preemption.").

87 *See Jancyn Mfg. Corp.*, 71 N.Y.2d at 97, 524 N.Y.S.2d at 11, 518 N.E.2d at 905.

88 251 N.Y. 467, 167 N.E. 705 (1929).

89 L. 1929, ch. 713, § 3.

tation.[90] This salutary act applied, in effect, only to New York City, but did not conform to the Home Rule requirements for special legislation.[91] Nevertheless, the Court found the subject matter of the Multiple Dwelling Law addressed a "state concern" and on that ground upheld its enactment as a valid exercise of State legislative power.[92]

In a seminal concurring opinion, then-Chief Judge Benjamin Cardozo argued that, if a subject, like slum clearance, "be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality."[93] Thus, even if legislation relates to the property, affairs, or government of a local government, if the legislation is also a matter of substantial state concern, the Home Rule clause is inoperative and the Legislature may act through ordinary legislative processes.[94]

Although *Adler* predated the adoption of Article IX by over 30 years, the Court of Appeals has continuously and expansively interpreted the

90 *Adler,* 251 N.Y. at 491-92, 167 N.E. at 714 (Lehman, J., dissenting).

91 *Adler,* 251 N.Y. at 470, 167 N.E. at 706-08 (Pound, J. concurring).

92 *Id.* at 473-78, 167 N.E. at 706-09.

93 *Id.* at 491, 167 N.E. at 714 (Cardozo, Ch. J., concurring). *See Patrolmen's Benevolent Assn. of City of New York,* 97 N.Y.2d at 386, 740 N.Y.S.2d at 663, 767 N.E.2d at 120 ("A recognized exception to the home rule message requirement exists when a special law serves a substantial State concern.").

94 Eliot J. Kirshnitz, *Recent Developments: City of New York v. State of New York: The New York State Court of Appeals, in Declaring the Repeal of the Commuter Tax Unconstitutional, Strikes Another Blow Against Constitutional Home Rule*, 74 ST. JOHN'S L. REV. 935, 947 (2000) [hereinafter *Strikes Another Blow*]. *See also Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 970 N.Y.S.2d 724, 726, 992 N.E.2d 1067, 1069 (2013) (holding that "where the Legislature has enacted a law of state-wide impact on a matter of substantial State concern but has not treated all areas of the State alike, the Home Rule section of the State Constitution does not require an examination of the reasonableness of the distinctions the Legislature has made"). *See also Matter of Town of Islip v. Cuomo*, 64 N.Y.2d 50, 52, 484 N.Y.S.2d 528, 529, 473 N.E.2d 756, 757 (1984) (Article's IX limitations on special laws "applies only to a special law which is directly concerned with the property, affairs or government of a local government and unrelated to a matter of proper concern to State government"). *See, e.g.*, *Osborn v. Cohen*, 272 N.Y. 55, 59-60, 4 N.E.2d 289, 290 (1936) (striking down a statute that provided for submission of issue of firemen's hours to referendum in cities of one million or more inhabitants; no "foundation in the record" that the establishment and control of fire departments are matters of state concern).

"state concern" doctrine.[95] Time and again, the Court has upheld legislation relating to local property, affairs, or governments, yet which also related to a State concern, despite the failure of those laws to conform to Home Rule requirements.

For example, the Court has found the following local matters to also be matters of state concern sufficient to sustain the Legislature's power to address them by special law, without either a Home Rule or Gubernatorial message or legislative supermajority:

- Waste disposal in Nassau and Suffolk Counties;[96]
- Municipal sewers in Buffalo;[97]
- Protection of the Adirondack Park's resources;[98]
- Salaries of District Attorneys in certain counties;[99]

95 *See Wambat Realty Corp.*, 41 N.Y.2d at 494, 393 N.Y.S.2d at 952, 362 N.E.2d at 584 (terming Adler a "decisively enlightening case"); Cole, *Ghost of Home Rule*, *supra* note 11, at 718 ("In virtually every subsequent judicial decision dealing with these matters, *Adler* has been cited for the proposition that as to matters of state concern, the legislature may act through the ordinary legislative process, unrestricted by the home rule provisions of the constitution."); GALIE, ORDERED LIBERTY, *supra* note 24, at 291 ("In general, the Court of Appeals has followed decisions made prior to the adoption of the article, giving 'matters of state concern' an expansive reading.") (citation omitted).

96 *See Matter of Town of Islip*, 64 N.Y.2d at 56-58, 484 N.Y.S.2d at 531-33, 473 N.E.2d at 759-61 (upholding special law regulating waste disposal in Nassau and Suffolk counties; state interest in pollution protection).

97 *See Robertson v. Zimmerman,* 268 N.Y. 52, 61, 196 N.E. 740, 743 (1935) (upholding special law establishing a sewage authority for the City of Buffalo through an act which imposed restrictions and obligations on one particular municipality; state concern for the life and health of communities taking water supply from Lake Erie, the Niagara River and Lake Ontario).

98 *See Wambat Realty Corp.,* 41 N.Y.2d at 494-95, 393 N.Y.S.2d at 952-53, 362 N.E.2d at 584-85 (upholding special law, the Adirondack Park Agency Act, in which State set up a zoning and planning program for all public and private lands within the park despite the zoning and planning powers of local government; statute addressed subject of state concern).

99 *See Matter of Kelley v. McGee,* 57 N.Y.2d 522, 536-39, 457 N.Y.S.2d 434, 439-41, 443 N.E.2d 908, 913-15 (1992) (holding that section in Judiciary Law which required district attorneys in counties with a certain population to be paid the same salary as county court judges did not conflict with Home Rule provisions of State Constitution; statutory classification was reasonable and related to an area of state concern).

- Local taxation;[100]
- Housing projects exempt from zoning laws;[101]
- Rent controls;[102]
- Serial bonds issued to cover pension and retirement liabilities;[103]
- Dispute-resolution mechanisms for local public employees;[104]
- Cultural institutions;[105]
- Bidding requirements on public contracts;[106]

100 *See New York Steam Corp. v. City of New York,* 268 N.Y. 137, 143, 197 N.E. 172, 173 (1935) (upholding statute authorizing cities with a population over one million to pass local tax laws for unemployment relief; state concern given law was designed to combat high unemployment during an unstable time period).

101 *See Floyd v. New York State Urban Dev. Corp.,* 33 N.Y.2d 1, 7, 347 N.Y.S.2d 161, 164, 300 N.E.2d 704, 706 (1973) (upholding statute under which New York State Urban Development Corporation ("UDC") could acquire land in urban core areas by purchase or condemnation and undertake the development of projects, exempt from local restrictions; State interest in allowing UDC to solve housing problems).

102 *See City of New York v. State of New York,* 31 N.Y.2d 804, 805, 339 N.Y.S.2d 459, 459, 291 N.E.2d 583, 583 (1972) (affirming lower court ruling decision which held that rent control was a matter of State concern and not within New York City's "property, affairs and government" powers).

103 *See Bugeja v. City of New York,* 24 A.D.2d 151, 152, 266 N.Y.S.2d 80, 81, *aff'd,* 17 N.Y.2d 606, 268 N.Y.S.2d 564, 215 N.E.2d 684 (finding no Home Rule impediment to State Legislature's authorization for the issuance of serial bonds to cover New York City's pension and retirement liabilities; continuance of sound civil service system matter of State concern).

104 *See Patrolmen's Benevolent Assn. of City of New York v. City of New York,* 97 N.Y.2d at 381-389, 740 N.Y.S.2d at 660-65, 767 N.E.2d at 117-22 (2001) (upholding special law implementing dispute resolution mechanisms for disputes between New York City policemen and New York City; law addressed "substantial State concern").

105 *See Hotel Dorset Co. v. Trust for Cultural Resources,* 46 N.Y.2d 358, 368-69, 413 N.Y.S.2d 357, 361-62, 383 N.E.2d 1284, 1288 (1978) (upholding statute that had specifications resulting in it being applied to only one museum, the Museum of Modern Art).

106 *See Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 318-19, 970 N.Y.S.2d 724, 726, 729-31, 992 N.E.2d 1067, 1069, 1072-73 (2013) (upholding amended Wicks law for public contracting that included differing threshold requirements; statute bears "a reasonable relationship to a substantial statewide concern which concern falls within the State Legislature's purview and must be accorded great deference by this court").

- Exempting firefighters from local residency requirements;[107]
- Taxes on New York City commuters' incomes;[108] and,
- Regulation of taxicabs in New York City.[109]

The State concern doctrine has narrowed the Home Rule clause's guarantee of a modicum of local legislative autonomy.[110] Today, the line between matters of State concern and matters of local concern is increasingly indistinct.[111] Few constraints exist on the Legislature's ability to interfere in local affairs by special law.[112] The Court of Appeals said as much in 2013 when it observed:

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107 *See Uniformed Firefighters Assn. v. City of New York,* 50 N.Y.2d 85, 90, 428 N.Y.S.2d 197, 198-99, 405 N.E.2d 679, 680 (1980) (upholding State law that eliminated a local requirement that New York City firefighters live in New York City; residency of employees a matter of State concern).

108 *See City of New York v. State of New York,* 94 N.Y.2d 577, 591–92, 709 N.Y.S.2d 122, 128–29, 730 N.E.2d 920, 926–27 (2000) (upholding special law that repealed New York City's commuter tax; State had a substantial interest in easing burden on non-City residents who work in New York City).

109 *See Greater N.Y. Taxi Assn.,* 21 N.Y.3d at 302-308, 970 N.Y.S.2d at 914-19, 993 N.E.2d at 400-405 (upholding special law that allowed livery cabs to accept passengers in the outer boroughs of New York City and outside Manhattan's central business district who hail the livery cabs from the street, and also expanded the number of traditional yellow cabs accessible to passengers with disabilities, notwithstanding that it had always been assumed previously that laws regulating New York City taxicabs required a Home Rule message; statute "addresses a matter of substantial state concern" and was "not a purely local issue").

110 *See Empire State Ch. of Associated Bldrs. & Contrs., Inc*., 21 N.Y.3d at 319, 970 N.Y.S.2d at 730, 992 N.E.2d at 1073 ("Home Rule provisions of the Constitution were never intended to apply to legislation" affecting matters of state concern and instead aimed at preventing "unjustifiable state interference in matters of purely local concern"). *See also* Gerald Benjamin & Charles Brecher, *Introduction*, in THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM 11 (Gerald Benjamin & Charles Brecher eds., 1988) ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

111 *See* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 ("The line between matters of state concern and matters of local concern remains indistinct[.]"); Cole, *Local Authority to Supersede State Statutes, supra* note 21, at 34 ("The areas carved out by Article IX of the State Constitution for control by local governments, free from State interference, except by general law — "property, affairs or government" — has been significantly narrowed and lacks identity.").

112 *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 171 ("as long as the state is able to make a colorable case that it is acting within respect to a matter of state concern, the Home Rule clause provides little restriction on the legislature's ability to act by special law").

> there must be an area of overlap, indeed a very sizable one, in which the state legislature acting by special law and local governments have concurrent powers. . . . A great deal of legislation relates *both* to the property, affairs or government of a local government and to [m]atters other than the property, affairs or government of a local government — i.e., to matters of substantial state concern.[113]

As things now stand, the State Legislature decides whether a home rule message is necessary with respect to a given piece of special legislation. And, this legislative judgment has been treated as "effectively unreviewable."[114]

Proponents of home rule despair over the relative ease with which the State Legislature can overcome constitutional limitations on special legislation.[115] They argue that Article IX's protections of the rights of localities have been "undermined . . . by the many exceptions for 'matters of state concern' with respect to which the Legislature is held free to act without the consent of the local body."[116] "The Legislature is not better suited, and indeed, may be less well-suited," goes the argument, "than the local government to deal with essentially local matters such as providing government services, administering the police department and developing new strategies for providing for the homeless."[117]

On the other hand, advocates for the status quo can point to decades of precedent and a system that, on the whole, has arguably served the State

113 *Empire State Ch. of Associated Bldrs. & Contrs., Inc*., 21 N.Y.3d at 316-17, 970 N.Y.S.2d at 728, 992 N.E.2d at 1070 (internal quotation marks & citations omitted; emphasis in original).

114 Report of the Task Force on the New York Constitutional Convention, 52 RECORD OF THE ASSN. OF THE BAR OF THE CITY OF NEW YORK 522, 619 (1997) [hereinafter "CITY BAR 1997 TASK FORCE REPORT"].

115 *See, e.g.,* Cole, *Ghost of Home Rule, supra* note 11, at 749 ("With the extension of the state concern doctrine into areas that logically should be subject to local determination, there is reason only for gloom."); Roberta A. Kaplan, *New York City Taxis and the New York State Legislature: What is Left of the State Constitution's Home Rule Clause After the Court of Appeals Decision in the Hail Act Case,* 77 ALB. L. REV. 113, 118 (2014) (the "highly deferential" approach the Court of Appeals has taken to claims of state concern "cast[s] a long dark shadow on the future of local government autonomy in New York State"), *id.* (the Court's jurisprudence "raises red flags about how much (if any) of the constitution's home rule clause remains in force going forward, making it difficult (if not impossible) for local governments in New York to delineate the appropriate boundaries of autonomous self-rule").

116 CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 618 (citations omitted).

117 *Id.* at 619.

well. Home rule is but one of a number of values encompassed by the Constitution, and "the State's commitment to minimal statewide standards of welfare, safety, health, and the like has taken precedence over the goal of local autonomy."[118] No less eminent an authority than Benjamin Cardozo was a staunch guardian of State sovereignty, recognizing, at least in close cases, the need for a dominant State, which represents all, over the power of local governments, which represent only a portion of the State.[119]

C. Unfunded Mandates

Another restriction on Home Rule is State mandates that require local governments to perform certain actions. These can be particularly controversial when unfunded.[120] State mandates cover a wide range of fields, including health care, education and social services. New York imposes more unfunded mandates than any state.[121]

Numerous other states[122] have attempted to resolve the tension between state mandates and Home Rule by adopting constitutional provi-

118 GALIE, ORDERED LIBERTY, *supra* note 24, at 292-93.

119 ANDREW L. KAUFMAN, CARDOZO 378-79 (1998).

120 *See generally*, Robert M. Shaffer, Unfunded State Mandates and Local Governments, 64 U. CINN. L. REV. 1057 (1996).

121 GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 278.

122 *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 179-80 ("Prior to and since [the 1967 Constitutional Convention] fourteen states have adopted constitutional provisions limiting or barring some or all unfunded mandates."); CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 620 ("There also is support for a constitutional amendment to restrict unfunded mandates by the legislature on New York's local governments. We view the debate over unfunded mandates as an extension of the home rule question. Again, New York lags behind other states that have considered and resolved this issue."); Deborah F. Buckman, *Construction and Application of State Prohibitions of Unfunded Mandates*, 76 A.L.R.6th 543 (2012) (collecting state court cases that construe and apply state prohibitions of unfunded mandates).

sions prohibiting or limiting unfunded mandates.[123] Notably, too, in 2011 a "Mandate Relief Redesign Team" established by Governor Cuomo recommended the adoption of a constitutional ban in New York on unfunded mandates on local governments.[124]

123 *See, e.g.*, CAL. CONST. art. 13B, § 6(a) ("Subject to certain exceptions, [w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service."); FLA. CONST. art. VII, § 18(a) ("No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure."); HAW. CONST. art. VIII, § 5 ("If any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost."); LA. CONST. art. VI, § 14(a)(1) ("No law or state executive order, rule, or regulation requiring increased expenditures for any purpose shall become effective within a political subdivision until approved by ordinance enacted, or resolution adopted, by the governing authority of the affected political subdivision or until, and only as long as, the legislature appropriates funds for the purpose to the affected political subdivision and only to the extent and amount that such funds are provided, or until a law provides for a local source of revenue within the political subdivision for the purpose and the affected political subdivision is authorized by ordinance or resolution to levy and collect such revenue and only to the extent and amount of such revenue."); MICH. CONST. art. IX, § 29 ("A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs."); MO. CONST. art. X, § 21 ("A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs."); N.H. CONST. pt. I, art. 28-a ("The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision."); N.J. CONST. art. VIII, § 2, ¶ 5 ("[A]ny provision of . . . law, or of . . . rule or regulation issued pursuant to a law, which is determined . . . to be an unfunded mandate upon boards of education, counties, or municipalities because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire."); N.M. CONST. art. X, § 8 ("A state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed."); TENN. CONST. art. II, § 24 ("No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.").

124 *See* NEW YORK STATE MANDATE RELIEF REDESIGN TEAM, MANDATE RELIEF, FINAL REPORT 14 (DEC. 2011), *available at* http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/FInal_Mandate_Relief_Report.pdf (last visited on Mar. 4, 2016).

CONCLUSION

New York's constitutional and statutory provisions regarding home rule are extensive, evincing a clear intent to protect local autonomy.[125] However, the balance between State and local powers has tipped "away from the preservation of local authority toward a presumption of state concern."[126] Some commentators have even observed that Constitutional Home Rule is a "ghost,"[127] "merely a pleasant myth"[128] and "a near total failure."[129]

Not since the 1967 Constitutional Convention has the body politic engaged in a serious discussion about Constitutional Home Rule.[130] Intense debates were then waged on this subject, resulting in proposals by the Convention that held the promise for greater local government initiative.[131] But those proposals, along with all others made by the 1967 Convention, failed at the polls.[132]

Today, nearly fifty years later, numerous proposals have been made for constitutional reform in this area. To be sure, "[t]here is no ready solution to the problem of state interference in local government actions."[133]

125 *See* WARD, THE NEW YORK STATE CONSTITUTION, *supra* note 6, at 545 (New York's constitutional and statutory provisions are more extensive than those in many states.).

126 Cole, *Ghost of Home Rule, supra* note 11, at 715 (1985); *see also* Benjamin & Brecher, *Introduction, supra* note 110, at 11 ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

127 Cole, *Ghost of Home Rule, supra* note 11, at 715 (1985).

128 W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 326 (1954).

129 Kirshnitz, *Strikes Another Blow, supra* note 94, at 943.

130 GERALD BENJAMIN & CHARLES BRECHER, *The Political Relationship* 118 in THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM (Gerald Benjamin & Charles Brecher eds., 1988).

131 *See* HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 273 (1997) ("Coupled with repeal of the existing constitutional provision allowing the state to enact legislation related to the 'property, affairs, or government' of local municipalities — a phrase which over the years had been narrowly construed by the courts to limit local flexibility — and its replacement by new language referring to 'matters of local concern and the local aspects of matters of state concern,' the proposed article offered considerable hope for greater local government initiative.").

132 *Id.* at 339-41.

133 Briffault, *Local Government and the New York State Constitution*, *supra* note 2, at 99.

Home Rule "doctrine has reflected in its structure the inherently difficult nature" of drawing lines between what is properly the domain of local government and the State Legislature's ability to legislate.[134] That said, many believe "that the home rule provisions of Article IX are clearly in need of revision, and given the current state of home rule there is little risk of adverse change."[135]

In sum, Constitutional Home Rule is a subject ripe for consideration and debate by all concerned. There is a need to weigh the benefits and costs of amendments to Article IX that would restore local autonomy through greater certainty and clarity. At a minimum, if and when the State establishes a preparatory constitutional commission, Constitutional Home Rule should be a subject to which it devotes significant time and attention.

134 Baker & Rodriguez, *Constitutional Home Rule and Judicial Scrutiny, supra* note 57, at 1342.

135 CITY BAR, 1997 TASK FORCE REPORT, *supra* note 114, at 620; *see also* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 ("Although the recent constitutional and statutory amendments undoubtedly represent great strides forward . . . much work remains to be done.").

CHAPTER FOURTEEN

STRENGTHENING ENFORCEMENT OF NEW YORK STATE'S CONSTITUTIONAL RIGHTS: IS A CONSTITUTIONAL CONVENTION THE RIGHT FORUM?

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New York's Constitution, at its core, is designed to safeguard the fundamental rights of our state's inhabitants. Are these rights illusory? Is there a meaningful process to allow individuals to enforce them? If not, would a state constitutional convention be suitable for developing such a process? This chapter examines these questions.

I. BACKGROUND

The New York State Constitution, adopted 12 years before the U.S. Constitution, confers a broad range of substantive protections and rights. It is more expansive than the U.S. Constitution, often guaranteeing individual rights of greater scope, including provisions pertaining to freedom of worship, education, conservation, taxation, social welfare, granting the right to indictment by a grand jury in felony cases, labor rights, and the right of assembly. Indeed, the substantive rights of the New York State Constitution, which have equivalent provisions in the federal Constitution, have been interpreted independently and, in many instances, more expansively by New York courts. One need only compare the guarantees relating to due process, freedom of speech, right to counsel, freedom of worship and even environmental protection, all of which have, in some measure, greater breadth than their federal counterpart. To be fair, our state Constitution also contains certain omissions. It is one of only four state constitutions that does not include a prohibition on ex post facto laws.

Real estate agents suggest "location" impacts value. So it is with a constitution. New York State's Bill of Rights appears at the beginning of our state Constitution, not at its end as exists in the federal Constitution. Its placement is not an insignificant factor. As one scholar observes, "The Bill of Rights in the national Constitution is an added assurance of limits on national government achieved in the Constitution by other means. In contrast, the powers of state government are plenary, except as specifically limited. It is therefore necessary to set out individual protections in state constitutions at the outset."[1]

Our state Constitution should be an important source of protection for individual liberties, but its potential has not been fully realized. Some have suggested that the reluctance to use state constitutions generally as a tool to protect individual liberties is rooted in the historic concern that state courts have not always been vigorous in the defense of individual liberties. While that may have been true in regions of our country, New York courts have, by contrast, sought to be sensitive to those historically disenfranchised.

As we approach a pivotal moment in our state's history, a mandatory constitutional referendum, it may be timely to ask if we should consider reinforcing those legal procedures that provide access to our state's constitutional protections.

The reluctance to use the New York State Constitution as a litigator's tool does not lie with the text of the document but rather the absence of a workable enforcement mechanism. Unlike the federal government and an increasing number of states, there is not an easily accessed constitutional tort in New York State available to those who would seek compensation for a violation of their state rights. Why would such an important document as our state Constitution be deprived of teeth? A much abbreviated version of the story begins more than 100 years ago.

A. The Federal Picture

The Federal Civil Rights Act of 1964, and in particular 42 U.S.C. § 1983, provides a statutory mechanism to redress federal constitutional violations committed by individuals acting under the color of state law (commonly referred to as a "section 1983 "case). Section 1983 had its origins in Section 1 of the Civil Rights Act of 1871, a congressional response to the failure of the states to prevent widespread violence committed by the Klu Klux Klan. It was not intended to cover the actions of federal officials and agencies acting under federal law. In 1971, the U.S. Supreme Court acknowledged the illogic of insulating federal officials from private rights of action for federal constitutional violations. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[2] the Court recognized an implied (non-statutory) constitutionally based caused of action that would allow torts predicated on the federal Constitution to be asserted against federal officers acting in their individual capacity. Since the federal government enjoyed sovereign immunity, liability was limited to individuals acting on behalf of the federal government. Subsequent federal cases expanded the *Bivens* rationale to other provisions of the Bill of Rights. In ensuing years, the *Bivens* cause of action was applied more broadly, to Cruel and Unusual Punishment in Contravention of the Eighth Amendment by the Supreme Court, to violations arising from the Fourth, Fifth and Eighth Amendments, and by lower federal courts, to violations arising from the First and Sixth Amendments.

Bivens is not without limitation. The Supreme Court and lower federal courts have held that a *Bivens* action may be foreclosed in certain circumstances. For example, *Bivens* would not provide a cause of action if an alternative statutory remedy exists including suppression of evidence in a

criminal case occurs, there is an express statement of legislative intent barring damages in a particular circumstance or in several other special circumstances including personal injury resulting from military operations. In addition, a *Bivens* action would not lie in the presence of immunity (enjoyed, for example, by prosecutors, judges and legislators acting within their scope) and qualified immunity (applying to federal officials who perform discretionary functions).

Despite its limitations, *Bivens* has been found to provide a meaningful deterrent to constitutional infractions and a conceptual underpinning for those state courts, including in New York, who wished to allow damages for a breach of state constitutional provisions despite the absence of an enabling statute or the existence of common law. *Bivens,* without more, served to usher in the modern era of the constitutional tort. (The term "constitutional tort" connotes actions for money damages for violation of a constitutional right and was first used, according to the N.Y.S. Court of Appeals, by Prof. Marshall Shapo in an article published 45 years ago in the Northwestern Law Review.)[3]

B. The New York Experience

States enjoy sovereign immunity derived from the U.S. Constitution under the Eleventh Amendment unless waived by the state or Congress, the latter only with regard to matters of federal concern. In 1939, New York State chose to provide for a limited waiver of its immunity with the adoption of the state's Court of Claims Act. The Act restricted the scope of the waiver to include only claims against the state for the appropriation of real or personal property, breach of contract, or for torts of state officers or employees while acting within their scope of service.[4] Over the next 50 years, the Court of Claims sought to adapt its jurisdiction to changing times and circumstances. However, on one issue, Court of Claims judges were unyielding—any suggestion that a free-standing tort existed for an alleged infringement of the New York Constitution was dismissed out of hand as not within the scope of the state's waiver of immunity provided by the Court of Claims Act.

The N.Y. Court of Appeals considered the issue in 1996, and, in *Brown v. State*, became the 20th state to recognize a direct cause of damages based upon a violation of its state Constitution. Prior to *Brown*, 19 states and Puerto Rico recognized an implied cause of action for state constitutional violations, and seven states expressly rejected a constitutional cause of action.

The claims in *Brown* rose from an investigation of an incident in 1992 in which a 70-year-old white women was attacked at knifepoint in a house located close to the State University campus in Oneonta, New York. The woman described her attacker as a black male and the police determined that he may have had a cut on his hand. When initial law enforcement activity failed to identify a suspect, the state police, local police and campus security obtained a list of all black male students and sought to question every black male attending the State University. African-American students were systematically stopped, interrogated and examined for injuries on their hands and forearms. When these efforts did not lead to an arrest, a multi-day street sweep was conducted in which every non-white male in the vicinity of the city of Oneonta was stopped and interrogated, frequently multiple times by officers of the three different police agencies.

The claimants initiated a class action seeking monetary damages from the state police, State University police, the State of New York and various officers and employees of those entities. They alleged, for purposes of the state claims, that the conduct violated the state's Equal Protection Clause and prohibition against unreasonable searches and seizures contained in article I, § 12 of the state Constitution, as well as federal equivalents. The state moved to dismiss on the grounds that the state Court of Claims lacked subject matter jurisdictions over alleged constitutional torts and that the plaintiffs had failed to state a cause of action. The Court of Claims agreed and dismissed, holding that constitutional torts, if they exist at all, are not actionable in the Court of Claims and a direct action for a violation of the state Bill of Rights is not cognizable in any court absent a link to a common law. The state's intermediate appellate court affirmed.

The New York court, reversing the state's intermediate appellate court, concluded that state constitutional rights that can be violated by state officials without remedial consequences are not meaningful rights, constitutional torts exist in New York State despite the absence of enabling legislation, and the Court of Claims Act should be interpreted to waive the state's sovereign immunity for state constitutional violations based upon acts of state employees that contravene state constitutional rights. Relying in large measure on the Supreme Court's analysis in *Bivens*, the Court of Appeals suggested that the decision was rooted in fundamental fairness, and the claimants in *Brown* did not have available any prospective relief; "it [was] damages or nothing."[5]

Judge Richard Simons, writing for the majority and for whom *Brown* constituted his last opinion on the Court of Appeals bench, suggested,

> [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.[6]

C. The Promise of *Brown*

The popular media characterized *Brown* a civil rights breakthrough. "New Yorkers Allowed to Pursue Money Awards in Rights Cases," reported the *New York Times* on November 20, 1996.[7] One commentator suggested,

> 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.[8]

Within months of the Court's decision in *Brown*, lines were drawn. Anticipating a concern by elected officials that an uptick in state civil rights litigation would be costly, civil rights organizations pointed out that it would be unlikely there would be a tsunami of litigation against the state. The New York State Constitution, unlike many state constitutions, does not contain a "natural rights" clause entitling its citizens to life, liberty and the pursuit of happiness. Rather, New York includes provisions similar to the First, Fourth, Fifth and Sixth amendments to the federal Constitution. Claims, they maintained, would be limited in number, having to be rooted in specific protections rather an amorphous natural rights provision.

State agencies and localities predicted that the *Brown* decision would open the floodgates to litigation and drain the state treasury. Some critics,

suggested, "If the Framers wanted to fashion a constitutional provision . . . enforceable by way of an action for money damages, there was nothing to stop them," and noted that in 1938 the delegates to the Constitutional Convention were aware that they could provide for a civil rights cause of action and did not.[9] Others suggested attempts "to protect citizens from all conceivable injuries at the hands of state government" would result in the creation of a manacled state.[10]

Initially *Brown* was a core argument for those seeking compensation for state constitutional incursions. Well in excess of 100 cases premised claims for money damages on the presence of a constitutional tort. State agencies and localities asserted in response that *Brown* was an aberration, intended by the Court of Appeals to be narrowly construed and only sporadically used. For the next 20 years the scope of *Brown* was adjudicated, lower state and federal courts increasingly adopted the government's view, and struck causes of action predicated on the existence of a state constitutional tort.

The winnowing of *Brown* was based on a handful of perspectives. Lower courts focused on the Court of Appeals' suggestion in *Brown* that the plaintiffs, "effectively had no remedy available to them."[11] The clause was interpreted to evidence the Court of Appeals view that constitutional claims should only be available as a last resort and if any other cause of action might exist which could provide redress, a constitutional tort would not be warranted.

There was no basis for this reasoning, plaintiffs and claimants responded. The Court of Appeals in *Brown* specifically noted the primacy of a constitutional cause of action by dismissing a concurrent Civil Rights Law cause of action as "duplicative" and marginalizing the existence of a section 1983 claim.[12] The Court was unambiguous when it stated "constitutional guarantees are worthy of protection in their own right without being linked to some common law or statutory tort."[13] Commentators noted that equivalent state and federal provisions of their respective Bill of Rights are often textually dissimilar and subject to different interpretations. The lower courts were unmoved, and in the ensuing years, deemed the existence of an analogous statutory, federal, or common law claim sufficient, without more, to merit dismissal of a companion cause of action based on a state constitutional tort. Claims for wrongful imprisonment, personal injury, or medical malpractice have become the basis for dismissal of a companion state constitutional cause of action.

In other instances, judges concluded that *Brown* was intended by the Court of Appeals to be applicable only to the Equal Protection Clause and prohibition on unreasonable searches and seizures (the constitutional provisions at issue in *Brown*) and not any other constitutional provision. Yet, other judges questioned whether *Brown* should properly apply to municipalities or public authorities or public benefit corporations.

Finally, uncertainty whether a state constitutional provision is self-executing appears to have slowed the application of *Brown*. Typically, negative constitutional rights (those that bar the state from taking action) have been thought to be self-executing and positive constitutional rights (requiring the state to provide a service or funding) are not self-executing and require the state legislature to determine funding levels or take other measures to implement the constitutional provision. In *Brown,* the Court found that "Article 1, Section 12 of the State Constitution and that part of section 11 relating to equal protection are self-executing."[14] But it added that, in New York, constitutional provisions are "presumptively self-executing."[15] The reference to a "presumption" suggests that lower courts may conduct de novo reviews to determine if constitutional safeguards are actionable in the absence of legislative action. It is unclear whether that was the intent of the Court of Appeals, and this remains one of the unresolved issues.

Following *Brown*, in *Martinez v. City of Schenectady,*[16] the Court of Appeals held that no constitutional tort claim was available to a plaintiff who had been convicted of using evidence obtained by use of a faulty warrant, when the plaintiff's conviction had been reversed after the Court of Appeals held the warrant to be invalid. That court noted that the *Brown* decision allowing a cause of action for a constitutional tort served two purposes: one public, one private. The public interest is to provide a deterrent against future violations of these rights. The private interest is to provide a deterrent against future violations of these rights. The private interest is also to provide some form of remedy to individuals whose rights are violated. The Court of Appeals deemed the reversal of Martinez's conviction to be sufficient disincentive to perform illegal searches to satisfy the public interest.

Dismissals of causes of action based upon constitutional torts were not, with the exception of the *Martinez* case, appealed at the N.Y. Court of Appeals. It appears that as long as one cause of action remained, whether federal, statutory, or common law, appeal of the dismissed constitutional tort was considered an unnecessary diversion. The consequence is that the

N.Y. Court of Appeals has been largely silent on the legal devolution of *Brown.*

II. GOING FORWARD

Twenty years after Judge Simons declared his desire that *Brown* "affirms and reinforces our fundamental rights," it may be that his views are becoming an artifact of an earlier period of judicial activism.[17] Court-crafted limitations developed over the past 20 years are numerous and daunting. With the exception of *Brown,* no recorded case reflects compensation based upon a violation of a state constitutional right in the absence of a companion common law, federal or statutory cause of action.

The basis for the Court of Claims general antipathy about constitutional torts is unknown, but several explanations are possible. After the Court of Appeals decision in *Brown*, Court of Claims judges expressed misgivings. As guardians of the limited waiver of sovereign immunity, perhaps they believed constitutional torts were unnecessary, potentially expensive and grandstanding in run-of-the-mill cases. Perhaps the cautious culture of the judiciary was not prepared for such a dramatic shift. In some measure, the judicial misgivings toward the new constitutional tort were predicted by New York State's Deputy Solicitor General who co-authored the state's brief in *Brown* and who stated after the decision was issued that "[t]he impact of this ruling may be more limited than either Judge Bellacosa [who authored the dissent in *Brown*] or the civil libertarians believe."[18]

In the final analysis, it may be reasonable to ask whether a state constitutional tort is necessary. Compensation continues to be paid based for official misconduct; redress exists for wrongful imprisonment and personal injury arising from police-civilian encounters. Section 1983 has become a touchstone for those wronged, and its provisions deemed to supersede any need for a state constitutional cause of action.

Is that adequate? Our state Constitution was designed to ensure a free government that protects fundamental rights across the breadth of the human condition. Should the aggrieved only be able to seek redress through the federal Constitution or common law? Would it be ironic that principles deemed so crucial that they need be embedded in New York's Constitution are not enforceable?

The need for a mechanism to enforce of the state Constitution merits discussion. Courts and commentators have raised a number of reasonable

questions concerning the application of *Brown*. What is the breadth of the waiver of sovereign immunity? Is the existence of companion statutory or common claims preclusive? Is there a meaningful way to distinguish between equal protection and search and seizure and other state constitutional rights? Are some provisions self-executing and others not? What is an appropriate statute of limitations? Does the existence of immunity for quasi-judicial and discretionary acts limit *Brown*?

With *Brown*, the N.Y. Court of Appeals brought New York into the family of states which allows causes of action for damages for violation of state constitutional rights, but the lack of clarity has hindered its application. Clarity can be the product of future court decisions, legislative action, or, if deemed appropriate, by public referendum following a constitutional convention. Over the past 20 years, lower courts, endeavoring to resolve these issues, materially narrowed the scope of *Brown*. Given that the essential question is political, the balance between governmental authority and accountability, it may be that the appropriate venue for consideration can be through a legislative action through enactment of a comprehensive Civil Rights Law that mirrors protections in the state Constitution or through consideration at a state constitutional convention. If the latter, there is ample precedent. As noted by Judge Simons in *Brown*,

> [p]rior to the Constitutional Convention of 1938, Judge Cardozo had written an opinion for the court of Appeals holding that evidence obtained in violation of the search and seizure clause of the Civil Rights Act could be used against the defendant in a criminal trial. The defendant's remedy for the wrong, he said, was a civil suit for damages. Based upon Cardozo's statement, the delegates of the Constitutional Convention assumed that damages were available to the victim of an unconstitutional act action and they used that argument to help persuade the Convention that exclusion was unnecessary. These debates revealed that the concept of damages for constitutional violations was neither foreign to the delegates nor rejected by them.[19]

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CHAPTER FIFTEEN

THE POLITICAL CONUNDRUM UNDERLYING THE REFERENDUM FOR A CONSTITUTIONAL CONVENTION IN NEW YORK

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I. INTRODUCTION

Underlying all the very important substantive articles in this book regarding a Constitutional Convention in New York State, lies a political conundrum. Why do New Yorkers so very rarely exercise their right to call a Constitutional Convention through referendum? Professor Gerald Benjamin has correctly described this reluctance by and within the electorate as akin to a "phobia."[1] Let us parse the political predicates underlying this reluctance amongst voters.

The first factor is hardwired into the electorate's DNA. When you mention the Constitution to any New Yorker, in fact any American, they immediately think of the U.S. Constitution, not a state Constitution. That federal Constitution (and its Bill of Rights) is essentially a process document. The root genius displayed by our founders in Philadelphia back in 1789 was that the Constitution reflected no one political philosophy, but instead forged a governing system that would bind all to an agreed governing process. It was drafted as an architecture plan of how to govern; it did not engineer the substance of how to direct governing decisions.

The federal Constitution has survived as a living and breathing document, enabling the American people to reshape their government as their nation grew to fill a continent and beyond. That process which Richard Neustadt long ago reminded us was less one of separated powers than one of "separated institutions sharing powers."[2] Consequently, our nation's Constitution earned the loyalty, in fact the devotion, of almost all political factions and hence the nation as a whole. There has never been any serious effort, even in the wake of a Civil War, the Great Depression, and two World Wars, for a wholesale makeover of the federal Constitution.

Consequently, when you suggest to New Yorkers, who share in that national consensus, the prospect of a state Constitutional Convention, their Malcolm Gladwell "Blink" reaction is to say no, we do not need a state Constitutional Convention in Albany.

Meanwhile, the little-realized reality is that New York State's Constitution is not at root a process document, for it includes provisions and rights related to education, the environment, labor (including the guarantee of public sector pensions), human services, social welfare and housing, amongst other provisions. Many of those substantive guarantees of social justice were enacted in the last major revision of the state's Constitution in 1938. The brass tacks political reality attending this factor is that those who feel protected by those guarantees (e.g., education advocates who

won a major lawsuit in the Court of Appeals predicated upon the constitution provision of a sound basic education; public employees who want their pensions maintained; and environmentalists who want the Adirondack Park kept forever wild) are loathe to risk the loss of those rights now locked into the state's Constitution.

The "phobia" that Professor Benjamin described long ago is therefore embedded in an electorate reflexively unused to contemplating a Constitutional Convention and mistakenly presuming that the state Constitution mimes the federal Constitution as a process document, while important interests, whose voices resonate with key electoral constituencies, have been unwilling to run the risk of losing fundamental substantive rights by opening them up for debate in a Constitutional Convention.

These two baseline factors usually lead to no votes on the referendum (e.g., 1957, 1977, and 1997), not to mention that the product of the Constitutional Convention called for 1967 was defeated at the polls. These negative factors are buttressed by two supplemental factors. One is longstanding (the public's lack of familiarity with the process) and the other a more recent development (voters are increasingly alienated from what appears to them as chronic gridlock and rampant corruption in our state government).

The state's Constitution itself lays out a process for enabling the public to direct, as well as ratify, a Constitutional Convention. Every 20 years, in the seventh year of the decade, a statewide referendum is held, asking the voters if they want to hold a Constitutional Convention. If the statewide electorate votes to hold such a Convention, that next year (the eighth year in the decade) the voters elect delegates to the Convention. The process further calls for three delegates to be elected from each State Senate district (now 63 seats and consequently 189 delegates) plus 15 delegates elected at large (statewide) totaling 204 delegates in all. The voters then will ratify or reject, in whole or in part (depending upon how the Convention submits the question(s) to the voters), the work of that Convention.

This is a rare process of direct democracy on the front end and the back end, where the public has three bites at the apple. In effect, for a new Constitution to be enacted the statewide electorate must vote in the affirmative to call a convention, then elect delegates to meet in a convention and finally ratifying in a statewide referendum the work of that Convention. This three part process is direct democracy on the front and back ends, with representative democracy in the middle. The state Constitution there-

fore will not change unless there is affirmative action at each stage of this triad.

The construct of this process quite frankly confuses voters on its face, precisely because it is at once unique and rarely used, but also because it runs straight into very real historical and empirical headwinds. First, New York State is not an initiative and referendum state (unlike California), so other than bond issues (most often transportation or environmental) and single topic constitutional amendments (e.g., authorizing casino gambling), New Yorkers rarely vote on statewide referenda. Simply put, there is precious little muscle memory for New York State voters on referendum voting.

Second, New Yorkers, especially urban voters throughout the state (not just from NYC), have deep-seated suspicions about using State Senate districts as the fundamental basis for selecting delegates to a Constitutional Convention. Until the *Wells v. Rockefeller* reapportionment cases which ultimately went to the U.S. Supreme Court, each upstate county, no matter how small it was in population, was guaranteed a State Senate seat, which left not just New York City but also upstate cities like Buffalo, Rochester, Syracuse and Albany underrepresented in the State Senate.

The one person-one vote cases at the U.S. Supreme Court changed all that, but New Yorkers subliminally sense that the close partisan divide for control of the State Senate over the last few decades has left the State Senate prone to partisan gerrymandering. Consequently, using State Senate districts as the fundamental building block of New York's Constitutional Convention raises the suspicions of many New Yorkers, especially urban Democrats throughout the state who suspect that State Senate districts are designed to dilute their influence. In a state like New York, with a strong Democratic registration advantage (3.06 million based largely upon urban registration patterns), that becomes a significant hurdle to overcome.

Third, the last two decades of New York State politics have been marred by gridlock and more recently by a string of corruption verdicts that have now deposed six of the State Senate's top leaders, including four who held the title of Majority Leader and three who led the body, not to mention the Speaker of the Assembly, on top of some 30 other state legislators who were convicted on corruption charges. This wave of corruption convictions has led the public to take a jaundiced eye to anything they believe Albany's politicians can gain control over. Public distrust of the legislature sunk the last referendum on the Constitutional Convention in

1997 as well as the constitutional amendment to overturn the *Silver v. Pataki* case's interpretation of gubernatorial budget-making powers in 2005.

New York's voters today are therefore quite suspicious of that which they don't fully understand. When it comes to calling Constitutional Conventions, New York's electorate has the inherently skeptical mule-like, "show me I'm from Missouri," attitude. For the so-called Con Con referendum to pass in 2017, those deep suspicions must be addressed and overcome. The electorate's skepticism is perfectly rational and most understandable. If Reformers clamoring for the referendum to pass are perceived as criticizing voters for not leaping at the chance to hold a Constitutional Convention, they will lose the 2017 referendum.

Reformers would be wise to relearn the enduring lesson of V. O. Key Jr.'s insight into the responsible electorate. Key was probably America's greatest political scientist, and he argued against the post-World War II conventional wisdom which condescendingly castigated voters as irresponsible. Key's insight was to analogize the behavior of voters to parents with teenagers. According to Key, voters, like the parents of teenagers, have neither the time nor the energy to follow each action of their elected officials. Instead, voters get a sense of when things are amiss and pull their support of incumbents, just as parents pull the car keys when their teenagers' bad behavior risks damage to life and limb.[3]

I believe that Key was correct, voters are not irresponsible: instead, they are busy leading their lives in uncertain economic times. Today, New York State's voters are probably less apathetic than alienated. Reformers too often fail to discern the difference between alienation and apathy amongst voters. Not to mention, the lack of real campaign experience leaves most Reformers bereft of either how to craft a resonating message for voters or the experience to deliver that message on behalf of a Constitutional Convention.

When Conventions have succeeded, it usually requires the experienced hand of a supportive governor working through a commission performing preparatory work followed up by astute political chess moves (e.g., Smith on Budget Reform in 1925 and Lehman in 1938 enacting significant portions from a Constitutional Convention). The proponents of the referendum's passage should therefore be pleased that Governor Cuomo smiled on the prospect of a Constitutional Convention and began the process of recommending funding for a study Commission, in his January 12, 2016 State of the State Message. Nevertheless, it should be noted that Governor

Cuomo's smile toward the prospects is not yet an endorsement of the 2017 referendum calling for a Constitutional Convention.

When you boil down all those factors, the net political effect is that if voters do not either understand or like the feel of what they see looming behind a Constitutional Convention, they are not likely to endorse calling one with their vote. The low voting on such referenda is an indicia of this political reality and so too has been not voting yes on the last three statewide referenda calling for a Constitutional Convention. Remembering that there is usually a significant and oftentimes a huge fall off from voters, particularly urban voters, who turnout to vote for candidates, versus those who actually vote on a referendum.

Consequently, for a referendum calling for a Constitutional Convention to pass in November of 2017, all these hurdles must be overcome. Proponents of a Constitutional Convention would be smart to internalize and confront those very real nerve endings triggering the electorate's negative reflexes. Explaining the process is only the beginning of meeting this de facto burden of persuasion.

As an aside, I am an agnostic of the utility of calling a state Constitutional Convention. Like many voters, I am suspicious of a process containing so many question marks and I remember coming to watch the proceedings of the last Convention as a young boy in 1967 and its many mistakes. But I also see the upside of a root and branch reworking of a substantive Constitution that has been not fundamentally reshaped in almost 80 years, given the profound changes sweeping across New York State over the last eight decades. Hopefully, my being agnostic will leave me free of any axes to grind in objectively parsing the politics underlying the upcoming referendum in 2017.

II. POLITICAL FACTORS THAT COULD LEAD TO PASSAGE

Having poured cold water on any notion that next year's referendum has an easy path to passage, let me now explore the political factors which could lead to next year's referendum calling a Convention actually being passed by the voters of New York State.

A. Regionalism

The fault line in New York State for over two centuries has been regionalism. The tectonic plates shaping and moving New York State's

electoral behavior have been the regional rivalries and agendas, large and small, which at once cut across but also are in turn shaped by partisanship, gender, race, religion, socio-economic status, and ideology. For the referendum to pass, the proponents must master the full panoply of facets attending the politics of regionalism.

If the referendum to convene the Constitutional Convention is to pass in November of 2017, we will have to measure not only how regionalism will impact that vote, but accurately gauge where the voters will come from and who will vote on the referendum. The biggest potential dynamic going for those who want the referendum to pass is that both Upstate New York and NYC currently feel aggrieved toward Albany.

Upstate New York's chronic disappointment at the fact that for decades its economy has lagged, not to mention that its population has been declining, especially amongst younger adults, has turned the voters' mood sullen, in both rural upstate over issues like the SAFE Act and in its metropolitan areas emerging from concerns about the quality of education and the environment. Many Upstate New Yorkers feel that they are underrepresented in key leadership positions of state government (e.g., of the statewide elected officials only LG Kathy Hochul from Erie County hails from Upstate and of the five legislative leaders and conference leaders only Assembly Minority Leader Brian Kolb, of Canandaigua, lives north of Yonkers). Few Upstate New Yorkers can cite, much less remember, when an Upstate New Yorker was last elected governor (i.e., FDR).

When you look at polling data, especially questions that ask voters is NYS on the right track or wrong track, or the concerns about public corruption, Upstate voters are usually more pessimistic than Downstate voters, especially NYC voters (e.g., in the Siena College Research Institute poll referenced October 26, 2015, 46 percent of New York's registered voters felt the state was on the right track vs. 39 percent who felt the state was on the wrong track, but 45 percent of Upstate voters felt the state was on the wrong track while only 30 percent of New York City voters and 43 percent of Suburban voters felt that way: the right track numbers broken down by region were 52 percent in NYC, 43 percent in the Suburbs, and 42 percent upstate).[4]

Meanwhile, in NYC elected officials and many advocacy groups and pundits are asking for more "home rule" control over vital concerns relating to issues affecting taxation, transportation, education, economic development, and higher education. These are not new complaints. Keep

in mind, under our state's Constitution, every locality, including New York City, exists as a creature of the state.

This is not simply a point of view, for it is deeply embedded in Court of Appeals and U.S. Supreme Court decisions. A distinguished state constitutional scholar, Richard Briffault of Columbia Law School, said it best: "The state role of establishing local governments is fundamental . . . local governments are established by special state action or in accord with general law, and derive their legal authority, their regulatory powers and their public service responsibilities from the state constitution, state statutes, and state-granted charters."[5]

Gotham's mayors have long chafed at this constitutional reality. Last spring, I read Richard Norton Smith's biography of Nelson Rockefeller and chuckled when I came across this quote: "Like every New York mayor before and since, Robert Wagner bitterly resented the city's status as a ward of the state, unable to set its own property, sales, or cigarette taxes without obtaining Albany's permission."[6]

Second, former Congressman and NYC mayoral candidate Anthony Weiner has called for state constitutional changes. In a recent op-ed in *The New York Times*, Weiner bemoaned that a Senator in faraway Oswego should have a say on a housing incentive deal on 57th Street in Manhattan, calling for a "return" of more governing "authority" to New York City.[7]

The problem is that Weiner's postulate fails a retrospective test of law, history, and politics. As Briffault reminded us, under our Constitution, the state creates its cities, not vice-versa. Weiner also ignores the fiscal crisis of the 1970s, when but for the state's intercession, New York City would have gone bankrupt. Taxpayers from Oswego, Otsego, and Ossining kept New York City afloat after the city proved it could not run its subways, maintain CUNY, or balance its budget without state help. Nor does New York City's current financial strength make it immune from the need for state support, as Nassau County has proven time and again. Nevertheless, if Weiner's argument proves persuasive to NYC voters, they can vote for a Constitutional Convention in the hopes of redressing those grievances.

Which brings us to the political source underlying any recent New York City Mayor's governing dilemma vis-à-vis Albany: New York City today has 43 percent of the state's population and 39 percent of its registered voters, but in the 2014 election cast only 26 percent of the vote for gubernatorial candidates. It has been 32 years since the city cast over 30

percent of the state's gubernatorial vote, when it hit a mere 31 percent share in 1982.

Now let's flip it back to Upstate, which despite having its share of the statewide population drop down to 36 percent (and only 38 percent of registered voters), has not cast below 46 percent of the vote on a statewide gubernatorial election in over 30 years and has often cast a 47–49 percent share of the total statewide vote. Upstate's consistently higher rate of voting has meant that despite conventional wisdom, it is Upstate's voters who drive the engine of gubernatorial politics. Conventional wisdom leaves Upstaters' feeling ignored by Albany, despite the reality that in terms of transportation and economic development dollars, Upstate holds a significant balance of trade surplus in terms of tax revenue paid into the state vs. budgetary allocations out of Albany vis-à-vis Downstate.

So if in November 2017, NYC voters in the midst of a mayoral election decide to support the so called Con Con referendum (motivated by seeking broader home rule prerogatives), while Upstate votes for the referendum due to its feeling ignored by state government (read aggrieved), then nearly three quarters of the state's electorate will be voting more for than against the referendum.

As an aside, the four Suburban Counties (Suffolk, Nassau, Westchester and Rockland) are 21 percent of the state's population, 23 percent of its registered voters but consistently cast between 23–25 percent of the statewide vote regardless of whether it is a presidential, gubernatorial or off-year election. Suburban voters, though a quarter of the electorate, are usually well over a third of the state's swing voters. The Suburban vote is thus the state's pivotal balance wheel in regional terms. For the referendum to pass, proponents must paint a persuasive picture of the referendum for Suburban voters.

The question of turnout will be a critical factor, as the fall off in the number of voters who actually cast a vote for referenda is always high. So even if we surmise that given 2017 is a mayoral year in NYC, how many NYC voters will actually vote in the Con Con referendum as opposed to those who vote for a mayoral candidate? For example, can the Reformers clamoring for a yes vote on the Con Con referendum craft a message which resonates with the minority voters who now cast between 55–57 percent of NYC's total vote in a general election? To deem this an open question is an understatement. In the final analysis, Reformers will have to stop talking to themselves if they are to weave a winning cross-regional strategy for passing this referendum.

B. Polling Data

Let us look at the early polling data to better glimpse where this is heading as we move toward November of 2017. The Siena Research Institute poll released July 15, 2015 shows that currently public opinion is in the classic half-full, half-empty mode when it comes to support for the 2017 referendum creating the Constitutional Convention. When asked, "Do you support or oppose having a Constitutional Convention in which delegates propose changes to the state constitution for voters to approve or reject?," voters support it 69-15 percent, with 16 percent undecided.[8]

The support ranges across the board (Democrats 69 percent, Republicans 67 percent, Independents 71 percent, Liberals 65 percent, Conservatives 71 percent, moderates 72 percent, 68 percent in NYC, 71 percent in the Suburbs and 70 percent Upstate, 18–34 in age 75 percent, 73 percent amongst those 35–54 in age, 72 percent amongst Catholics, 66 percent amongst Whites, 76 percent from Blacks and 73 percent amongst Latinos). The groups where support lagged behind the average were amongst Jewish voters (55 percent supported), voters 55 and older (62 percent), and those earning $100,000 or more (66 percent): traditionally the highest voting blocs in referenda elections. Nevertheless, this represents a glass more than half full for those who want the referendum to pass.

On the glass half empty side, only 6 percent knew, according to this Siena poll, some (4 percent) or a great deal (2 percent) about the referendum, or the fact that it was defeated in 1977 and 1997. A full 75 percent of New York's registered voters knew "nothing at all" about the process for voters calling for a Constitutional Convention. If opponents of the referendum skillfully play off this informational deficit amongst the three quarters of the electorate regarding a Constitutional Convention, while the proponents grow too comfortable with the support level from early polls, the referendum will lose at the ballot booth.

So the dynamic from 1997 appears to be holding in the early polling heading into 2017. The polling data in 1997 showed strong support for the referendum, but little public knowledge of the process or its ramifications. In 1997, that left the supporters vulnerable to a late run of opposition advertising coming mostly from organized labor (but education and environmental advocates did not support the 1977 referendum either), and in the end, the 1997 referendum failed to pass. Heading toward 2017, proponents should be concerned about the air coming out of the call for a Con Con as the frost hits the pumpkin patch, just before Election Day in November of 2017.

C. Interest Groups

Where are the interest groups today? The short answer is we do not know, although we should suspect they remain in a negative "show me I'm from Missouri" mindset. Even though the 1997 debate and advertising focused upon triggering public mistrust towards the Legislature (e.g., legislators getting paid double if they were delegates to the convention as well as holding their current seats in the legislature), the legislature and most of its members actually opposed the call for a Constitutional Convention in 1997.

Meanwhile, since 1997, the legislature has bristled at what they consider an ill-considered Court of Appeals decision expanding gubernatorial budget-making powers based upon the power to draft the language accompanying the budget (i.e., the *Silver v. Pataki* case). In 2005, the legislature sought to overturn this case by a single constitutional amendment which was defeated by a landslide in the referendum.

Might the legislature see a Constitutional Convention called in 2017 (meeting in 2019 after delegates were selected in 2018) as its last best hope for overturning what they consider was an ill-considered shift toward gubernatorial budget-making prerogatives codified by the Court of Appeals? How will the interest groups who might feel they could get a better budgetary shake from the legislature than they do from the governor under *Silver v. Pataki* (e.g., labor, education and higher education as well as social service advocates) react? Might these interest groups put aside their instinctive mistrust of a Constitutional Convention to link arms in support of seeking to return the state budget process to where it was pre-*Silver v. Pataki*? Or will the institutional reluctance of those interest groups remain firm fearing changes (i.e., on public pensions, education and the environment) more than opportunities for advancement at a Convention? We simply do not know today the answer to any of these questions.

Correspondingly, if that shift occurs amongst the legislature and key interest groups, based upon a strong desire to overturn *Silver v. Pataki*, will Governor Andrew Cuomo derivatively react by opposing the 2017 referenda, not wanting to risk losing the gubernatorial language powers codified in *Silver v. Pataki*? Governors tend to be trusted more than the legislature in public referenda (e.g., in 2005 when the heir apparent Democrat Eliot Spitzer joined the incumbent Governor George Pataki in opposing the legislature's amendment to functionally overturn *Silver v. Pataki*). Remember, Governor Cuomo smiled upon, but did not defini-

tively endorse, the call for a Constitutional Convention in his 2016 State of the State Message. Once again, all of this remains an open political question heading into 2017.

Might other interest groups view the recent legislative gridlock around foundation aid funding formulas implementing the Court of Appeals decision in the CFE case in primary and secondary education, the Dream Act, the Tuition Tax Credit for private schools, the codification of *Roe v. Wade* protections in terms of reproductive health, as a predicate for eschewal of their past opposition to a Constitutional Convention, instead seeking state constitutional provisions locking in their version of social justice, which have been the victims of gridlock in the legislature? Once again, we simply do not yet know the conclusion reached by these advocates and interest groups.

In addition, might environmental advocates feel less worried about their ability to protect the forever wild provisions for the Adirondack Park and instead seek a state constitutional provision committing the state of New York to combat climate change feeling that such a provision would prove popular in the ratifying referendum in 2019 (e.g., in the 2014 exit polls, 68 percent of New York voters felt climate change was a serious problem).

Reformers should take note, instead of messaging the 2017 referendum around process, they would probably find that voters are more interested in issues like education, higher education, a woman's right to choose, criminal justice reform, the environment, amongst other economic based social justice issues than the process issues which have long been the staple of agendas crafted by Reformers. Do Reformers have either the interest or the capacity to build a substance-based coalition to build voter support for the 2017 referendum?

III. CHANGES IMPACTING POLITICS SINCE 1997

There are two additional changes impacting our current electoral politics which have changed since 1997. The first is the *Citizens United* case making independent expenditures a protected First Amendment right. The second is the relatively inexpensive reach and depth of social networking which allows voters to talk amongst themselves (i.e., relatively small groups of advocates can create their own movement). Unlike 1997, both big money donors and grass roots movements could become major players in the process (not only in the 2017 referendum but in the 2018 dele-

gate selection vote and the 2019 Convention) that a successful referendum would trigger.

Think of the groups and individuals that might step up to the plate and this goes far beyond the Koch brothers. The well-heeled advocates for charter schools could do battle with union-backed advocates seeking a provision mandating equal funding for districts, for competing constitutional provisions; pension reform advocates backed by hedge fund executives could be at war with public sector unions over public pension provisions. Tom Steyer, the environmental crusader, could come into NYS and seek a constitutional mandate related to climate change and renewable energy resources. Minority voters and civil libertarians could seek a constitutional provision raising the age or even broader criminal justice reforms if the State Senate continues to block legislative changes. The list of interests and issues could go on and on, as those listed above are only high profile examples.

Will these potential independent expenditure players push for a Convention in 2017 or wait to see if the referendum passes before trying to persuade voters of their cause? Or will the Reformers lambaste the independent expenditure efforts over process, strangling the substance-process coalition in the proverbial political crib? Once again, we simply do not know the answer to these questions.

It is also possible that all this issue based controversy could sink the Convention, just as the debate over repealing the Blaine amendment (the 19th Century provision prohibiting state aid to parochial schools) sidetracked the 1967 Convention and the failed referendum which followed.

IV. CONCLUSION

In the final analysis, question marks dominate any fair analysis of the political predicates surrounding the 2017 referendum for there are almost no exclamation points to guide any projection based analysis. I predict that a chemical reaction amongst and amidst individual voters will in turn drive a kinetic force in the larger electorate, buttressed by interest groups, wealthy donors behind independent expenditures and grass roots social networking, which will determine the ultimate outcome of this referendum in 2017 on whether or not to call a state Constitutional Convention. Whether the political physics underlying those reactions pass or defeat the referendum remains to be seen.

My own view is that the outcome of the referendum is a literal jump ball. The ultimate outcome will depend in no small measure on the politi-

cal skills of those on both sides of the question. Do voters see more risk in calling a Convention or more hope based upon a visceral judgment that things cannot get worse and we deserve better as a state?

If this referendum were held in 2008 or 2009, I believe it would have passed (in the wake of the ugly Senate coup). If it were held in 2011 or 2012, it would have no doubt failed (during the incredibly productive first two years of Governor Andrew Cuomo's bipartisan first term). Heading into 2017, I do not think we yet know how individual voter chemistry will move the kinetic forces of political mobilization. At this point, I do not believe anyone can predict with certainty how New Yorkers will decide to call this question in 2017.

It is my hope that this chapter has accurately and dispassionately parsed the parameters of this looming referendum on a Constitutional Convention. Winston Churchill would no doubt label this, as he once observed of Russia: "It is a riddle wrapped in a mystery inside an enigma, but perhaps there is a key."[9] In terms of Russia, Churchill speculated that the key perhaps was national interest; here, it will be where New Yorkers, as a statewide electorate, feel the state's interest lies, with or without a Constitutional Convention.

1 Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMP. 53, 69 (1996).

2 RICHARD E. NEUSTADT, PRESIDENTIAL POWERS AND THE MODERN PRESIDENTS 29 (The Free Press 1990).

3 *See* V. O. KEY, JR., THE RESPONSIBLE ELECTORATE: RATIONALITY IN PRESIDENTIAL VOTING 4, 7–8, 150 (1966).

4 Press Release, *Half of Voters View Cuomo Favorably; New Yorkers Give Him Weak Job Performance Ratings; Especially on Corruption, Education, Infrastructure, Economy*, SIENA RESEARCH INST. (Oct. 26, 2015), https://www.siena.edu/assets/files/news/SNY_October_2015_Poll_Release_--_FINAL.pdf.

5 Bruce Gyory, *DeBlasio's Beef with Cuomo Ignores the Constitution*, CITY & STATE (Sept. 18, 2015), http://www.cityandstateny.com/articles/politics/new-york-state-articles/de-blasio%E2%80%99s-beef-with-cuomo-ignores-the-constitution.html#.Vt3GqPkrKUk.

6 RICHARD N. SMITH, ON HIS OWN TERMS: A LIFE OF NELSON ROCKEFELLER 334 (2014).

7 Anthony D. Weiner, *How to End the Feud Between the Mayor and the Governor*, N.Y. TIMES (Aug. 26, 2015), http://www.nytimes.com/2015/08/27/opinion/how-to-end-the-feud-between-the-mayor-and-the-governor.html?_r=0.

8 Press Release, *Cuomo Favorability & Job Performance Ratings Slip a Little; Voters Give Gov. Low Grades on Education, Economy, Corruption & Balancing Upstate/Downstate Needs*, SIENA RESEARCH INST. (July 15, 2015), https://www.siena.edu/assets/files/news/SNY_July_2015_Poll_Release_--_FINAL.pdf.

9 WINSTON CHURCHILL, WINSTON CHURCHILL: HIS WIT AND WISDOM 136 (Hyperion Books).

BIBLIOGRAPHY PART I

THE NEW YORK CONSTITUTION: A GUIDE TO SOURCES AND COMMENTARY

Compiled by Peter Galie and Christopher Bopst

ONLINE SOURCES

When materials are available online, we have provided URL addresses. The website of the New York State Library is particularly valuable for research on the New York Constitution. Selected constitutional convention records, constitutional commission reports, and other materials are online and available on the website, http://www.nysl.nysed.gov/ [accessed Sept. 21, 2011]. However, the site is not the easiest to navigate. The following sequence should prove useful in finding these sources. The home page displays a tab on the side margin titled "Digital Collections." That link takes you a page with the link "Search the Digital Collection," which in turn opens a page offering a search function. Choose the "Browse" tab at the top left, then select the option titled "Government Collections," then "New York State Government Documents" and then the option "Agencies, Authorities, Boards, Commissions (Miscellaneous)." The list that appears includes the above-described records.

Returning to the main browse page by clicking "Browse" at the top, choose "Government Collections," then choose "General Collections," then select "Social Sciences, sociology & anthropology." Click on the "Law" link. The page contains, among others, a link to Charles Z. Lincoln's *Constitutional History of New York* (see below), as well as a copy of the 1846 constitution.

Going back to the main browse page, click on "Government Collections," then "New York State Government Documents," then execute the following sequence: click on "Education Department," then "Office of Cultural Education," and "New York State Library." The list that appears includes constitutional convention bibliographies compiled by Ernest Breuer, as well as Robert Allan Carter's *Legislative Intent in New York*, 2d ed. (New York State Library, 2001). We have noted the specific records available in the bibliographic essay that follows.

THE CONSTITUTION

The New York State Constitutions of 1777, 1821, 1846, and 1894, including amendments, can be found in volume 5 of Francis Newton Thorpe, ed., *The Federal and State Constitutions: Colonial Charters and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, 7 vols. (orig. pub. 1909; reprinted, Buffalo, N.Y.: William S. Hein & Co., 1992). Volume 7 of William F. Swindler, ed., *Sources and Documents of United States Constitutions*, 10 vols. (Dobbs Ferry, N.Y.: Oceana Publications, 1978) contains the 1777, 1821, 1846, and 1894 constitutions and the proposed constitution drafted by the 1967 convention.

The text of the current constitution can be found on the website of the New York Secretary of State: http://www.dos.ny.gov/info/constitution/ [accessed Sept. 21, 2011]. The current constitution, annotated clause by clause, is available in *McKinney's Consolidated Laws of New York Annotated*, Book 2 as supplemented, and *New York Consolidated Laws Service* [CLS], volumes 41C, 42 and 42A. McKinney's *Consolidated Laws* is available online as part of a subscription to Westlaw Campus. All proposed amendments to the constitutions are printed in the *Laws of New York* and *McKinney's Session Laws of New York*, both published annually. The *New York Times* and *Albany Times-Union*, in both their paper and electronic versions (http://www.nytimes.com/ [accessed Sept. 21, 2011] and http://www.timesunion.com/ [accessed Sept. 21, 2011]), report all proposed amendments before the November general elections when such amendments are on the ballot.

Robert Allan Carter's *New York State Constitution: Sources of Legislative Intent,* 2d ed. (Littleton, Colo.: Fred B. Rothman & Co., 2001) provides sources of legislative intent for each section of the constitution. It is an excellent tool for locating convention debates, legislative documents, commission reports, governor's papers, and other miscellaneous sources that pertain to the various sections of the document. Robert Emery's "A Brief Research Guide to the New York State Constitution," *Legal Reference Services Quarterly* 8 (Nov. 1988): 189-202 and Dorothy Butch, *New York State Documents: An Introductory Manual* (Albany, N.Y.: New York State Library Bibliography Bulletin No. 89, 1987) provide general information about official publications of New York State. Butch covers all publications that relate to the constitution, statutes and administrative laws, as well as the legislative, executive, and judicial branches. The entries are annotated with helpful information about the

location and character of the documents in question. William H. Manz, *Gibson's New York Legal Research Guide*, 3d ed. (Buffalo, N.Y.: William S. Hein & Co., 2004) also contains an excellent section on the documentary sources of the New York Constitution.

There are a number of sources for the meaning and intent of the constitutional provisions. The multistate microfiche series, *State Constitutional Conventions, Commissions and Amendments, 1959-1978* (Washington, D.C.: Congressional Information Service (CIS), 1981), contains the complete records of all New York State constitutional conventions and commissions.

In addition to the constitutional convention records and debates on amendments proposed by the state legislature, there are three other authoritative sources. The most important of these are the decisions of the state judiciary, especially the decisions of the Court of Appeals. The decisions of the latter are reported in the *New York Reports* and in the *North Eastern Reporter*. These decisions are available online with a subscription to Westlaw or Lexis-Nexis. The Opinions of the Attorney General are a second authoritative source of constitutional interpretation. The attorney general is constitutionally required to render an opinion on the impact of any amendment proposed by the legislature, and is frequently called upon to render opinions on the meaning of various constitutional clauses. These opinions are now published in an annual report, *Opinions of the New York State Attorney General* (Command Information Services, formerly by Lenz & Riecker). Since 1995, the opinions have been made available on the website of the Attorney General. Available: http://www.ag.ny.gov/appeals-and-opinions/numerical-index [accessed Sept. 12, 2011]. Finally, the official papers of the governors of New York, published in yearly compilations, contain information on constitutional intent, as governors often provide justifications for the amendments they propose or support.

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The most complete bibliography on the state's constitutional history is Ernest Henry Breuer, *Constitutional Developments in New York 1777-1958: A Bibliography of Conventions and Constitutions with Selected References for Constitutional Research* (Albany, N.Y.: University of the State of New York, State Education Department, 1958). Breuer issued two updates to this work: *Constitutional Developments in New York 1958-1967: A Temporary Supplement to Constitutional Developments in New York* (Albany, N.Y.: University of the State of New York, State Education Department, 1967), and *New York State Constitutional Convention of*

1967, April 4-September 26th 1967: A Second Supplement to Constitutional Developments in New York 1777-1958 (Albany, N.Y.: University of the State of New York, State Education Department, 1970), the latter a compilation of all the official documents from and commentary on the 1967 constitutional convention. All three are online at the New York State Library website (see above).

Four bibliographies serve as indexes to the CIS set by including the microfiche number adjacent to the bibliographic entry. These are: Cynthia E. Browne, comp., *State Constitutional Conventions from Independence to the Completion of the Present Union, 1776-1959 : a bibliography* (Westport, Conn.: Greenwood Press, 1973); Bonnie Canning, comp., *State Constitutional Conventions, Revisions, and Amendments, 1959-1976: a bibliography* (Westport, Conn.: Greenwood Press, 1977); Susan Rice Yarger, comp., *State Constitutional Conventions, 1959-1975: a bibliography* (Westport, Conn.: Greenwood Press, 1976); and Nicholas Olcott, ed., *State Constitutional Conventions, Commissions and Amendments, 1959-1978: An Annotated Bibliography*, 2 vols. (Washington, D.C.: Congressional Information Service, 1981). Nicholas Olcott, ed., *State Constitutional Conventions, Commissions and Amendments, 1959-1978: An Annotated Bibliography*, 2 vols. (Bethesda, Md.: Congressional Information Service, 1989) continues the coverage of the Browne volume. These volumes are valuable for their extensive coverage as well as their citations to the CIS microfiche collection. The entries in Gibson's *New York Legal Research Guide* (see *supra*) are keyed to this series.

THE BACKGROUND

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THE CONVENTION OF 1821

Records

New York State Constitutional Convention (1821), *Reports of the Proceedings and Debates of the Convention of 1821* . . . , Nathaniel H. Carter and William L. Stone, reporters (Albany, N.Y.: E. & E. Hosford, 1821) [CIS-NY 8], Da Capo Press reprinted this edition in 1970. A report based on the Carter and Stone edition was printed by J. Seymour in 1821. New York State Constitutional Convention (1821), *Journal of the Convention of the State of New York . . . 1821* (Albany, N.Y.: Cantine & Leake, printers to the State, 1821) [CIS-NY 7]. The constitution of 1821 is reprinted in volume 5 of Thorpe, volume 1 of Lincoln, and volume 7 of Swindler. New York State Constitutional Convention (1821), *Documents, committee reports etc.* (Albany, N.Y., 1821). The *Journal* is the daily record of the actions taken by the delegates. The *Reports,* though not transcripts, constitute the official record of the convention. They are all online and available at the New York State Library website. For amendments to this constitution see Chapter 5 of Lincoln, contained in volume 2.

Commentaries

Lincoln, 1: 613-756, and Dougherty, Chapters 5-8, provide accounts of the convention. Merrill D. Peterson, ed., *Democracy, Liberty and Property: The State Constitutional Conventions of the 1820's* (orig. pub. 1966; Liberty Fund edition with foreword by G. Alan Tarr, 2010) has informative essays by Peterson and Tarr on the 1821 convention, putting its work in the context of what other states were doing with their constitutions

during the 1820's. It includes excerpts from the debates of the convention. Older studies of the political and economic forces underlying the convention's work are Dixon Ryan Fox's "New York Becomes a Democracy," in Alexander C. Flick, ed., *History of the State of New York in Ten Volumes*, 6: 1-34. This essay is based on his fuller treatment of the period entitled *The Decline of Aristocracy in the Politics of New York* (New York: Columbia University Press, 1919). Also valuable is volume 1 of Hammond. Donald B. Cole*, Martin Van Buren and the American Political System* (Princeton, N.J.: Princeton University Press, 1984), emphasizes the role of Van Buren in leading the "Bucktail" majority at the convention.

The two institutions abolished in 1821—The Council of Appointment and The Council of Revision—have been well studied: Alfred B. Street, *The Council of Revision of the State of New York: Its History, a History of the Courts in which Its Members Were Connected, Biographical Sketches of Its Members and Its Vetoes* (Albany, N.Y.: William Gould Publisher, 1859); Frank W. Prescott and Joseph F. Zimmerman, *The Council of Revision and the Veto of Legislation in New York State* (Albany, N.Y.: Graduate School of Public Affairs, State University of New York at Albany, 1973); J.M. Gitterman, "The Council of Appointment in New York," *Political Science Quarterly* 7 (Mar. 1892): 80-115, and Hugh M. Flick, "The Council of Appointment in New York State—The First Attempt to Regulate Political Patronage, 1777-1822," *New York History* 15 (July 1934): 253-80.

The treatment of the question of African-American suffrage at the convention is thoroughly examined by Phyllis F. Field, *The Politics of Race in New York: The Struggle for Black Suffrage in the Civil War Era* (Ithaca, N.Y.: Cornell University Press, 1982). Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief* (Stanford, Calif.: Stanford University Press, 1957) places the convention in the context of the origin and development of party alignments in the broader movement he labels the "Jacksonian Persuasion."

Much dissertation literature has focused on the convention. Helen Louise Young, "A Study of the Constitutional Convention of New York State in 1821" (Ph.D. Diss., Yale University, 1910) examines the convention's work in light of the changes that had taken place since 1777. John Anthony Casais, "The New York State Constitutional Convention of 1821 and Its Aftermath" (Ph.D. Diss., Columbia University, 1967) concentrates on the factional alignments and voting patterns at the convention. George Phillip Parkinson, "Antebellum State Constitution-Making: Retention,

Circumvention, Revision" (Ph.D. Diss., University of Wisconsin-Madison, 1972) places the 1821 convention in a comparative context.

THE CONVENTION OF 1846

Sources

New York State Constitutional Convention (1846), *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York . . . 1846*, William G. Bishop and William H. Attree, reporters (Albany, N.Y.: Evening Atlas, 1846). An alternative source is New York State Constitutional Convention (1846), *Debates and Proceedings in the New York State Convention for the Revision of the Constitution*, S. Croswell and R. Sutton, reporters (Albany, N.Y.: Argus Printers, 1846). Neither of these are verbatim records. They are records compiled by reporters from two Albany newspapers, the *Argus* and the *Evening Atlas*. New York State Constitutional Convention (1846), *Journal of the Convention of the State of New York . . . 1846* (Albany, N.Y.: Carroll and Cook, 1846) [CIS-NY 13]. The constitution, as revised, is reprinted in Lincoln, vol. 1, Thorpe, vol. 5, and Swindler, vol. 7 and is on line at the New York State Library site (see above). For amendments to this constitution from 1847-1867, see Lincoln, 2: 218-40.

Commentaries

There is no monograph on the 1846 convention. Lincoln, 2: 9-217, gives it extensive treatment. Less considerable attention is given by Dougherty, chs. 8-9. Edward P. Cheyney, "The Antirent Movement and the Constitution of 1846," in Alexander C. Flick, ed., *History of the State of New York in Ten Volumes*, 6: 281-321, as the title indicates, focuses on the connection between the antirent movement and the convention. Edna L. Jacobsen, "New York's Constitution A Hundred Years Ago," *New York History* 28 (Apr. 1947): 191-96, provides a short summary of the major changes made at the convention and contains interesting social background on the delegates. A contemporary account by a prominent lawyer-politician is Benjamin Franklin Butler's *Outline of the Constitutional History of New* York, cited *supra*. L. Ray Gunn, The Decline of Authority: Public Economic Policy and Political Development in New York State, 1800–1860 (Ithaca, N.Y.: Cornell University Press, 1988), contains the most sophisticated analysis of the convention's work (Chapter 6), and is one of the few works to attempt to demonstrate a relationship between constitutional change and economic development. Marvin Meyers, *The*

Jacksonian Persuasion, cited *supra*, examines the convention's work with special attention to its treatment of the business corporation. Hendrik Hartog, "Because All the World Was Not New York City: Governance, Property Rights, and the State in the Changing Definition of a Corporation, 1730-1860," *Buffalo Law Review* 28 (Winter 1979): 91-110, documents the complex process by which governmental corporations like New York City were losing their autonomous legal identity and becoming an adjunct of the state administrative system, while the private corporation was emerging from its "publicness." Treatment of the African-American suffrage issue is found in Phyllis Field, *The Politics of Race in New York*, cited *supra*. Francis Bergan, *The History of the New York Court of Appeals, 1847-1932* (New York: Columbia University Press, 1985) provides information on the origin of the court of appeals in the 1846 convention. Patricia E. McGee, "Issues and Factions: New York State Politics from the Panic of 1837 to the Election of 1848," (Ph.D. Diss., St. John's University, 1970), places the convention in the context of the factionalizing and realignment of politics in New York during the 1840s. George Phillip Parkinson, "Antebellum State Constitution-Making," cited *supra*, looks at the changes effected by "radicals" in a comparative context.

CONSTITUTIONAL DEVELOPMENTS FROM 1847-1894

Sources

Records of the 1867 convention include New York State Constitutional Convention (1867-1868), *Journal of the Convention of the State of New York . . . 1867* (Albany, N.Y.: Weed, Parsons & Co., 1867) [CIS-NY 19]. New York State Constitutional Convention (1867-1868), *Proceedings and Debates of the Constitutional Convention of the State of New York . . . 1867 and 1868* . . . , Edward F. Underhill, reporter (Albany, N.Y.: Weed, Parsons & Co., 1868), 5 vols. [CIS-NY 20]. Lincoln reprints the proposed constitution, 2: 423-63.

The record of the Constitutional Commission of 1872 was never published so New York State Constitutional Commission (1872-1873), *Journal of the Constitutional Commission of the State of New York . . . 1872-1873* (Albany, N.Y.: Weed, Parsons & Co., 1873) [CIS-NY 25] is the only source of the commission's activities. Its recommendations are found in New York State Constitutional Commission (1872-1873), *Amendments Proposed to the Constitution of the State of New York . . . March 25, 1873* (Albany: Argus Printer, 1873).

The record of the Judiciary Commission of 1890 was never published. Information about this body is available at New York State Constitutional Commission (1890-1891), *Journal* (Albany, N.Y., 1891) [CIS-NY 28]. It issued a series of reports to the legislature culminating in the New York State Constitutional Commission (1890-1891), *Report of the Judiciary Commission . . . dated January 23, 1891* (1891 N.Y. Sen. Doc. No. 51). The reports are listed in Breuer, *Constitutional Developments in New York 1777-1958, supra*, and *Gibson's New York Legal Research Guide*, *supra*.

Commentaries

Francis Lieber, a professor of constitutional law at Columbia Law School, published an address he gave before the New York Union League Club, *Reflections on the Changes Which May Seem Necessary in the Present Constitution of the State of New York* (New York: Union League Club, l867). The essay was meant to influence the work of the l867 convention. David Dudley Field, a prominent advocate of codification of the laws and author of the Field Code of Civil Procedure, published *Suggestions Respecting the Revision of the Constitution of New York* (New York: W. Read, l867). His suggestions were in the form of a proposed constitution meant to provide a model for the l867 convention. Lincoln, 2: 18-125 and Dougherty, chs. 10-14, cover the period in question thoroughly. Other commentary is found in Finla G. Crawford, "Constitutional Developments, 1867-1915," in Alexander C. Flick, ed., *History of the State of New York in Ten Volumes*, 7: 199-240. Homer Adolph Stebbins, *A Political History of the State of New York, 1865-1869* (New York: Columbia University Press, 1913), provides a summary of the convention's work and a commentary on the politics therein. James C. Mohr, *The Radical Republicans and Reform in New York During Reconstruction* (Ithaca, N.Y.: Cornell University Press, 1973), a more recent treatment that focuses primarily on the convention's handling of the question of African-American suffrage.

THE CONVENTION OF 1894

Documents

A large number of publications accompanied the calling of the 1894 convention. Thirteen volumes of preparatory materials were published for the use of the delegates. The volumes are listed by title in Breuer, *Constitutional Developments in New York 1777-1958, supra*, and Butch, *New*

York State Documents, supra. The convention's work is found in New York State Constitutional Convention (1894), *Record* (Albany, N.Y., 1894), published in six volumes and subsequently revised and indexed in five volumes in New York State Constitutional Convention (1894), *Revised Record of the Constitutional Convention of the State of New York . . . 1894*, indexed and revised by William H. Steele (Albany, N.Y.: Argus Company, 1900) [CIS-NY-31]. New York State Constitutional Convention (1894), *Journal of the Constitutional Convention of the State of New York . . . 1894* (Albany: Argus Company, 1895) [CIS-NY 30] also provides guidance. The 1894 constitution is reprinted in Thorpe, vol. 5; Lincoln, vol. 4; and Swindler, vol. 7. Volume 4 of Lincoln annotates this constitution.

Commentary

Lincoln devoted an entire volume to the work of the 1894 convention. Dougherty gives much less coverage in Chapters 14-18. Good summaries of the convention's accomplishments are found in Finla G. Crawford's "Constitutional Developments," *supra*, and Frank H. Hamlin, "The New York Constitutional Convention," *Yale Law Journal* 4 (June 1895): 213-22. Three more recent works focus on the role of the Republican Party at the convention, the impact of interest groups, regional considerations, while putting the convention in the larger context of New York's politics: Samuel T. McSeveney, *The Politics of Depression: Political Behavior in the Northeast, 1893-1896* (New York: Oxford University Press, 1972); Richard L. McCormick, *From Realignment to Reform: Political Change in New York State 1893-1910* (Ithaca, N.Y.: Cornell University Press, 1981); and Robert Crosby Eager, "Governing New York State: Republicans and Reform, 1894-1900" (Ph.D. Diss., Stanford University, 1977).

THE CONVENTION OF 1915

Sources

New York State Constitutional Convention (1915), *Journal of the Constitutional Convention of the State of New York . . . 1915* (Albany, N.Y.: J. B. Lyon, 1915) [CIS-NY 36]. The debates are in two forms: New York State Constitutional Convention (1915), *Record of the Constitutional Convention of the State of New York, 1915 . . .* (Albany, N.Y.: J. B. Lyon Co., 1915), 4 vols., and New York State Constitutional Convention (1915), *Revised Record of the Constitutional Convention of the State of*

New York . . . 1915 (Albany, N.Y.: J. B. Lyon Co., 1916), 4 vols. [CIS-NY 37]. There were a large number of preliminary publications produced for use by delegates and their staffs. These are listed in Breuer, *Constitutional Developments in New York 1777-1958, supra*, and Butch, *New York State Documents, supra*. A copy of the full text of the revised constitution was reprinted in the *New York Times*, Sept. 12, 1915: 18-21.

Commentaries

Best of the early works are Finla G. Crawford, "Constitutional Developments," *supra*, and volume 2 of Alden Chester's *Courts and Lawyers of New York: A History, 1609-1925* (New York: The American Historical Society, Inc., 1925), 4 vols. The volume contains a chapter on the 1915 convention. The only monograph on the convention is by Thomas Schick, *The New York State Constitutional Convention of 1915 and the Modern State Governor*, published by the National Municipal League (Sowers Printing Co., 1978). It focuses on the convention's attempts at governmental reorganization but slights the impact of political party and political factors in general. A good corrective emphasizing the latter is Gerald D. McKnight, "The Perils of Reform Politics: The Abortive New York State Constitutional Reform Movement of 1915," *The New-York Historical Society Quarterly* 63 (July 1979): 203-27. Schick provides a full bibliography of materials relating to the 1915 convention.

CONSTITUTIONAL DEVELOPMENTS FROM 1916-1937

Sources

Breuer, *Constitutional Developments in New York 1777-1958*, *supra*, Butch, *New York State Documents*, *supra*, and *Gibson's New York Legal Research Guide*, *supra*, all have complete listings of the manual, journal, and proceedings of the Judiciary Convention of 1921. The convention's recommendations are found in New York State Constitutional Convention (1921), *Report to Legislature Dated January 4, 1922* (Albany, N.Y.: J. B. Lyon Co., 1922) (1922 N.Y. Leg. Doc. No. 37). A supplemental report providing further rationale for its recommendations was issued, New York State Constitutional Convention (1921), *Supplemental Report of Executive Committee . . . 1922* (Albany, N.Y.: J. B. Lyon Co., 1922) (1922 N.Y. Leg. Doc. No. 67).

Commentaries

The convention is discussed in Francis Bergan. Alden, *supra*, treats the Judiciary Convention of 1921 in the context of his analysis of the Judiciary Act of 1925. How executive reorganization and the constitutional reforms advocated by the 1915 convention were achieved is described in Finla G. Crawford, "Recent Political Development, 1915-35," in Flick, ed., *History of the State of New York in Ten Volumes*, 7: 241-80. Paula Eldot, *Governor Alfred E Smith: The Politician as Reformer* (New York: Garland, 1983) provides a fuller discussion of Governor Smith and Executive Reorganization.

THE CONVENTION OF 1938

Sources

As with the 1915 convention, preparatory work for the Convention of 1938 was undertaken. The New York State Constitutional Convention Committee issued a series of twelve *Reports* (New York & Albany, N.Y., 1938), collectively known as the "Poletti Report" after Charles Poletti, then lieutenant-governor, who supervised its production. These reports are available online at the New York State Library website (see above). Titles for these volumes, as well as other materials connected with the 1938 convention, are listed in Breuer, *Constitutional Developments in New York 1777-1958, supra*, Butch, *New York State Documents, supra*, and *Gibson's New York Legal Research Guide*, *supra*. The activities of the 1938 convention are found in New York State Constitution Convention (1938), *Journal of the Constitutional Convention of the State of New York . . . 1938* (Albany, N.Y.: J. B. Lyon Co., 1838) [CIS-NY 47], as well as New York State Constitutional Convention (1938), *Record of the Constitutional Convention of the State of New York, 1938 . . .* (Albany, N.Y.: J. B. Lyons, 1938), 3 vols. New York State Constitutional Convention (1938), *Revised Record of the Constitutional Convention of the State of New York . . . 1938* (Albany, N.Y.: J. B. Lyon Co., 1938), 4 vols. [CIS-NY 48], was issued by the same publisher in 1938 and is available online at the New York State Library website.

Commentaries

The only published monograph on the convention, Vernon A. O'Rourke and Douglas W. Campbell's *Constitution-Making in a Democracy: Theory and Practice in New York State* (Baltimore, Md.: Johns Hop-

kins Press, 1943) is the first published study of a New York convention to focus on interest group activity and partisanship. A similar approach but with more attention to the specific issues is Wilbert Losson Hindman, Jr., "The New York Constitutional Convention of 1938: The Constituent Process and Interest Activity" (Ph.D. Diss., University of Michigan, 1940). Frieda Almira Gillette, "The New York State Constitutional Convention of 1938," (Ph.D. Diss., Cornell University, 1945), describes the major issues and how they were handled, concluding with an analysis of partisan divisions on each of these issues. An early attempt to relate the convention decisions to public opinion is Madge M. McKinney, "Constitutional Amendment in New York State," *Public Opinion Quarterly* 3 (Oct. 1939): 635-45. Also useful is Arthur E. Sutherland, Jr., "Lawmaking by Popular Vote: Some Reflections on the New York Constitution of 1938," *Cornell Law Quarterly* 24 (Dec. 1938): 1-12. Articles written by delegates to the convention are listed in Hindman, 422.

CONSTITUTIONAL DEVELOPMENTS BETWEEN CONVENTIONS, 1939-1966

Sources

A list of amendments to the 1894 constitution between 1939 and 1967 can be found in New York State Department of State, *Manual for the Use of the Legislature of the State of New York*, published annually by the secretary of state through the years 1988-89. Between 1957 and 1961, three temporary commissions on constitutional revision (New York State Temporary Commission on the Constitutional Convention, Special Legislative Committee on the Revision and Simplification of the New York State Constitution, and the New York State Temporary Commission on the Revision and Simplification of the Constitution) held hearings and issued interim and topical reports on various aspects of the constitution. These, as well as the unpublished materials of the commissions, are listed and discussed in Breuer, *Constitutional Developments in New York 1958-1967, supra*, Butch, *New York State Documents, supra*, and *Gibson's New York Legal Research Guide*, *supra*. They provide an excellent picture of the status of constitutional reform in the late 50s and early 60s, and useful background information.

Commentaries

Guthrie S. Birkhead, *A Right to Choose: The Prospective Constitutional Convention in New York State*, prepared for the Citizenship Clear-

ing House (Syracuse, N.Y.: Syracuse University Press, 1957) summarizes the pros and cons of holding a convention as well as the major issues that would have faced a convention. Birkhead also provides a list of organizations active in constitutional reform, or who had taken a position on the question of reform. Franklin Feldman, "A Constitutional Convention in New York: Fundamental Law and Basic Politics," *Cornell Law Quarterly* 42 (Spring 1957): 329-45, puts the upcoming vote on the 1957 convention in the context of the political limits on constitutional reform. The May, 1957, issue of the *St. John's Law Review* (Volume 31) was devoted to the question of whether there ought to be a constitutional convention in 1959.

THE CONVENTION OF 1967

Sources

The New York State Temporary State Commission on the Conventional Convention issued a series of sixteen *Reports* (Albany, N.Y., 1967), which cover a variety of topics [CIS-NY 56-71]. These reports have been bound in two volumes (Albany, N.Y., 1966) and are online at the New York State Library website. The New York State Department of Audit and Control issued a five-volume series entitled *Comptrollers Studies for the 1967 Constitutional Convention* (Albany, N.Y.: 1967) [CIS-NY 72A-72E]. Hearings held throughout the state by the temporary commission described above were later bound in five volumes of mimeographed transcripts: New York State Temporary State Commission on the Constitutional Convention, *Transcript of Public Hearings* (New York:, Ralph Fink, 1966).

New York State Constitutional Convention (1967), *Proceedings of the New York State Constitutional Convention* (Albany, N.Y., 1968), 12 vols. [CIS-NY 75A-75F], contains the journal, debates, proposed amendments, and documents of the convention. These documents may be found online at the New York State Library website. The proposed constitution can be found in *Text, Abstract and Highlights of the Proposed Constitution of the State of New York . . .* (Albany, N.Y.: New York State Constitutional Convention, 1967) and Swindler, *supra*, vol. 7.

Commentaries

Ernest R. Breuer, *New York State Constitutional Convention of 1967*, *supra*, updates his earlier bibliography and includes a list of archival material held by the New York State Library in Albany. The League of Women Voters of New York published a pamphlet entitled *New York State*

1967 Constitutional Convention (New York: Foundation for Citizen Education, Inc., 1966). It provides useful background information as well as the league's position on constitutional reform. The Citizens Union of New York City's position is presented in Citizens Union of the City of New York, *New York State Constitutional Convention 1967* (New York: mimeograph, 1967). Two other sources of information and reform proposals are Sigmund Diamond and Nancy D. Lane, eds., *Modernizing State Government: The New York Constitutional Convention of 1967* (New York: Academy of Political Science, 1967) and Columbia School of Law, *Essays on the New York Constitution* (bound mimeograph, 1966). The articles in the former are general discussions with comments by noted scholars and political figures; the latter is a more technical examination of constitutional problems with specific proposals for reform. Elmer E. Cornwell, Jay S. Goodman, and Wayne R. Swanson put the 1967 Constitutional Convention in the context of six other state constitutional conventions held between 1964 and 1970 in *Constitutional Conventions: The Politics of Revision* (New York: National Municipal League, 1974). Donna E. Shalala, *The City and the Constitution: the 1967 New York Convention's Response to the Urban Crisis* (New York: National Municipal League, 1972), provides a view of the convention's work that focuses on its treatment of urban problems as well as an analysis of the divisions among reformers. Though written from its own perspective, the League of Women Voters of New York State, *Seeds of Failure: A Political Review of New York State's 1967 Constitutional Convention* (New York: Silver Mountain Press, 1973) is an informative overview of the convention, and also provides reasons for the failure of the convention's work. Richard I. Nunez, "New York State Constitutional Reform — Past Political Battles in Constitutional Language," *William and Mary Law Review* 10 (Winter 1968): 366-78, puts the failure in the context of earlier conventions. Lewis B. Kaden, "The People: No! Some Observations on the 1967 New York Constitutional Convention," *Harvard Journal of Legislation* 5 (Summer 1968): 343-71 and William J. vanden Heuvel's "Reflections on Constitutional Conventions," *New York State Bar Journal* 40 (June 1968): 261-68, while recognizing the inevitability of partisanship at conventions, make recommendations as to how it can be reduced or limited. *New York Times* articles from the time of the convention provide an excellent source of information and opinion on the convention and its product.

The 1967 convention has been well covered in dissertation literature. The fullest coverage is given by Henrik N. Dullea, *Charter Revision in the Empire State: The Politics of New York's 1967 Constitutional Convention* (Albany, N.Y.: Rockefeller Institute Press, 1997). Dullea, in this revised

version of his dissertation, examines the forces leading to the convention, plots regional, partisan, and ideological divisions using roll call votes, interviews participants, and explores the reason for the constitution's failure. More specific in their focus are: James R. Dunne, "A Longitudinal Study of the Role Concepts of a Select Group of Delegates to the 1967 New York State Constitutional Convention," (Ph.D. Diss., State University of New York at Albany, 1972); Carol Schiro Greenwald, "Lobbyists' Perceptions of the 1967 New York State Constitutional Convention," (Ph.D. Diss., City University of New York, 1972), and Irving H. Freedman, "The Issue of Public Support for Church-Related Education in the 1967 New York State Constitutional Convention: A Study in the Decision-Making Process," (Ed.D. Diss., State University of New York at Albany, 1969).

CONSTITUTIONAL DEVELOPMENTS FROM 1968-2000

General treatment of this period is found in Galie, *Ordered Liberty*, chs. 15-16. In 1975, the New York State Assembly appointed a Speaker's Task Force on Constitutional Revision. That task force issued a brief report entitled *Constitutional Revision in New York State* (Albany, N.Y., 1976). Intended to be preparatory for the 1977 referendum, it reiterated arguments of earlier commissions about the need for major constitutional reform and called for the appointment of a new temporary commission to educate the voters on the connection between the state government's inability to meet their needs and the defects of the constitution. Ultimately, no commission was created. A similar brief report, issued by The New York State Assembly, Committee on Judiciary, *Shall There Be a Convention to Revise the Constitution and Amend the Same?: A Report of the New York State Assembly, Standing Committee on Judiciary* (Albany, N.Y., 1977), concluded that a convention was the only appropriate forum for effective reform.

A Temporary State Commission on Constitutional Revision, appointed in 1993 by Governor Mario Cuomo in anticipation of the 1997 mandatory referendum, issued a series of reports: New York State Temporary State Commission on Constitutional Revision, *The New York State Constitution: A Briefing Book*, Gerald Benjamin, ed. (Albany, N.Y.: Nelson A. Rockefeller Institute of Government, 1994); New York State Temporary State Commission on Constitutional Revision, *Delegate Selection Process* (Albany, N.Y.: Nelson A. Rockefeller Institute of Government, 1994); and New York State Temporary State Commission on Constitu-

tional Revision, *Effective Government Now for the New Century . . .* (Albany, N.Y.: Nelson A. Rockefeller Institute of Government, 1995); online at the New York State Library website. They contain analysis and suggestions for reform. These reports, along with additional materials on the question of constitutional reform, were published as Gerald Benjamin and Henrik N. Dullea, eds., *Decision 1997: Constitutional Change in New York* (Albany, N.Y.: Rockefeller Institute Press, 1997). Opposition to a convention was offered in the Task Force on the New York State Constitutional Convention, "Report of the Task Force on the New York State Constitutional Convention," The Record of the Association of the Bar of the City of New York 52 (June 1997): 522-643.

Edward J. Cleary, the President of the New York State A.F.L.-C.I.O., argued, "While there are many problems facing our state a constitutional convention is not the way to solve them . . . New York State already has an amendment process in place . . . a process that does not involve spending millions of dollars or force us to wait." Editorial, *Should New York State Hold a Constitutional Convention*, BUFFALO NEWS, Nov. 1, 1997, at B3.

The League of Women Voters, in a September, 1997, publication, admitted that the New York Constitution was "deeply flawed and in need of revision," although it expressed concern that a convention would be an unwieldy body, "susceptible to control and discouraging to independent-minded members." Elsa Brenner, "A New Constitution: Yes or No*?" New York Times*, Nov. 2, 1997, New York/Region, p. 1.

Richard Perez-Pena, *Constitution Is Stealth Issue of 1997, Attracting Strong Feelings*, N.Y. TIMES, Sept. 27, 1997, at B4.

CONSTITUTIONAL DEVELOPMENTS DURING THE TWENTY-FIRST CENTURY

Little research on the state constitution has emerged in the first decade of the 21st century. The New York State Bar Association devoted the Spring, 2010 issue of its *Government, Law and Policy Journal* (Volume 12) to the current state of the New York Constitution. Other sources of information about the current state constitution are the reports issued by various constitutional officers such as the attorney-general [Online], available: http://www.ag.ny.gov/appeals-and-opinions/numerical-index [accessed Sept. 12, 2011], and the state comptroller [Online]. Available: http://www.osc.state.ny.us/legal/index.htm [accessed Sept. 12, 2011]. The Department of State issues publications concerning local government in New York, including *Local Government Handbook*, 6th ed., (2009)

[Online]. Available: http://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf [accessed Sept. 12, 2011]. The handbook provides a clear description of the structure, powers, and operations of the various layers of local government, explaining how the constitution, statutes, and court decisions have shaped the tradition of local government in New York.

Gerald Benjamin, "The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context," 65 *Albany Law Review* 1017 (2002).

Gerald Benjamin, "The Necessity for Constitutional Change," *Albany Law Review* 69 (2006): 877-88 offers arguments for a constitutional convention as the best solution the state's problems. Jerald A. Sharum, "A Brief History of the Mechanisms of Constitutional Change in New York and the Future Prospects for the Adoption of the Initiative Power," *Albany Law Review* 70 (2007): 1055-87 explores the possibility of the initiative as a means of constitutional change in New York. Most commentary on the constitution in the last 20 years has come from reform groups and organizations such as The Brennan Center for Justice at New York University School of Law [Online]. Available: http://www.brennancenter.org/ [accessed Sept. 12, 2011]; (New York Public Interest Research Group (NYPIRG) [Online]. Available: http://www.nypirg.org/ [accessed Sept. 12, 2011]; the Citizens Budget Commission [Online]. Available: http://www.cbcny.org/ [accessed Sept. 12, 2011]; The Manhattan Institute for Policy Research [Online]. Available: http://www.manhattan-institute.org/ [accessed Sept. 12, 2011]; and the Citizens Union of the City of New York [Online]. Available: http://www.citizensunion.org/ [accessed Sept. 12, 2011]. A more complete list of those calling for reform can be found in Patricia E. Salkin, "New York at a Crossroads: Sustaining a Government Reform Agenda on the Frontlines with Executive, Legislative and Judicial Reform Initiatives," *Albany Law Review* 69 (2006): 827-829.

THE CURRENT CONSTITUTION

Regular coverage of issues concerning the state constitution can be found in the *New York Times*, the *New York State Bar Association Journal*, and *Empire State Report*. The latter contains articles on current aspects of New York State government and politics. Relevant articles may also be found in law reviews, especially *Syracuse Law Review*'s annual "Survey of New York Law" issue [information about publication and certain abstracts Online], available: http://www.law.syr.edu/student-life/publications/law-review/ [accessed Sept. 12, 2011], *Touro Law Review*'s "Annual

New York State Constitutional Issue" [information about publication and back issues Online], available: http://www.tourolaw.edu/lawreview/ [accessed Sept. 12, 2011], and the *Albany Law Review*'s annual "State Constitutional Commentary" begun in 1996, which addresses state constitutional law issues generally and New York State issues in particular. Back issues of this law review are available online from 2006 [Online], available: http://www.albanylawreview.org/Pages/home.aspx [accessed Sept. 12, 2011]. The Nelson A. Rockefeller Institute of Government [Online], available: http://www.rockinst.org/ [accessed Sept. 12, 2011], sponsors public policy forums and conferences, as well as provides research reports and other publications that address various aspect of New York State government, including the state constitution.

REFORMING THE STATE CONSTITUTION

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Compiled by Gerald Benjamin for the Roosevelt Initiative[1]

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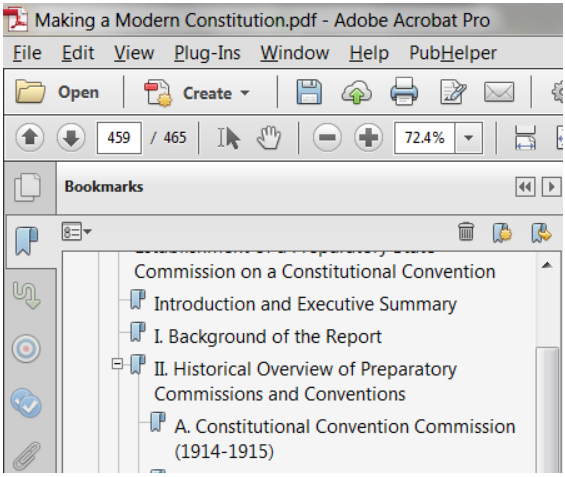

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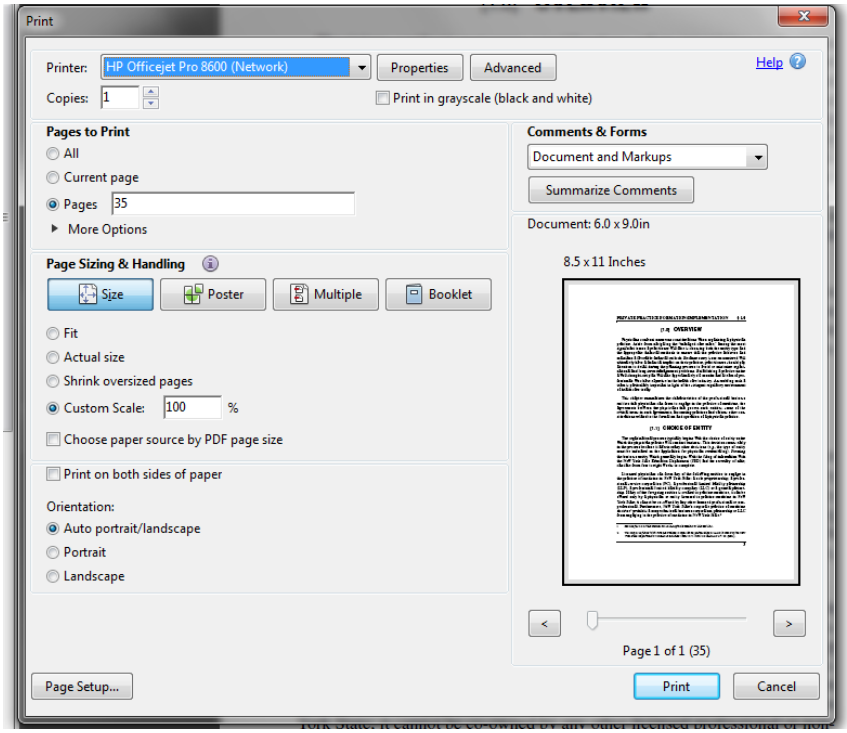

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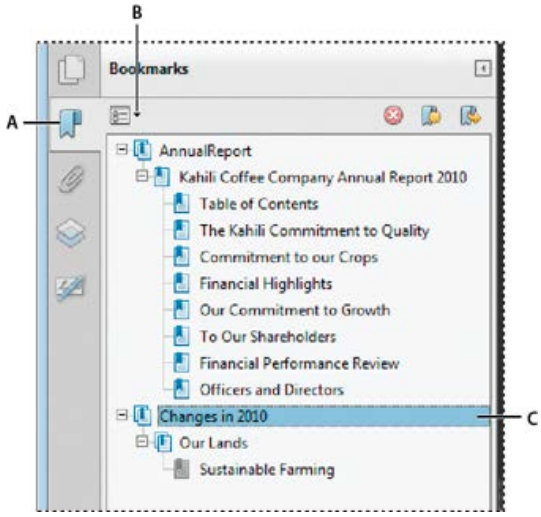

Bookmarks panel

A. *Bookmarks button*

B. *Click to display bookmark options menu.*

C. *Expanded bookmark*

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Automatically scroll through a document

Automatic scrolling advances your view of the PDF at a steady rate, moving vertically down the document. If you interrupt the process by using the scroll bars to move back or forward to another page or position, automatic scrolling continues from that point forward. At the end of the PDF, automatic scrolling stops and does not begin again until you choose automatic scrolling again.

1. Choose View > Page Display > Automatically Scroll.
2. Press Esc to stop scrolling.

PDFs with file attachments

If you open a PDF that has one or more attached files, the Attachments panel automatically opens, listing the attached files. You can open these files for viewing, edit the attachments, and save your changes, as permitted by the document authors.

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