

**REPORT OF THE NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON THE NEW YORK STATE CONSTITUTION:
*Establishing a Temporary State Commission to Study New York's Constitution
and Make Recommendations***

INTRODUCTION AND EXECUTIVE SUMMARY

The constitutional commission has been an important component of New York's state constitutional tradition since 1872.¹ As New York does not permit ballot initiatives, constitutional amendment may be achieved only by legislatively initiated amendments or by constitutional convention, each a cumbersome vehicle.² To supplement our state's constitutional tradition, the legislature, as well as the executive, have established various constitutional commissions, either as predecessors to conventions or to vicennial ballot calls, or as standalone entities, for purposes of studying and suggesting revisions to New York's organic law.³ These commissions have enhanced our state's constitutional evolution and been woven into its constitutional tapestry.

¹ See PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 154-55 (Fordham University Press 1996) [hereinafter *ORDERED LIBERTY*]; see also generally Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285 (2001) [hereinafter *A Worthy Tradition*].

² N.Y. CONST. art. XIX; see also PETER J. GALIE & CHRISTOPHER BOPST, *THE NEW YORK STATE CONSTITUTION* 349-53 (Oxford University Press, 2d ed. 2012).

³ See generally Robert F. Williams, *The Role of the Constitutional Commission in State Constitutional Change*, in *DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK* 46 (Gerald Benjamin & Henrik N. Dullea, eds., Rockefeller Institute Press 1997); see also generally Galie & Bopst, *A Worthy Tradition*, supra note 1.

New York’s Constitution is undoubtedly in need of review and revision. The state’s fundamental charter survives in functional form, but is replete with antiquated passages, such as bond issuances long since expired, and the document has grown cumbersome and is littered with extraneous, duplicative material. New York’s most recent constitutional convention met in 1967, with ballot propositions for conventions having been rejected by the voters in 1977, 1997, and 2017. The legislative amendment process is sporadic and piecemeal and has produced few structural changes in the last half-century.⁴ As the next convention referendum will likely not occur until 2037, the Committee on the New York State Constitution recommends that New York convene a temporary state commission to study the Constitution and recommend amendments.

This report is comprised of five parts. The first part summarizes the background of the Committee on the New York State Constitution and the issuance of the report. Part II provides an overview of the constitutional amendment process in New York. Part III supplies a synopsis of New York’s historical use of constitutional commissions. Part IV presents the Committee’s recommendations and pertinent considerations. Part V concludes that given the obligation of the coordinate branches of government to maintain the vitality of our state’s charter, New York should immediately establish a temporary advisory constitutional commission.

⁴ See 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 286-87 (Peter J. Galie, Christopher Bopst, & Gerald Benjamin, eds., SUNY Press 2016) [hereinafter *All or Nothing*, in BROKEN CONSTITUTION]; see also GALIE, ORDERED LIBERTY, *supra* note 1, at 332 (recounting that in the 25 years since the 1967 convention, 4,437 constitutional amendments were proposed. Sixty-five of these were passed by the legislature and 43 were approved by the voters).

I. BACKGROUND OF THE REPORT

In 2015 New York State Bar Association President David P. Miranda organized the Committee on the New York State Constitution (the Committee). Its function was to serve as a resource on matters related to our state’s Constitution, make recommendations for constitutional amendments, provide counsel regarding the 2017 referendum on whether to convene a constitutional convention, and promote initiatives designed to educate the legal community and public. The Committee has continued to the present day and has examined a wide range of state constitutional topics.

At its meeting held March 10, 2022, Committee Chair Christopher Bopst announced the formation of a subcommittee on constitutional commissions to evaluate the wisdom of convening such a body, and to possibly prescribe the parameters that govern such a commission. The subcommittee met on various occasions. Following extensive research and discussion, the subcommittee issued this Report, which was approved by a vote of the Committee on November __, 2023.

II. AMENDING THE STATE CONSTITUTION

Throughout its history, New York has adopted four state Constitutions: in 1777, 1821, 1846, and 1894. The final one, as amended, is the current constitution under which the state operates. The Constitution of 1777, drafted and approved by the Fourth Provincial Congress, contained no procedure for amending the document.⁵ The 1821 Constitution, the first in the state to be ratified by electors

⁵ N.Y. CONST. of 1777; *see also* 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 162-188 (1906); *also* Benjamin, *All or Nothing*, in BROKEN CONSTITUTION, *supra* note 4, at 288.

following a constitutional convention called solely for that purpose, established a process of amendment via legislative initiative.⁶ This required passage of a proposed constitutional amendment by both houses of the legislature, which would thus be “referred to the legislature then next to be chosen.”⁷ If the newly elected senate and assembly each passed the measure a second time, the proposal would be submitted to the voters for approval by a majority of the qualified electors casting a ballot on the amendment.⁸ First passage required a simple majority of the elected members in each house while second passage required a two-thirds vote of the same group.⁹ The 1846 Constitution modified the legislative amendment process to require a mere majority vote of the elected members of the legislature on second passage.¹⁰ The process by which amendments are originated in the legislature has

⁶ N.Y. CONST. of 1821, art. VIII, § 1; *see also* VERNON A. O’ROURKE & DOUGLAS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK 38-39 (Johns Hopkins Press 1943) [hereinafter CONSTITUTION-MAKING] (noting that although the first constitution contained no amendment mechanism, there “was agitation for constitutional changes as early, at least, as 1811,” both in the legislature and by popular petitions for a convention. After an initial 1820 bill was vetoed by the Council of Revision, the legislature on March 13, 1821 passed a new bill providing for an April convention referendum vote; the “convention question carried by a vote of 106,346 to 34,901, with all but six of the fifty counties favoring the convention.” *See id.*, at 40-42.

⁷ N.Y. CONST. of 1821, art. VIII, § 1; *see also* 1 LINCOLN, *supra* note 5, at 219. The current wording provides that after first passage, the proposal is to be “referred to the next regular legislative session convening after the succeeding general election of members of the assembly.” N.Y. CONST. art. XIX, § 1.

⁸ N.Y. CONST. of 1821, art. VIII, § 1; *see also* 1 LINCOLN, *supra* note 5, at 219.

⁹ *See id.* The 1821 Constitution did not include a provision for a constitutional convention, although the fact that such a convention could be called was beyond dispute.

¹⁰ N.Y. CONST. of 1846, art. XIII, § 1; *see also* 1 LINCOLN, *supra* note 5, at 74. Article XIX also requires that all proposals be referred to the attorney general for a written opinion “as to the effect of such amendment or amendments upon other provisions of the constitution,” but that failure of the attorney general to render said opinion shall not “affect the validity of such proposed amendment or legislative action thereon.” N.Y. CONST. art. XIX, § 1.

remained largely unchanged in the intervening 175 years. The Constitution provides that if “the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon,” the same “shall become a part of the constitution on the first day of January next after such approval.”¹¹

The 1846 convention and resulting Constitution constitutionalized the legislature’s authority to call at any time for a vote of the people to hold a constitutional convention.¹² Yet it also included a profound new mechanism for amendment and revision of the state Constitution that would bypass the legislature, in the form of a mandatory convention referendum to be held every 20 years.¹³ This corrected a lacuna in the work of the 1821 convention described by Charles Z. Lincoln, one of New York’s preeminent state constitutional historians. As Lincoln noted, the 1821 Constitution “did not go far enough, for it did not provide for conventions. The legislature could still decline to recommend a convention, or

¹¹ N.Y. CONST. art. XIX, § 1. Some states require a higher threshold. Tennessee, for instance, requires a proposed amendment to be submitted to the voters during a gubernatorial election and ratification of “such amendment or amendments by a majority of all the citizens of the state voting for governor...” See TENN. CONST. art XI, sec. 3; see also JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 11 (University Press of Kansas 2006) (explaining that in states with similar approval thresholds, “it has been practically impossible for legislative amendments to be ratified” and “[t]he only realistic opportunity to secure constitutional change...has been through constitutional conventions...”).

¹² N.Y. CONST. of 1846, art. VIII, § 2; see also 1 LINCOLN, *supra* note 5, at 275; also 2 LINCOLN, *supra* note 5, at 209-11.

¹³ See *id.* Fourteen states have a constitutionally required periodic convention vote, including: Alaska, Hawaii, Iowa, New Hampshire, and Rhode Island, every ten years; Michigan every 16 years; and Connecticut, Illinois, Maryland, Missouri, Montana, New York, Ohio, and Oklahoma every 20 years.

defer action indefinitely, even if there were a general public demand for such a convention.”¹⁴

The 1846 Constitution thus directed: “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...”¹⁵ New York was the third state to adopt an automatic convention referendum provision.¹⁶ The 1894 Constitution made 1916 the operative date from which the 20-year referendum call would run,¹⁷ and the convention of 1938 reset the commencement date to 1957 to henceforth avoid submission “during a national or state election year...”¹⁸

Many of the particulars of New York’s current provisions governing constitutional conventions such as membership, authority, and procedure, were established by the Constitution of 1894, drafted by a convention which was called in 1886 but delayed over delegate selection issues.¹⁹ Lincoln explains, “while the

¹⁴ See 2 LINCOLN, *supra* note 5, at 210; see also O’ROURKE & CAMPBELL, CONSTITUTION-MAKING, *supra* note 7, at 59 (detailing that “[t]he Convention of 1846 had been preceded by a similar situation to that prevailing before the Convention of 1821, that is, popular agitation and legislative inaction. In 1844, petitions from twenty-four counties had asked that the question of holding a convention be submitted to popular vote.”).

¹⁵ See 1 LINCOLN, *supra* note 5, at 275.

¹⁶ See Benjamin, *All or Nothing*, in BROKEN CONSTITUTION, *supra* note 4, at 289-93 (observing that New Hampshire was the first in 1792 and Indiana the second in 1816).

¹⁷ N.Y. CONST. of 1894, art. XIV, § 2.

¹⁸ See GALIE, ORDERED LIBERTY, *supra* note 1, at 255.

¹⁹ See 3 LINCOLN, *supra* note 5, at 671.

people had the right to determine every twenty years whether a convention should be held...details concerning it, were left to the discretion of the legislature.”²⁰ The 1894 Constitution arrived at “apparently the ultimate practicable stage of evolution on this subject, by providing a convention scheme which is substantially independent of the legislature.”²¹

Article XIX of the Constitution prescribes that if the greater of the votes cast on the convention referendum consent, delegates will be chosen at the next general election, three from each senate district and 15 at-large voted upon by the entire state.²² The delegates are to “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.”²³ The convention’s proposals must be submitted to the electorate for potential ratification at an election “held not less than six weeks after the adjournment of such convention.”²⁴ If a majority of those voting on the proposals approve, the amendments or revision again take effect on the following January the first.²⁵

²⁰ *See id.*

²¹ *See id.*

²² *See* N.Y. CONST. art. XIX, § 2.

²³ *See id.*

²⁴ *See id.*

²⁵ *See id.* Article XIX, § 3 provides that if an amendment is coincidentally proposed by a constitutional convention “relating to the same subject” as an amendment proposed by the legislature, the amendment submitted by the convention is controlling.

After New York’s colonial-era Fourth Provincial Congress became its first constitutional convention in 1777,²⁶ the state has held eight additional conventions: in 1801, 1821, 1846, 1867-68, 1894, 1915, 1938, and 1967.²⁷ Of these, the 1867-68, 1894, and 1938 conventions were held pursuant to mandatory twenty-year calls. Convention referendum propositions were rejected by the voters in 1858, 1916, 1957, 1977, 1997, and 2017.

Eighteen states authorize direct initiatives as a mode of constitutional amendment.²⁸ Others, such as Florida and Utah, have instituted permanent constitutional revision commissions.²⁹ In 1969 Utah adopted a statute creating a

²⁶ New York’s Fourth Provincial Congress convened in White Plains on July 9, 1776, but to avoid the threat of British attack, “it became necessary for the Convention to move from place to place,” including Harlem, King’s Bridge, Odell’s in Phillipp’s Manor, Fishkill, Poughkeepsie, and finally Kingston, where the first state Constitution was adopted on April 20, 1777. *See* 1 LINCOLN, *supra* note 5, at 484, 491-2, 500. This was the only New York State Constitution that took effect without a vote of the people.

²⁷ The 1967 convention was proposed by the legislature and approved by the voters in 1965, the leading impetus being the U.S. Supreme Court decisions rendering New York State’s apportionment schemes unconstitutional. *See* PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 28 (Greenwood Press 1991); *see also* Peter J. Galie & Christopher Bopst, *Constitutional Revision in the Empire State: A Brief History and Look Ahead*, in MAKING A MODERN CONSTITUTION: THE PROSPECTS FOR CONSTITUTIONAL REFORM IN NEW YORK 85 (Rose Mary Bailly & Scott F. Fein, eds., New York State Bar Association 2016) (observing that the 1967 convention “was an anomaly, precipitated by the U.S. Supreme Court decision declaring New York’s reapportionment scheme unconstitutional”) [hereinafter *Revision in the Empire State*, in MODERN CONSTITUTION].

²⁸ The states are Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *See* Galie & Bopst, *Revision in the Empire State*, in MODERN CONSTITUTION, *supra* note 27 at 94.

²⁹ *See generally*, Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL’Y SYMP. 27, 40-46 (1996) [hereinafter *Changing State Constitutions*].

permanent Constitutional Revision Study Commission. This commission, which was not permitted to make recommendations directly to the people, existed for nearly 50 years but was repealed in 2018.³⁰ Florida is unique in that it has two constitutionally established permanent commissions having the power to submit proposals for constitutional amendments directly to the voters.³¹ The first, the Florida Constitution Revision Commission,³² was established when the state's 1968 Constitution was adopted. The second commission, the Taxation and Budget Reform Commission,³³ was designed as part of a 1988 constitutional amendment.³⁴ Each commission meets every 20 years, but the meeting dates are staggered to ensure that one of the commissions meets every ten years. These commissions have both succeeded in having certain of their proposals approved by the voters.

New York does not presently have either a constitutional initiative or a constitutional commission with authority to submit proposals directly to the electorate. The 1967 convention considered proposals for amendment by popular initiative and a permanent revision commission, but both were rejected by the delegates.³⁵ It seems the "closest New York has come to adopting an initiative was in 1935 when first passage for a constitutional initiative was obtained. The

³⁰ See *id.*; see also 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, 14-17 (1996) [hereinafter *Things of the Past*].

³¹ See Williams, *Things of the Past*, *supra* note 30, at 14-17.

³² See FLA. CONST. art XI, § 2.

³³ See FLA. CONST. art XI, § 6.

³⁴ See Williams, *Things of the Past*, *supra* note 30, at 14-17.

³⁵ See HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 212-13 (Rockefeller Institute Press 1997).

proposal failed to obtain the required second passage...,” and “[n]o constitutional convention in New York has proposed the adoption of an initiative in any form.”³⁶ No proposal for a Florida-style constitutional revision commission has ever gained serious traction in New York.

III. THE CONSTITUTIONAL COMMISSION IN NEW YORK

Alongside the familiar avenues of constitutional revision, various states began experimenting with the constitutional commission as early as 1852.³⁷ There are two general types of constitutional commission: preparatory commissions, which are gathered to offer information and guidance in connection with an upcoming convention or convention vote, and study commissions, independent groups charged with analyzing and proposing amendments to a state’s constitution. During its history, New York has convened commissions of both stripes, all temporary in duration, counting as few as five and as many as 42 members.³⁸

For each of its twentieth century conventions, New York formed preparatory commissions to aid the delegates. The Constitutional Convention Commission was created by the legislature in preparation for the 1915 convention;³⁹ the

³⁶ Galie & Bopst, *Revision in the Empire State*, in MODERN CONSTITUTION, *supra* note 27, at 98-99.

³⁷ See Galie & Bopst, *Changing State Constitutions*, *supra* note 29, at 40-46; see also generally Williams, *Things of the Past*, *supra* note 30; see also ALBERT L. STURM, THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968 33-49 (National Municipal League 1970).

³⁸ In 1875 New York created by legislative concurrent resolution a “commission to devise a plan for the government of cities” (S. Con. Res., 98th Sess., 1875 N.Y. Laws 831 [1875]) (the Tilden Commission), but it has been explained that this was “strictly speaking not a constitutional commission...” Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1293.

³⁹ L. 1914, ch. 261.

Constitutional Convention Committee (the Poletti Commission) was appointed by executive order of Governor Herbert H. Lehman in anticipation of the 1938 gathering;⁴⁰ and the Temporary State Commission on the Constitutional Convention was created by statute in advance of the 1967 convention.⁴¹

The state had formed a preparatory commission known as the Temporary Commission on the Constitutional Convention, chaired by Nelson Rockefeller, in advance of the 1957 referendum. The convention call was defeated by the voters that November.⁴² Prior to the 1997 referendum, Governor Mario Cuomo issued an executive order in May of 1993 establishing a Temporary State Commission on Constitutional Revision.⁴³ The commission dutifully conducted its work, but again the voters declined to call a convention.⁴⁴

In addition to New York's experiences with preparatory commissions, the state has seen marked success with independent constitutional study commissions.

Though the proposals of the convention of 1867-68 were largely rejected by the voters in 1869, the demand for constitutional reform survived. With the support of Governor John T. Hoffman, the legislature created a 32-member commission to propose revisions that could be adopted via the legislative amendment process.⁴⁵

⁴⁰ Exec. Order, July 8, 1937.

⁴¹ L. 1965, ch. 443, extended by L. 1966, ch. 129.

⁴² L. 1956, ch. 814; *see also* Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1307.

⁴³ *See* Exec. Order No. 172, N.Y. COMP. CODES R & REGS. tit 9, § 4.172 (1993).

⁴⁴ *See*, Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1313-15.

The commission organized in Albany in December of 1872 and adjourned in March of 1873, later presenting its report to the respective houses of the legislature.⁴⁶ Many of the commission’s proposals received double passage in the senate and assembly, and were subsequently ratified by the voters in 1874. A “new mode of constitutional reform” was thus born in New York.⁴⁷

In 1921 New York formed a 30-member hybrid group to offer amendments solely to the Constitution’s Judiciary Article.⁴⁸ Termed a constitutional convention by statute, this body possessed “all of the characteristics of a constitutional commission,” including the mandate that its proposals be submitted to the legislature for possible further action.⁴⁹ This body presented recommendations on subjects such as the jurisdiction of the Court of Appeals, the structure of the supreme court and appellate divisions, consolidation of the New York City courts, and service by Courts of Appeals judges and supreme court justices as constitutional convention delegates.⁵⁰ The legislature incorporated the majority of

⁴⁵ L. 1872, ch. 884; *see also* 2 LINCOLN, *supra* note 5, at 469-73 (1906); *also* Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1290-92.

⁴⁶ *See* 2 LINCOLN, *supra* note 5, at 471.

⁴⁷ *See* Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1291; *see also* JOHN HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 245 (Neale Publishing Co. 1915) (noting, “[t]he commission of 1872 was an innovation in constitutional evolution in this State”) [hereinafter CONSTITUTIONAL HISTORY].

⁴⁸ L. 1921, ch. 348. New York had previously convened a 38-member commission to propose amendments to the judiciary article in 1890 (L. 1890, ch. 189), but this group’s recommendations met with less immediate success than the 1921 commission. *See* Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1296-98.

⁴⁹ Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1300.

⁵⁰ *See id.*, at 1301-1303.

this body's submissions into a new Judiciary Article, which was approved by voters in 1925. The resulting modifications are said to "represent the most significant reform of the judiciary article in the twentieth century..." and "the last systemic revision of the judiciary article until the adoption of a unified court system in 1961."⁵¹

Following the voters' rejection of the 1957 convention referendum, but in light of the sustained need for constitutional reform, the legislature in 1958 adopted a concurrent resolution creating a Special Legislative Committee on the Revision and Simplification of the Constitution.⁵² Like the preparatory commission immediately preceding it, this committee was again chaired by Nelson Rockefeller. After Rockefeller assumed the governorship in 1959, the legislature created a Temporary Commission on the Revision and Simplification of the Constitution to succeed the Special Legislative Committee.⁵³ These two study commissions both produced comprehensive examinations of the state charter and set forth proposals, many of which were adopted, that led to the "simplification and removal of obsolete material from the constitution."⁵⁴ The success of these commissions "provides ample evidence that important, if non-controversial, constitutional reform can be accomplished in the absence of a convention."⁵⁵

⁵¹ *See id.*, at 1302-03.

⁵² Assembly Res. 164, 181st Sess. (N.Y. 1958); *see also* GALIE, ORDERED LIBERTY, *supra* note 1, at 264; *see also* Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1308-09.

⁵³ L. 1959, ch. 4; *see also* Galie & Bopst, *A Worthy Tradition*, *supra* note 1 p. 1309.

⁵⁴ Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1309.

⁵⁵ *See id.*, at 1311 (noting, "[t]he fact that the more controversial issues, such as reapportionment and state and local tax and debt limits, were the subject of careful scrutiny, but no action, suggests that such issues might require a convention or outside intervention").

IV. RECOMMENDATIONS

The mounting divide between the form and the function of New York's fundamental charter has caused it to be characterized as a "Potemkin Constitution."⁵⁶ While the call for improvement is heard, no attempt at meaningful reform has garnered sufficient public or governmental interest to sustain it. Some reform efforts have met with frank opposition from those entrenched and others resistant to erosion of their vested interests.⁵⁷ Nonetheless, if New York's Constitution is of sufficient consequence to our state's government and the lives of its citizens to warrant maintaining its vitality, then the question remains how best to accomplish such reform in the near term.

A temporary study commission presents an effective solution to our state's perpetual constitutional stagnation. The Committee believes that creating such a body whose sole function is to recommend changes to the legislature will result in a better chance at achieving the desired reform. A commission would be less costly and cumbersome than a constitutional convention. The legislature would still be the sponsor of any constitutional change and the safeguards of the amendment process (double passage by two consecutively elected legislatures) would still be required for any constitutional change. However, the use of a commission would bring more focus and expertise to the amendment process.

The previous use of such bodies in New York and sister states suggests some prudent practices and alternatives. Necessary subjects of consideration when

⁵⁶ See BROKEN CONSTITUTION, *supra* note 4, at 2-6.

⁵⁷ See Benjamin, *All or Nothing at All*, in BROKEN CONSTITUTION, *supra* note 4, at 300-302.

creating such a commission include the commission's mode of establishment, its duration, its scope of authority, the selection, composition, and compensation of its members, and associated costs of such a body.

New York and other states have formed constitutional commissions by various means, including constitutional provision, statute, legislative resolution, and executive order. This Committee recommends that the commission be established by statute, as contributions by both the legislature and governor in the creation and funding of the body will lend it greater credence and increase the chances that the commission's proposals will reflect the needs of the state. Further, the commission should be of a fixed and limited duration. Although some other states have established permanent periodic or standing bodies, the most successful study commissions in New York's history have been temporary bodies. A temporary commission will necessarily limit attendant expenditures. Draft legislation for the creation of such a constitutional commission is Appendix A to this report.

Previous commissions in New York and other states have differed in their scope of authority. Some bodies have been afforded unlimited power to recommend proposals to amend their state's Constitution, while others, such as New York's 1890 commission on the judiciary, have been constrained to certain subjects. The Committee believes the proposed commission should be unlimited in its purview. As the commission will ultimately submit its proposals to the legislature for possible further action, the oft-raised fear about a possible constitutional convention – that the removal of beloved provisions of the constitution could be proposed directly to the voters – is not present.

The commission's membership will bear profoundly on its legitimacy and the likelihood of favorable action on its proposals. The body ought to be sufficiently broad to encompass a diversity of participants and perspectives. The Committee proposes a group of 40 individuals, five selected by the governor, five by the Chief Judge of the Court of Appeals in consultation with the Administrative Board of the Courts,⁵⁸ ten by the Speaker of the Assembly, five by the assembly minority leader, ten by the Temporary President of the Senate, and five by the senate minority leader. No more than three of the five appointments made by the governor and Chief Judge should be of the same partisan affiliation. Consideration was afforded by the Committee to a commission chosen solely by the legislature, but it is believed that adding commissioners selected by the executive and judicial branches will enhance deliberations addressed especially to those branches' concerns. Guidance is taken as well from the Florida Constitutional Revision Commission, whose members are chosen by, among others, the governor and the Chief Judge of the Florida Supreme Court. Mindful, however, that the governor and Chief Judge play no formal role in the amendment process, the Committee believes the majority of the commission members (30 out of 40) should be appointed by the legislative leaders. The Committee further proposes that the leader of the majority party in each house should have more appointments than the minority party, to better reflect the will of the people.

The commission's ranks should include professors of law and political science, similar to New York's Law Revision Commission.⁵⁹ The Committee

⁵⁸ The Administrative Board of the Courts consists of the Chief Judge of the Court of Appeals and the presiding justice of each of the state's four judicial departments. *See* N.Y. CONST. art. VI, § 28(a).

⁵⁹ N.Y. LEG. LAW § 70.

proposes that currently-serving legislators and judicial officers not be permitted to serve as members of the commission, in order that the deliberations of the assembly be free from the existent political environment to the fullest extent and to obviate concerns regarding dual compensation and office-holding.⁶⁰ It is recommended that public sector retirees receiving state or municipal pensions be permitted to serve and be duly compensated, but that no further pension credit accrue based upon such service.

Compensation should be provided for the commissioners' devotion of their time and expertise at a level commensurate with current members of the legislature, together with allowance for travel and associated expenses. This will hopefully encourage diverse participation and simultaneously ward against the perception of elitism.

Consistent with this Committee's 2015 recommendation for a preparatory commission, we propose that any study commission be afforded "a dedicated, full-time, expert staff under the direction and assistance of an executive director, a research director and a counsel."⁶¹ The Committee echoes the 2015 report's further

⁶⁰ See Gerald Benjamin, *Constitutional Change in New York State: Process and Issues*, in MODERN CONSTITUTION, *supra* note 27, at 67 (explaining, "[i]n 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").

⁶¹ See Report of the New York State Bar Association Committee on the New York State Constitution: *The Establishment of a Preparatory State Commission on a Constitutional Convention*, approved by the House of Delegates November 7, 2015, at 22, available at: <https://nysba.org/app/uploads/2020/02/Committee-on-State-Constitution-Report-1.pdf> (last visited September 16, 2023).

observations that “commission will require significant appropriations to accomplish [its] task” but that this would undoubtedly be “a wise investment.”⁶² Acknowledging again both realities, adequate appropriations should be allotted for the commission’s compensation, the prerequisites of its labors, necessary support, and other justifiable expenditures.

V. CONCLUSION

New Yorkers will likely not have occasion to vote on a constitutional convention until 2037.⁶³ Given the pressing need for revision of our state’s Constitution, the Committee on the New York State Constitution recommends the immediate formation of a temporary constitutional study commission to fill this void. The constitutional commission has a worthy tradition in New York and this Committee wholeheartedly recommends its revival.

⁶² See *id.*, at 22-23.

⁶³ Given that voters have rejected the last three convention calls in New York, and no constitutional convention has been held in any state since the early 1990s, approval in 2037 is hardly assured.

APPENDIX A

Model Statute – Temporary Advisory Commission on the Constitution

AN ACT creating a temporary advisory commission on the state constitution to make a comprehensive study of the state constitution and provide recommendations to the legislature for amendment and revision

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. A temporary state commission is hereby created to be known as the temporary advisory commission on the state constitution. The commission shall make a comprehensive study of the state constitution and provide recommendations to the legislature for revision and simplification. The commission shall collect and compile such information and data as the commission deems useful to its purpose.

§ 2. The commission hereby created shall consist of forty residents of the state, of whom five shall be appointed by the governor, five by the Chief Judge of the Court of Appeals in consultation with the Administrative Board of the Courts, ten by the Speaker of the Assembly, five by the assembly minority leader, ten by the Temporary President of the Senate, and five by the senate minority leader. No more than three of the five appointments made by the governor and by the Chief Judge of the Court of Appeals in consultation with the Administrative Board of the Courts shall be of the same political affiliation. The governor, Chief Judge of the Court of Appeals in consultation with the Administrative Board of the Courts, Speaker of the Assembly, and Temporary President of the Senate shall each appoint at least one professor of law or political science from a duly accredited institution. Such members shall serve at the pleasure of the officer making the appointment. The members of the commission shall elect from its membership a chair and vice-chair, who shall appoint a steering committee. Vacancies in the membership of the commission and among its officers shall be filled in the manner provided for original appointments. Currently serving members of the legislature and currently serving judicial officers shall not be authorized to serve on the commission.

§ 3. For the accomplishment of its purpose the commission shall be authorized and empowered to employ an expert non-partisan staff and undertake any studies, inquiries, surveys, or analyses it may deem relevant through its own personnel or

in cooperation with any public or private agencies, including institutes, universities, foundations, or research organizations. The commission shall be empowered to make recommendations to the legislature regarding any aspect of the state constitution.

§ 4. The commission may employ and at pleasure remove such personnel as it may deem necessary for the performance of its function and fix their compensation within the amounts made available by appropriation.

§ 5. The commission may meet within and without the state, hold hearings, and shall have all the powers of a legislative committee pursuant to the legislative law.

§ 6. The members of the commission shall receive compensation equivalent to that of a member of the legislature and shall be allowed their actual and necessary expenses incurred in the performance of their duties. Public sector retirees shall be permitted to serve on the commission but shall accrue no further pension credit based upon such service.

§ 7. The commission may request and shall receive from any department, division, board, bureau, commission, or agency of the state of any political subdivision thereof such facilities, assistance, and data as it deems necessary or desirable to properly carry out its duties.

§ 8. The commission is hereby authorized and empowered to make and sign any agreements, and to do and perform any acts that may be necessary, desirable, or proper to carry out the purposes of this statute.

§ 9. The commission shall make an interim report to the legislature on the progress of its work not later than six months from the date of the commission's initial meeting, with a final report to be issued not later than one year from the date of said meeting. It shall include in its reports such recommendations for revision and simplification of the constitution as it may deem necessary or desirable.

§ 10. Within thirty days of the date of the commission's initial meeting, it shall request from the legislature a list of constitutional issues, priorities, or other suggested modifications as the legislature may deem appropriate for consideration by the commission.