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Government, Law and Policy Journal

A Publication of the New York State Bar Association
Committee on Attorneys in Public Service, produced in cooperation with the
Government Law Center at Albany Law School

The New York State Constitution

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CAPS Announces New Blog for and by Public Service Attorneys

NYSBA's Committee on Attorneys in Public Service ("CAPS") is proud to announce a new blog highlighting interesting cases, legal trends and commentary from around New York State, and beyond, for attorneys practicing law in the public sector context. The CAPS blog addresses legal issues ranging from government practice and public service law, social justice, professional competence and civility in the legal profession generally.

Entries on the CAPS Blog are generally authored by CAPS members, with selected guest bloggers providing articles from time to time as well. Comments and tips may be sent to caps@nysba.org.

To view the CAPS Blog, you can visit http://nysbar.com/blogs/CAPS. You can bookmark the site, or subscribe to the RSS feed for easy monitoring of regular updates by clicking on the RSS icon on the home page of the CAPS blog.

"I am excited that during my tenure as the Chair of the Committee on Attorneys in Public Service our Technology Subcommittee, headed by Jackie Gross and Christina Roberts-Ryba, with assistance from Barbara Beauchamp of the Bar Center, have developed a CAPs blog.

This tool promises to be a wonderful way to communicate to attorneys in public service items of interest that they might well otherwise miss. Blogs are most useful and attract the most interest when they are current and updated on a regular basis, and our subcommittee is committed to making the CAPS blog among the Bar Association's best!

Thanks to the subcommittee for this great contribution!"

—Peter S. Loomis
CAPS Chair

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Message from the Chair

By Peter S. Loomis

In my first message as chair of the Committee on Attorneys in Public Service (CAPS), I talked about our Committee's structure, our past accomplishments and our aspirations for the year ahead. Since then, CAPS has continued its important role as part of the greater Association. In January, CAPS once again sponsored a day-long CLE as part of the Annual Meeting in New York City. In the morning, Brooklyn Law School Professors Jason D. Mazzone and William D. Araiza led a discussion of significant recent decisions of the Supreme Court and important cases currently pending before the Court. The annual Supreme Court review has become a CAPS tradition and continues to be well received. The afternoon program changes each year, and this year's program was entitled *The State Legislature and the State Constitution: The Path Forward.* The session brought together three expert panels whose members represented a variety of perspectives, including academic, judicial, legislative and executive, on the governance issues that have faced New York State over the past year and will continue to be relevant in the coming months. Having attended several of CAPS's past afternoon programs, all of which have been relevant and timely, I thought this year's topic was the most fascinating, and made even more so by the frank comments of the panelists, including the Counsel to the Governor. Special thanks go to our Annual Meeting Subcommittee co-chairs, Natasha Phillip and Spencer Fisher, for their tireless efforts in producing this stellar program.

CAPS closed out this extraordinary day with its annual reception during which our Committee's Award for Excellence in Public Service was presented to three co-recipients. This year's honorees were Diane F. Bosse, former Chair of the New York State Board of Law Examiners; Hon. Patricia D. Marks, of the Monroe County Court; and Peter H. Schiff, of the New York State Department of Law. Selecting recipients is always a challenge since each year a significant number of highly qualified and deserving public servants are nominated. My thanks go to our Awards and Citations Subcommittee co-chairs, Tony Cartusciello and Donna Hintz, for their work this past fall in shepherding the awards process for CAPS. Thanks go as well to former Chief Judge Kaye and Judge Read of the Court of Appeals who graciously agreed to participate in the awards presentation. Judge Kaye had written in support of Ms. Bosse's nomination and Judge Read had been a co-nominator of Mr. Schiff.

As the work of our various CAPS subcommittees continues, it is an appropriate time to reflect on the importance of public sector attorneys to the Association, and conversely, the importance of the Association to those attorneys working in the public sector. It is a symbiotic relationship that does not currently command enough discussion. It was former Association President Kate Madigan who, when she served as chair of the Membership Committee, spearheaded the effort within the Association to determine how the Association could better meet the needs and interests of government attorneys. Former CAPS chair Hank Greenberg discussed the genesis of the Committee in a Message from the Chair in the Spring 2001 issue of the *Government, Law and Policy Journal*. As Hank stated, "…the story begins in 1997—the year when NYSBA's leadership came to grips with the fact that a remarkably high number of attorneys in public service did not belong to any bar association. This under-represented and therefore under-served attorney group posed dilemmas for NYSBA and public service attorneys alike. NYSBA is unable to fully represent the wide spectrum of the legal profession if public service attorneys, with their unique perspectives, go largely unheard, their talents untapped, and their needs unmet." A NYSBA Task Force was assembled to study the issue, which, among other activities, surveyed government lawyers and discovered that managers of government law offices often discouraged their attorneys from participating in bar association activities. Again quoting Hank Greenberg, "…all too often, the Task Force learned, government lawyers were warned that bar association participation was not in the government's best interest or ethically problematic." In 1998, based on recommendations of the Task Force, CAPS was established.

Although we are now in our 12th year of existence and CAPS has enjoyed great successes and garnered increasing respect inside and outside of the NYSBA, the relationship between public sector attorneys and the Association continues to be a work in progress.

CAPS has established itself as the focal point for public sector attorneys in visible ways, as evidenced by our *Government, Law and Policy Journal*, our awards and citations program, and our CLE programs at the Association's Annual Meeting each year. Our talents as public servants have been well tapped and the Association has benefited. Our committee's role in promoting the relevance of the Association to public sector attorneys has been vital and is well recognized by the Association's leadership. We constitute an important segment of the Association's membership. This past year, for example, the House of Delegates adopted the Model Code of Judicial Conduct for State Administrative Law Judges that had been written by our

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Editor's Foreword

By Rose Mary K. Bailly

As many of the contributing authors to this Issue note, the current state of affairs in New York State government is very troubling. Given the situation, the *Government, Law and Policy Journal* was delighted when Bennett Liebman, the Executive Director of the Government Law Center at Albany Law School, accepted our invitation to be the guest editor of this issue which is devoted to an examination of the New York State Constitution, the fundamental basis for our government.

I want to extend my thanks to the authors and all those behind the scenes whose hard work and diligence have made this a successful issue. Our Board of Editors was extremely helpful in identifying scholars and lawyers who would lend their expertise to this analysis. I would like to especially thank our Executive Editor for 2009-2010, Ali Chaudhry, Albany Law School, Class of 2010. He and his colleagues from Albany Law School, Robert Axisa, Jeremy Cooney, Stephen Dushko, Marwa Elbially, Lynn Evans, Jillian Kasow, Joi Kush, Daniel Schlesinger, Robin Wheeler, and Andrew Wilson, diligently reviewed and edited the articles.

We are again indebted to the staff of the New York State Bar Association, Pat Wood, Lyn Curtis and Wendy Harbour, for their expertise and enduring patience. And last, and always, my thanks to Patty Salkin for her inspiration and infectious enthusiasm for this topic.

Finally, any flaws, mistakes, oversights or shortcomings in these pages fall on my shoulders. Your comments and suggestions are always welcome at rbail@albanylaw.edu or at Government Law Center, 80 New Scotland Avenue, Albany, New York 12208.

Message from the Chair *(continued from page 2)*

CAPS ALJ Subcommittee. Today, public sector attorneys constitute an important segment of the Association's membership.

Nonetheless, percentage wise, the number of public service attorneys who are members of the Association remains considerably lower than among those in the private sector, and while the Association's dues structure may be a stumbling block for some, one still hears stories that some government offices are less than supportive of their attorneys' bar activities. This is truly unfortunate, because participation by public sector attorneys in bar activities simply makes them better lawyers. Too often, government attorneys are isolated and have little contact with other public sector lawyers except those with whom they may work on a daily basis. There is little time or opportunity for interaction with others, even though it can benefit both the agency and the attorney. Being active on the various CAPS subcommittees, for example, whose membership is open to all Association members, affords public sector attorneys valuable opportunities to exchange ideas and share best practices with others in similar settings and situations. From my own perspective, I recall knowing very few public sector attorneys other than those with whom I worked until I became active on the ALJ Subcommittee several years ago. I know that as a direct result of my experiences on that Subcommittee and later as a member of CAPS itself, I have experienced enormous professional growth and personal satisfaction. Discussions with ALJs in other agencies over the years have confirmed my belief that absent involvement in Associations such as ours, we have few arenas available in which to share experiences and learn how others have dealt with similar issues. Aside from the more recognized benefits of NYSBA membership, including CLE at a reduced cost and sponsored insurance programs, bar membership by public service attorneys can bring them into a community of their peers, where they will find real avenues for growth and enrichment. There are likely countless numbers of public sector attorneys working in New York who remain professionally isolated and for whom membership in the Association could be a rewarding experience. The trick is to identify those attorneys and share with them information about the Association and CAPS. Our Membership and Association Outreach Subcommittee is presently engaged in an effort to identify public sector attorneys so that we can have that discussion. It is my hope that during my remaining tenure as chair CAPS can play an increasingly effective role in bringing more public sector attorneys into the Association.

Introduction: The New York State Constitution

New York State's existing constitution is always a ripe topic for review. There has not been a Constitutional Convention since 1967, and 1938 was the last year that the work of a Constitutional Convention was at all successful in revamping the basic law of the State. The next regularly scheduled statewide vote on a Constitutional Convention is in 2017.

Yet, at a time where most of the residents of New York State are seriously questioning the ability of State and local governments to deliver timely basic services, shouldn't there be an effort made to review the basic document that provides the framework for the delivery of these services? Cynical political observers (and far too many of us have become just that) will generally agree upon the need for Constitutional review but will ridicule and snivel at the idea that anyone will actually seriously venture to amend the Constitution. They believe that too many interest groups are already vested in maintaining aspects of the existing Constitution, and that the public will view the process of amending the Constitution as being little different from the current manifestly dysfunctional political process.

So conventional wisdom suggests that no serious players in New York State should touch constitutional revision with a ten foot pole. The contributors to this issue of the *Government, Law and Policy Journal* do not believe that mere lip service should be paid to the issue of revising the State Constitution. With the exception of the articles that I have contributed, our most knowledgeable, wise, and experienced people have contributed their ideas to this issue. You are certainly free to snivel at and ridicule anything that I have submitted, but please take a serious look at the other articles in this *Journal*. The business of reviewing our basic governing document deserves your most critical attention.

Bennett Liebman, Executive Director
Government Law Center
Albany Law School

When Is Constitutional Revision Constitutional Reform? Constitutional Development in New York

By Peter J. Galie

Overview

Like most state constitutions, New York's Constitution is more easily amendable than the national document. Passage of a proposed amendment by majority vote of the legislature in two sessions with an intervening election, and ratification by a majority of the voters at a general election, are sufficient.[1] The Constitution further requires that the question of whether to hold a constitutional convention "to revise the constitution and amend the same" be placed on the ballot every twenty years. If a majority of voters at the general election agree, a constitutional convention is formed. The Legislature, at any general election, can submit that question to the voters. In both cases any changes proposed by the convention must be submitted to the voters at a general election. The process is at once majoritarian and participatory, allowing the citizens a direct role in approving constitutional changes not available at the national level. Nineteen states permit constitutional amendment by initiative: New York is not one of them and has no tradition of constitutional change by popular initiative. Attempts to raise the issue at constitutional conventions have garnered little support.

The relative ease of constitutional change by formal mechanism is reflected in the state's constitutional history: eight constitutional conventions, four constitutions and over 220 amendments to the current constitution. As important as the judiciary and the Attorney General have been, it remains true that the primary means of altering the constitution in New York has been through formal constitutional mechanisms, that is, a constitutional convention or constitutional amendments. The federal judiciary has played a much larger role in constitutional change than has the state judiciary. The willingness of New York and the states in general to make regular changes in their constitutions, and the ability of the citizens to play a direct role in the process of constitutional changes, are two salient differences between the national and state constitutional traditions.[2]

One result of this willingness to entertain constitutional change is that state constitutions are generally long, complex documents, containing materials that read more like statutory law or administrative codes than constitutional law. New York's current constitution contains 51,700 words. Alongside lofty and significant protections of freedom of speech and due process are provisions for the drainage of swamp or agricultural lands, pari-mutuel betting on horse racing, ski trails, and divorce.

In responding to the unique role provided for states by the federal system, New York shares this state constitutional tradition while producing a constitutional history that reflects the unique character and traditions of the state. To that tradition we shall now turn.

"The willingness of New York and the states in general to make regular changes in their constitutions, and the ability of the citizens to play a direct role in the process of constitutional changes, are two salient differences between the national and state constitutional traditions."

Constitutional Development from Colony to Constitutional Republic: The Constitution of 1777[3]

The roots of constitutional government in New York are embedded in the state's colonial history, which, in turn, was rooted in English constitutional and common law. Four factors shaped the contours of the first constitution of New York State: the existence of prominent and politically active elite, many of whom were provincial gentry whose power rested in their landed estates; the early development of a heterogeneous society with an accompanying factional politics; the existence of charters functioning as instruments of government; and a strong commitment to liberty protected by and rooted in the common law, Magna Carta, and various acts of parliament.

Two of the five charters governing the colony between 1629 and 1776 stand as milestones in the development of the colony's legal tradition: the Charter of Liberties and Privileges of 1683, New York' first experiment with representative government; and the Charter of Liberties of 1691. In addition to providing a governor, council, and assembly, they guaranteed due process of law, trial by jury, religious liberty, and no taxation without consent of assembly.

By the beginning of the 18th century the constitutional structure of New York resembled the pattern developed in England after the Glorious Revolution. The council soon developed a separate role and would be the basis for a state senate. The structure in place by the middle of the 18th century would be adopted with minor changes in the Constitution of 1777.

The Fourth Provincial Congress, or "the Convention of Representatives of the State of New York," as they renamed themselves in July 10, 1776, was both a governing body and constituent assembly. It was the result of a special election called to give the provincial assembly a mandate to form a new government. This election implicitly recognized a distinction between a constitutional convention and a legislative body, and the notion of a state constitution as superior to legislative enactment. It met in March 1777. The central issues were how democratic should the government be and how the powers should be distributed among the branches of the government. On the first issue, compromise created an electorate in which nearly 60% of adult males and 70% of heads of families could vote for members of the assembly but only roughly 29% for senators and the Governor. No distinction was made between white and black males for purposes of voting. A tripartite structure was established with a bicameral legislature. The governor was to be elected directly by the people for a term of three years, giving him an independence and stability not available in other states. He shared his veto power with a Council of Revision consisting of the governor, the chancellor, and judges of the Supreme Court, whose veto could be overridden by a two-thirds vote in both houses. The council was to exercise the veto to strike down unconstitutional as well as unwise legislation.[4] Appointments were to be shared with a Council of Appointments, consisting of the Governor and four senators chosen by the assembly—one from each of the four the great senate districts. The judiciary was given a degree of independence, serving "during good behavior." A Court of Impeachment and Correction of Errors, composed of the president of the senate, senators, the chancellor, and judges of the Supreme Court, was established to try impeachments and correct errors on appeal from the Supreme Court or Chancery. These institutions suggest that, whatever their commitment to the doctrine of the separation of powers, it did not prevent them from mingling various powers for specific purposes.

Although no formal bill of rights was included, there were provisions establishing the right of property owners to vote, religious freedom, a right to trial by jury, a due process clause, right to counsel, a conscientious objector clause for Quakers, and protection against bills of attainder. Additionally, the constitution provided for continuation of the common law where not inconsistent with or superseded by state law, which afforded important protections. The religious liberty provision ended the tradition of multiple religious establishments in the state, thus defusing the potentially explosive church-state issue.

The Constitution was approved on April 20, 1777, at Kingston, New York, marking that day as the birth of New York as a constitutional state. In forty-two sections and fewer than 7,000 words, the 1777 Constitution embodied the great ideas and institutions for which it is justly praised. Its preamble incorporated the Declaration of Independence, and particularly in its treatment of executive power the document directly influenced the work of the 1787 constitutional convention in Philadelphia. Just as important are the issues that were not addressed. John Jay lamented the fact that no clause prohibiting domestic slavery was included. No provision mentions education and, most surprisingly, no method of amending the document was provided.

Among the reasons for the success of the document was the fact the convention did not alter those aspects of the governing process that had proven effective. That continuity, combined with the moderate character of the document, enabled it to achieve legitimacy, which, in turn, accounted for the relatively smooth transition from colony to constitutional republic.

The First Constitutional Convention: 1801

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

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

Participation and Property: The Constitutional Convention of 1821

The Convention of 1821 originated as an attempt by Tammany Hall to destroy DeWitt Clinton. Not that there weren't legitimate issues of constitutional reform. The state had grown in population from just over 190,000 in

1777 to 1,300,000 in 1820, with much of the growth coming in newly settled areas of the West and North. The suffrage, apportionment and judicial service provisions of the constitution of 1777 disadvantaged these new settlers. The Council of Appointment had become the chief vehicle for the spoils system and the Council of Revision was increasingly seen as an anti-democratic check on the will of the people.

In the absence of any constitutional provision for calling a convention, it fell to the Legislature to make the decision. A dispute with the Council of Revision forced the Legislature to place the question of a call for a convention before the people and to include a provision that required convention proposals to be ratified by the people before taking effect. This decision established the tradition in New York of making constitutional conventions the creatures of the people and not the Legislature. The convention would focus on four issues: suffrage, the appointing power, the power of the Council of Revision, and reorganization of the judiciary.

On the question of suffrage, property qualifications for white males were removed, but simultaneously delegates placed a property qualification on African Americans, disenfranchising all but a handful of the 6,000 free adult black males. The debates over property qualification for voting have been justly called one of the great suffrage debates in American history.

The Council of Appointments was abolished. The convention decided to make some offices elective, some appointed by local bodies, some by the Legislature, and some by the Governor. The Council of Revision, under attack as being a violation of the separation of powers, anti-democratic and too partisan, was also eliminated. The replacement was modeled on the national presidency, with the governor possessing a veto that could be overridden by two thirds of the Legislature. He was also given the power to see that the laws were faithfully executed. Contrariwise, the governor's term was reduced from three to two years and his power to adjourn the Legislature was eliminated.

Concerning the judiciary, a new system of circuit courts was created, members of the Supreme Court were dismissed and a new Supreme Court created, the latter a measure aimed at the alleged partisanship of sitting judges. The convention added a provision requiring a two-thirds vote of Legislature for passage of any bill appropriating money or property for local or private purposes, beginning a tradition of restricting legislative action that would continue throughout the 19th century. For the first time the canal policy of the state was constitutionalized. Unlike its predecessor, the 1821 convention devoted a separate article (VII) to a bill of rights for its citizens, drawing its provisions largely from the English Bill of Rights of 1689, the Bill of Rights adopted by the state Legislature in 1787, and the federal Bill of Rights of 1791. Unique to the state constitution was a provision allowing conscientious objection to any member of a religious denomination.

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

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

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

Several other issues needed to be addressed. State indebtedness created by extensive public works programs, a system of land tenure which led to anti-rent riots, problems created by special incorporation of private enterprises, and a judiciary unable to cope with rapid growth of state were major factors in the drive for a constitutional convention.

The convention swept away the old feudal system of land ownership, constitutionalized debt structure for the canal, and eliminated bank monopoly by limiting the Legislature's power to grant special charters. Practically all local offices were made elective; senators' terms were reduced from four to two years, and assemblymen were to be elected from single-member districts to give representation to smaller opinion clusters. The judiciary was made elective and completely reorganized, with a Court of Appeals established as the court of last resort, replacing the old Court of Impeachment and Correction of Errors. The offices of secretary of state, treasurer, attorney general, comptroller, canal commissioner, state engineer, and state prison inspector were made elective. Reflecting general disillusionment with legislative branch, delegates added twenty-two restrictions on legislative power, including two remarkable provisions mandating a popular referendum for issuance of any long-term bonds and the placing of a limit of one million dollars on the aggregate temporary debt of the state.

The convention devoted some attention to rights, adding provisions protecting against excessive fines or bail, cruel and unusual punishment, and unreasonable detention of witnesses. The capstone of the convention's drive to democratize the polity came with the addition

of a new mode of initiating constitutional reform. The delegates provided that in 1866 and every twenty years thereafter, and also at such other times as the Legislature may provide, the question "Shall there be a Convention to revise the Constitution and amend the same?" be submitted to the voters. Only on the question of equal suffrage for black males did the delegates hesitate, submitting that provision to the voters as separate question. The proposed constitution was approved overwhelmingly, but the special amendment for African Americans was rejected by a similar margin. It was essentially a new document with only eleven provisions unchanged. State and local offices were democratized, legislative power was restricted, executive power was diffused, all in the name of grassroots democracy. For this reason the Constitution of 1846 has been called the "People's Constitution."

The First Failure: The Constitutional Convention of 1867

The Convention of 1867 was the first to be called as a result of the "every twenty years" provision. The Judiciary received the most attention, and changes aimed at reducing the backlog of cases and extending terms of judges to fourteen years were submitted separately to the voters and approved in 1869.

The most contentious issue, African-American suffrage, embroiled the convention in the politics of race. Delegates proceeded cautiously, submitting an equal suffrage amendment as a separate item, which was defeated in 1869. The issue of women's suffrage also received some attention, but delegates declined to recommend it because public sentiment did not demand and would not sustain such a revolutionary innovation. The delegates proposed significant reforms in other areas: senators would be elected to four years; more restrictions on legislative power were added; the governor's powers were strengthened; and a court of claims was created. For the first time in a constitutional convention in New York a Committee on Cities was created and a serious attempt was made to address the question of home rule. Caught in the crossfire between the desire to address the corruption in the cities and the impulse towards local autonomy, the final recommendations did not provide much in the way of home rule.

An unreasonable search and seizure clause was added, as were provisions allowing for juries of less than twelve, one calling for free common schools, and a new article dealing with bribery of public officials. The voters rejected the proposed constitution.

Efforts towards reform continued in the state and gave birth to a new mode of constitutional reform, the constitutional commission. Commissions called by governors between the conventions of 1872 and 1894 made significant recommendations concerning the judiciary, legislature, the executive, debt, the cities, and corruption. Many of these recommendations found their way into the constitution by way of legislatively proposed amendments. Henceforth, constitutional commissions would play an important role in state constitutional reform.

The Constitution of 1894: Confronting a "New" New York

The question of whether to hold a convention was put to the voters as required in 1886, but disputes over delegate selection held up a convention until 1894. The convention incorporated changes in the judicial article recommended by the Judiciary Commission of 1890, adopted a "forever wild" state forest preserve in the Adirondacks, founded the University of the State of New York, set up a merit based civil service system, and established some home rule provisions. Provisions regulating registration, authorizing voting machines, and setting up bipartisan election boards were attempts to reduce electoral fraud. The Legislature was apportioned in such a way as to ensure representation of all counties and prevent the counties of New York City from ever dominating the Legislature. Finally the convention established the present method of selecting delegates to a constitutional convention, namely, three from each senatorial district and fifteen elected statewide.

In the area of rights, a provision forbidding any aid, direct or indirect, to institutions of learning under the direction of a religious denomination (often referred to as the Blaine Amendment) was added. A second addition to Article I guaranteed a right of action to recover in wrongful death cases, preventing the legislature from capping monetary damages. A women's suffrage amendment was reported to the floor of the convention. After a long and thoughtful debate it was rejected. The voters approved the proposed constitution and, as amended, it is the present constitution of New York.

The Constitutional Convention of 1915

The "every twenty years" clause would have put the convention question on the ballot in 1916, a presidential election year. The Legislature moved the date to 1914 and the electorate approved a convention by the slimmest of margins. The convention took place in the prime of the progressive movement and ideas of efficient and responsible government dominated the convention. The delegates approved measures for executive reorganization and consolidation, the short ballot, and an executive budget. Some steps were taken to move the government away from a principle of separation of powers, allowing more coordination between executive and legislative branches.

Three measures were adopted in the area of rights protection: a separate amendment would be submitted on the question of women's suffrage; an equal protection

clause probably modeled on the Fourteenth Amendment was included; and defendants accused of minor crimes would be allowed to waive their right to indictment by grand jury and jury trial. The proposed constitution was grounded on a philosophy of expertise, efficiency, and economy, reflecting the ideas of leading reformers of the progressive era who extolled the virtues of business and the British parliamentary system. The proposed constitution was rejected overwhelmingly.

The defeat of the convention's work did not end the push for reform. Between 1917 and 1938, most of the measures proposed in 1915 were adopted through legislative amendment, including a women's suffrage amendment (1917), reorganization of the judiciary (1925), executive consolidation and the short ballot (1925), an executive budget (1927), and a four-year term for the governor (1937). Collectively, these amendments reshaped New York government in the first quarter of the 20th century.

Constitutional Reform and the Depression: The Convention of 1938

With no clear mandate and no specific constitutional issues, few expected much from the 1938 convention. Yet the social and economic issues ignored in 1894 and 1915 could no longer be ignored in a depression. Delegates were forced to reevaluate their understanding of the role of government in society. The most striking features of the revisions were the addition of a "bill of rights for labor" and two new articles on the care of the needy and housing, which recognized the State's responsibility for creating a safety net for those needing support in the necessities of life. Following an enlightening debate on civil liberties, protection against unreasonable search and seizure was provided. A provision prohibiting discrimination against an individual's civil rights on the basis of race, color or creed would mark the first appearance of an equal protection clause in the State's constitution and included protection against private and state discrimination.

The convention created a new article on local finance, consolidating the various provisions concerning the debt and taxing powers of local governments, and created a new article on taxation. In line with new understanding of the role of government, delegates liberalized some of the restrictions placed on the Legislature in the 19th century, but simultaneously imposed additional restrictions on use of state credit and on public authorities.

Two additions affected the amending process: the first required that all amendments be submitted to the attorney general for a non-binding opinion on their impact on other sections of the constitution; the other prohibited submitting the question of holding a convention during a national or state election year and fixed 1957 as the next automatic submission year.

The convention submitted its work in the form of nine separate amendments allowing voters to pick and choose rather than submitting the changes as part of a new constitution for a yes or no vote. Voters approved six of the nine, rejecting the three generally viewed to be the most partisan: proposals barring use of proportional representation by local governments, revising the apportionment formula, and creating a new judicial district.

"A Modern Constitution?" The Constitutional Convention of 1967

New Yorkers amended the constitution 93 times between 1939 and 1966. Among others, these amendments created departments of commerce and motor vehicles, accomplished court reorganization (1961), added a bill of rights for local government (1963), and established a lottery to support education. In 1957, voters said "no" to the question of calling a convention. However, a series of ground-shaking Supreme Court decisions declaring New York's apportionment scheme a violation of the national constitution precipitated a legislative call for a constitutional convention.[5] The voters approved.

The Convention produced a substantially revised document which made extensive changes. The length of the document was cut in half, and the number of articles was reduced from twenty to fifteen. Concerning rights, the ban on aid to sectarian schools was eliminated, and an exclusionary rule and a conservation bill of rights were added. The state would assume the cost of welfare programs over a ten-year period as well as the cost of the statewide court system. The governor's pocket veto power was eliminated but he was given more flexibility in administering the executive branch. Apportionment was taken out of legislative hands and placed with a special commission. Provisions were added, moving the state towards providing free higher education, and reducing the voting age to eighteen. The debt-approval referendum requirement was removed.

The delegates produced a more streamlined document with minimal restrictions—a constitution designed for an activist state. No constitutional convention in New York was more responsive to the needs of the cities, but its bold initiatives in the area of welfare, education, and community development, among others, proved too much for the voters. Opposition to the controversial provisions, combined with tepid support from reformers, resulted in a stunning defeat.

Constitutional Developments: 1968-2010

The failure to pass significant constitutional revisions did not dampen the willingness to amend the document. Fifty-two amendments were adopted between 1968 and 2010. Eight of those concerned the judiciary. Collectively they authorized a centralized administration of the court

system, established a Commission on Judicial Conduct, and adopted a merit selection system for the Court of Appeals. Thirteen involved another perennial issue, debt and tax limitations, nearly all of which relaxed debt limitations to allow additional state and local borrowing. In 1995, a series of wide ranging proposals addressing the State's questionable financial practices, particularly the use of "back door financing" devices, were rejected by the voters, and attempts in 2005 to revise the budget process to ensure timely budgets and a greater role for the Legislature were also rejected. A gender-neutral language amendment was approved in 2001. None of the amendments adopted in the past thirty years addressed the major constitutional problems facing the state. In 1977 and 1997, voters answered "no" to calls for a constitutional convention and the State entered the 21st century with the constitution adopted in 1894.

Related to this decline in the resort constitutional reform to confront problems facing the state is the fact that constitutional developments taking place in other states in the last quarter of the 20th century did not take root in New York. These include amendments limiting the tenure of governmental officials, transferring policymaking power to the people through constitutional initiative, and reducing the powers of state officials by limiting the funds government could raise or spend or requiring super majorities for enactment of tax increases.[6]

Reform and Effective Government in New York

State constitutions are expected to shape collective public identities or character by articulating the collective aspirations of the citizenry; organize government with sufficient power to act with efficiency and responsiveness; limit power to prevent its abuse; and protect rights and liberties. How effective has the State's constitution been in achieving those goals? Articulating collective aspirations and identities in a heterogeneous state is no small feat. The combination of collective benevolence, competitiveness and a willingness to tolerate individual diversity are identified as the features New York's political culture is reflected in, and have been preserved and fostered by the charter.

How effective the constitution has been in enabling the State to meet the challenges of governing New York is more problematic. By the end of the first decade of the 21st century, discontent with New York government had reached record levels. Nearly every reform or public interest group in the state has issued reports expressing dissatisfaction with the state of the State and calling for extensive reform. These include, among others, the Brennan Center, The Citizens Budget Commission, Center for Governmental Research, Citizens for a Better New York, Empire Center for New York State Policy, Manhattan Institute for Public Policy Research, Citizen's Union, Common Cause, NYPIRG (New York Public Interest Research Group), and The League of Women Voters.

The list of items suggested for inclusion on the reform agenda is extensive:

- The convention delegate selection process may violate the Voting Rights Act of 1965 as amended,[7] and in any case, as presently structured will likely not produce the diversity necessary for an open and representative convention;
- a permanent constitutional reform commission;
- an independent, non-partisan commission, rather than the Legislature, to draw district lines to ensure a non-gerrymandered, open and competitive political process;
- a balanced budget, an independent budgeting commission, and timely budget adoption;
- the extent to which state and local governments should be subjected to tax and debt limitations;
- the extent to which the State should rely on public authorities; term limits on legislators;
- a constitutional initiative;
- campaign finance reform provisions in the constitution;
- ethics and lobbying reform;
- simplified court system;
- appointed or elected judges;
- consolidation of the multiple layers created by 4,720 local taxing jurisdictions;
- political and fiscal autonomy for local governments;
- removal of ban on gambling;
- housekeeping changes including elimination of obsolete items, and provisions that have been declared contrary to federal law such as the apportionment provisions of Article II and the requirements of truth, good motives and justifiable ends, when defending against criminal prosecutions for libels.[8]

Before any attempt is made to adopt any of these proposed reforms, a number of questions need to be addressed. Are the structures and procedures inadequate, and how is that determined? When is the constitution the appropriate vehicle to achieve policy goals? Are the limits in the constitution too restrictive or not restrictive enough, and on what basis is that judgment to be made? Are the fundamental principles and policies contained in the documents in accord with the State's political culture? It has been an assumption, if not an article of faith, in the state constitutional tradition that constitutional reform is a continuous and necessary process to correct problems that have arisen by virtue of new social and economic circumstances, or to rectify defects in the constitution itself.

Understanding the nature and evaluating the effectiveness of constitutional reform requires examination questions, which have yet to receive systematic and empirical scrutiny by scholars or reformers.[9]

The assumption that the constitution is a locus for reform raises other questions, on which little research has been produced. What are the criteria one might use or the factors to consider that will enable us to make informed judgments as to when constitutional reform will be successful and when it will not? One exception to this generalization is the research on the effectiveness of constitutional limits on debt accumulation.[10] What kinds of constitutional provisions are most likely to achieve the desired result? Are self-executing provisions more effective than those authorizing the Legislature to implement the provision? Are proscriptive provisions more effective than those allowing for discretion on the part of decision makers? The "Forever Wild" clause of the New York Constitution is self-executing and authorizes suits by citizens to restrain violations of the article.[11] The article also contains a provision stating it shall be the policy of the state to conserve and protect its natural resources and scenic beauty.…"[12] The latter is a non-self-executing provision but one that has had its broad policy goals implemented by statute.[13] Are detailed provisions describing what is to be done and how more effective are such provisions than those authorizing the Legislature to fill in those details? When is detail necessary and when should constitutional provisions be brief and general? The Judiciary Article, one of the longest in the document, spells out in detail court structures and procedures, leaving little discretion to the Legislature. The National Constitution leaves most of that detail to the legislative branch. Contrariwise, the articles on social welfare, housing and education authorize the Legislature to implement the provisions. The latter approach gives the judiciary as well as the legislature discretion. Courts can intervene or not depending on judges' understanding of the role of the courts. A case in point is the Court's interpretations of the education article. Historically, the State's judiciary took a "hands-off" policy on the implementation of the section that required the Legislature to provide for support of "a system of free common school wherein all the children of the state may be educated."[14] It rejected the claim asserting that this clause required equitable funding for school districts.[15]

Another important question is the extent to which constitutional failure is due to a disjuncture between the provisions of the document and the political culture of the State. The consequences of such fissures are evident when the question of what to do about the debt limit and gambling provisions of the constitution are raised.

Constitutional Reform in New York: The Future

The pervasive public discontent and the consensus on the need for reform raise an intriguing question about constitutional reform in New York. Given the extensive dissatisfaction with state government, and the chorus of groups that have indicted the state's political process, why has this state of affairs continued?

One reason is the lack of consensus as to what should be done with these provisions. The divisions that have limited their efficacy have simultaneously made it difficult to gather the political support necessary to achieve constitutional change. That the extensive dissatisfaction with New York State government has not yet been channeled into a politically effective movement for constitutional reform is also a contributing factor. Under these conditions political elites are reluctant to start down that path. Past political leaders such as former Governor Mario Cuomo and former Mayor of New York City, Rudy Giuliani, have publicly supported a constitutional convention; but neither the legislative leadership of either party nor the governor has spoken in favor of holding a convention. Legislative support for reform is crucial: no constitutional amendments and no constitutional convention, at least until 2017, can take place without legislative action. Even resort to constitutional commissions depends on legislative support, as any commission recommendations would require legislative approval.

Constitutional reform by constitutional convention is made more problematic by objections to holding a convention, shared even by those who believe reform is necessary. These include:

- The senatorial district system used in the delegate selection process is discriminatory and will not provide a fair, open, and representative convention;
- State officials who served as delegates are eligible for dual compensation allowing for "double dipping";
- A convention would be ineffective because it would be controlled by the same insiders and party leaders who are part of the problem;
- Conventions are cumbersome, unwieldy and expensive ways to achieve reform;
- A Pandora's Box would be opened allowing for a runaway convention that might threaten the basic values embodied in the document.

Supporters of a convention make the following responses:

- Problems with the delegate selection process can and should be remedied by legislative action before any convention is called;
- A more open delegate selection process will mean a convention of more than just insiders;
- Less than a third of delegates at the last constitutional convention held in 1967 were legislators or

former legislators and that convention produced a bold, forward looking document;

- An examination of the eight constitutional conventions held in New York supports the conclusion that conventions in New York have remained near the center of the political spectrum, sometimes moving in the direction of pragmatic liberalism, and other times towards a moderate conservatism. Though theoretically unlimited, they have in fact functioned within very effective practical limitations: the state constitutional tradition which they inherit; the inevitable need for compromise in a state of such diversity—a process effectuated by the political parties who organize the convention; and by the fact that voters must approve any proposed constitution. These considerations, it is argued, make the specter of a Pandora's Box little more than a theoretical possibility.[16]

The New York State Constitution is an imperfect document, generally acknowledged to be in need of reform. Nonetheless, in its 223-year history, it has enabled New Yorkers to accommodate new social forces, expand the electorate and develop a system of civil liberties of which New Yorkers can be justly proud. It is a constitution that has committed the state to the protection of social and economic—as well as political—rights. In the past, New Yorkers have demonstrated a willingness to ponder and revise their constitution. Although the electorate rejected calls for a convention required to be on the ballot in 1977 and 1997, the financial crisis facing New York in the opening decades of the 21st century, coupled with the widespread dissatisfaction of the public with the government, have brought the question of constitutional reform once more to the fore.

Endnotes

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2. John J. Dinan, The American State Constitutional Tradition 272-74 (2006).
3. The following materials are drawn from Peter Galie, Ordered Liberty: A Constitutional History of New York (1996).
4. Madison likely had this device in mind when he proposed a Council of Revision as a further check on the House of Representatives. *See* The Federalist No. 51 (James Madison).
5. *See* WMCA Inc. v. Lomenzo, 377 U.S. 633 (1964) (invalidating the apportionment provisions of the New York State Constitution).
6. *See* G. Alan Tarr, Understanding State Constitutions 157-59 (1998) for discussion of this "new agenda" in state constitutional reform.
7. 42 U.S.C. § 1973.
8. N.Y. Const. art. I, § 8.
9. One exception to this generalization is Charles Press, *Assessing the Policy and Operational Implications of State Constitutional Change*, *in* 12 Publius 99–111 (Winter 1982).
10. *See* Beverly Bunch, *The Effect of Constitutional Debt Limitations on State Governments' Use of Public Authorities*, *in* 68 Public Choice 57–69 (1991); David C. Nice, *The Impact of State Debt Policies to Limit Financing*, *in* 21 Publius 69–82 (1991).
11. N.Y. Const. art. XIV, § 1.
12. N.Y. Const. art. XIV, § 4.
13. N.Y. Envtl. Conserv. Law §§ 1-0101, 15-0101.
14. N.Y. Const. art. XI, § 1.
15. *See* Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27 (1982). However, in Campaign for Fiscal Equity v. New York, 100 N.Y.2d 893 (2006), the Court of Appeals held that the clause required the state to distribute funding for education in such a way as to guarantee that each student receives a sound basic education.
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A Convention for New York: Overcoming Our Constitutional Catch-22

By Gerald Benjamin

> There was only one catch and that was Catch–22.…Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to.
>
> —Joseph Heller, *Catch–22*

A Quinnipiac poll released on December 16, 2009, reported that fifty-eight percent of New Yorkers characterized their state government as the "worst" or "among the worst" in the nation.[1] Seventy-two percent were negative about the job the state legislature was doing.[2] In a relatively new development—incumbents are almost always supported, even when the institutions in which they serve are not[3]—a near majority (forty-six percent) advocated replacement of their own state senator.[4] And almost two thirds (sixty-three percent) supported calling a constitutional convention to reform state government.[5]

The voters' views were shaped in a very bad year for New York State government. The first Democratic Senate majority in almost a half century was elected in 2008, but then could not organize itself; the entire Legislature was frozen in inaction while leadership issues preoccupied that house. A few months later, two Democratic Senators briefly joined the Republicans, creating another episode of stasis before they returned to the fold. Several Senators were under investigation for corruption; one—Hiram Monserrate—escaped felony conviction for beating and slashing his female companion, but still faced expulsion by his colleagues.

As for Governor Paterson, he had earlier admitted to infidelity and the use of illegal drugs and was himself in office because his predecessor had been forced out by a sex scandal. Throughout 2009, Paterson's political obituary was written and rewritten as he fumbled the appointment of a U.S. Senate successor to Hillary Clinton after she resigned to become U.S. Secretary of State, and he was unable to coax an effective response from the Legislature to the most serious fiscal crisis in New York in at least a third of a century. Meanwhile, the Senate's former Republican Majority Leader, Joe Bruno, was convicted in federal court for influence peddling.

New Yorkers' willingness to consider a constitutional convention was led by a growing bipartisan chorus of prominent voices advocating this path to reform. Though there was not widespread agreement on the precise changes needed, there was a gathering sentiment that the thorough reconsideration of the state government's operation and structure that only a convention could provide was essential. Former New York City Mayor Republican Rudy Giuliani called for a convention in the pages of the *New York Times*.[6] Former Governor Democrat Mario Cuomo did the same in the *Wall Street Journal*, the *New York Times*, and the *Albany Times Union*.[7] Ned Regan, who served more than fifteen years as the State Comptroller, created the New York State Citizens Project, a new organization devoted to state government reform with a particular focus on constitutional change.[8] Rick Lazio, the leading Republican candidate for Governor, and Richard Brodsky, a member of the Assembly and candidate for Attorney General, signed on as well.[9]

There are two ways a constitutional convention call may be initiated in New York State.[10] The first is by the Legislature. The last time this happened was in 1965, not coincidentally the last time the Democratic Party controlled both legislative houses. Democrats had been trying for all of the twentieth century to advance constitutional home rule for New York City and undo the legislative apportionment provisions adopted in 1894 that, former Governor Al Smith said, made the state "constitutionally Republican." The document produced by that convention—a considerable improvement over the nineteenth century constitution under which we are still governed—was rejected by the voters after convention leaders unwisely offered the document to them on an all-or-nothing basis.[11] Alternatively, a convention may arise from an affirmative response at the polls to the automatic constitutional convention question. Every twenty years since 1846, the state constitution requires that New Yorkers be asked: "Shall there be a convention to revise the constitution and amend the same?"[12] Conventions were regularly called in accord with this process in the State through the latter part of the nineteenth and the early twentieth centuries. The last, in 1938, offered its results to voters in multiple questions and gained their approval for considerable constitutional change.[13] But New Yorkers voted

"No" to the mandatory question the last three times it was asked, in 1957, 1977, and 1997, most recently rejecting the opportunity by a margin of two to one.[14]

The recent experience in New York is typical of that of the fourteen states with the automatic convention question. As a forthcoming essay by John Dinan of Wake Forest University shows, though some have come close, none of these jurisdictions has called a constitutional convention in recent years.[15] This marks an important change. While the United States has, of course, had only one national constitution over the course of its history, "[t]he states have functioned under 146 separate constitutions."[16] But our propensity to entirely replace state constitutions has ground to a halt in recent decades. The last one adopted was in Georgia, in 1982.[17] There has not been a state constitutional convention since the one held in Louisiana in 1992.[18] (There, delegates were not separately elected; legislators served as delegates.)

"[T]he primary remaining option for convention proponents is the automatic ballot question, and that won't be asked until 2017.… With two intervening elections for statewide state office, and four intervening legislative elections, this constitutes light years in political time."

Though there was some speculation that resistance was diminishing as the governmental miasma thickened in Albany over the course of 2009, there is little hope for the legislative path to a constitutional convention. Legislators have succeeded in the system as it is, and members in the majority party in both houses benefit from it. When things are not working well, as now has long been the case in New York, they are the objects of reform, not its likely beneficiaries.

It is true that some individual members in both parties and both houses have embraced the prospect that a convention offers for structural reform in state and local government and politics. Richard Brodsky, a senior Democratic Assembly member and candidate for Attorney General, has put in a bill calling a convention that has attracted a number of cosponsors.[19] Others in the Senate and Assembly have introduced legislation or amendments to allow a limited convention, or address process concerns of potential convention supporters.[20] The current Assembly Minority Leader, Republican Brian Kolb, has made the calling of a "People's convention" a prime object of his diminished conference; the Assembly minority however has little voice in governance, and thus little to lose from change.[21]

But the preponderance of sentiment in both legislative majorities appears solidly against. And most significantly in New York's strong leader system, Assembly Speaker Sheldon Silver remains resolutely opposed.[22] Despite the posture of previous Governors, and though he has no formal say in the matter because gubernatorial approval is not needed to put a convention question on the ballot, so is Governor David Paterson. He argued in a press release this past June that: "The same special interests that have come to dominate establishment Albany will once again attempt to influence the movement to a constitutional convention—just as they did in 1997. They will spend millions of dollars to affect the process and they will seek to elect delegates to a convention that comes from the same broken system."[23]

So the primary remaining option for convention proponents is the automatic ballot question, and that won't be asked until 2017, seven years from now. With two intervening elections for statewide state office, and four intervening legislative elections, this constitutes light years in political time.

The Legislature and the Constitutional Convention Catch–22

Moreover, and most ironically, the current political reality is that the Legislature has almost as much control over the outcome of the mandatory convention question referendum as it does of its own choice to place the matter on the ballot. There are two major reasons for this.

Process Change Gatekeeping. To understand the first, it is necessary to go back in time almost one hundred fifty years, for a history lesson. Responding to the automatic ballot question, New Yorkers called a constitutional convention in 1886. Democrats controlled the Governorship, Republicans the Legislature. Concerned about winning a majority at the convention, the executive and legislative branches clashed on the process under which delegates would be elected. The issues were: the year in which to hold the delegate election; use of a special or general election for choosing delegates; use of a process that would limit (or not) delegates elected to those supported by the two major parties; the districts from which most delegates would be elected; the size, composition, and election of potential statewide at-large convention delegations; the potential expense of a convention; and the timing of submission of the convention's work to the voters.[24]

The deadlock persisted for seven years; a compromise process was finally reached in 1893. It provided for election of one hundred twenty-eight delegates from Assembly districts (favored by Republicans) and thirty-two at-large (favored by Democrats). Additionally, the Governor was to appoint eight delegates, five of whom were to be from labor organizations and three from the Prohibition Party (favored by Democrats).[25]

The election was held. The Republicans controlled the outcome, a convention was held, and a new constitution was approved at the polls in 1894. To avoid the kind of deadlock in the future that had just been experienced—

and not incidentally to cement a partisan advantage at future conventions—the 1894 Republican convention majority put considerable detail about future delegate selection processes in the document.[26] That detail is still there.

The constitution now requires that:

- three delegates be selected from each state senate district and fifteen statewide, at-large;
- the convention convene in Albany on the first Tuesday in April of the year following delegate election;
- the convention be the judge of its own members, adopt its own rules and hire its own staff;
- delegates receive compensation and expenses equivalent to that paid an Assembly member; and
- results be offered to the voter at a time and in a manner the convention chooses.

The constitution also specifies a quorum rule and procedures for filling delegate vacancies.

Placing this detail in the constitution denied discretion to the Legislature on these matters of process, but did not make them less potentially controversial. Here is one of several possible examples. At the 1967 convention, the last held in the state, thirteen sitting legislators were elected as delegates. (Thirty-two former legislators also served.)[27] Because of the constitutional provision on delegate compensation, each of these legislators received two salaries that year, one for service in the Legislature and one for service as a convention delegate. Each also received double pension benefits.

When the automatic referendum on calling a convention comes over the political horizon, many considering support of a "Yes" vote object to the possibility that this "double dipping" will again occur. More generally, most also object to legislators serving as delegates since, they argue, the legislators have their own separate path for amending the constitution, or calling a convention to revise it. They insist that the process for delegate selection be "fixed" before they consider supporting a convention call.

As the 1997 state Constitutional Convention Commission showed, double dipping may be barred by statute.[28] So can service by legislators as delegates, probably not by a direct prohibition (suspect under the U.S. Constitution) but by extension of prohibitions against dual office holding. However, altering the delegate selection process requires the Legislature to act, either by statute or amendment. If the Legislature does nothing, the conditions set by potential supporters cannot be met. Blocking the formation of a coalition in support of a "Yes" vote for calling a convention does not require any action at all; passive aggression is enough. And of course, the Legislature—for all its disabilities—has proved itself very good at not acting.

Convention Preparation Gatekeeping: Remember the old story about the native New Yorker who was approached on the street by an out-of-towner and asked, "Pardon me, how do I get to Carnegie Hall?" The New Yorker replied, "Practice, practice, practice."

If the same New Yorker were asked this year, "How do we get to a state constitutional convention," he or she would do well to reply, "Prepare, prepare, prepare."

John Dinan's research shows that the referendum vote in support of a mandatory constitutional convention question generally increases in response to two factors: endorsement of the idea by the Governor and/or sitting political leaders and serious preparation to explain what a convention is and how it might help address the problems facing the state.[29]

In New York, there has been no serious effort by the Legislature to help prepare for the automatic constitution convention question since 1957. On the run up to the 1977 vote (a time of major fiscal crisis in New York City and State), no preparations were made by either the Governor or the Legislature. Senate Majority Leader Warren Anderson dismissed a possible convention as a "$20 million boondoggle." "There are a substantial number of issues that require hefty concentration and hefty analysis," said Michael DelGuidice, a key staffer to Assembly Speaker Stanley Steingut. "The legislature for the past several years has been dealing with daily crises." Failure to prepare thus became an argument against calling a convention. [30]

Governor Mario Cuomo, a strong advocate of a convention, appointed a Constitutional Revision Commission in 1994 to prepare for the 1997 vote. No legislators served on the Commission, and the majorities in both houses took no role in the appointment process for Commission members. Moreover, Commission activities were funded through the budget of the governor's office; there was no line item approved by the Legislature. This standing apart allowed the Legislature to argue that the Commission was simply another device through which Cuomo could bash them. Since it had no part in creating or sustaining the Commission, it could justify ignoring its recommendations regarding preparing for a convention, and it did.[31] Again, passive aggression.

The automaticity of the convention question, its greatest strength, is thus also its greatest weakness. It is a strength because, at least in theory, it allows bypassing those in power to remedy systemic problems in governance that they cause, or from which they benefit. It is a weakness because it arises without regard to the current political circumstances. Too often we have a remedy available when we don't need it, and need it when we don't have it, or can effectively be denied it by the tactical behavior of those it is designed to bypass.

An Action Agenda

One important characteristic of the automatic vote in New York on whether to call a constitutional convention (like for most American elections) is that it is cyclical, and therefore offers choice at a predictable time. The fixed twenty-year long cycle timing is problematic for reasons earlier mentioned, and also because the vote comes in an odd numbered year. In an odd numbered year turnout is lower, and intense minorities protecting particular interests can more easily block a positive outcome, as organized labor did in 1997. In contrast, in an even numbered year state candidates are on the ballot, and calling a convention could more easily be made a statewide campaign issue.

But still, the predictability of the vote allows focused planning. With the next mandatory referendum vote seven years off, how should we New Yorkers prepare, those of us who think that calling a constitutional convention is the only viable path to serious systemic reform of our battered and beleaguered state government?

Here are some ideas, a baker's dozen:

1. Organize. Understand that "Getting to Yes" in a vote to call a constitutional convention is a political process that requires organization and resources.

   A single statewide organization is needed, present and well rooted in all New York's counties. This organization might be modeled on nationally supported statewide movement efforts in states with provisions for Initiative and Referendum.

   Resources must be obtained for a multi-year effort, concomitant with those raised to develop, introduce and win elections on contested referendum questions in California.

2. Secure public endorsements in support of holding a convention from candidates for statewide, state and local office. Counter-intuitively, this may be easier the more far into the future the actual referendum vote, as the consequences of position taking for candidacies are marginal. But once in office public officials tend to stay in office, and this modest step puts them on the record.

4. Induce county and other local governments across the state to pass resolutions calling for a constitutional convention.

5. Seek a pledge from gubernatorial and/or attorney general candidates in 2010 to create a constitutional change study function in the governor's and/or attorney general's office, to

   - create a comprehensive agenda of constitutional issues before the state, and
   - prepare regular reports on matters on this agenda, and
   - develop an active academic network engaged on state constitutional issues.

6. Encourage supportive action in the Legislature and the executive branch.

   Support immediate calling of a constitutional convention by the Legislature, accompanied by a provision to create and fund a commission to prepare for that convention.

   Support inclusion by the Governor of an appropriation to prepare for a convention in the executive budget.

   Help interested members develop and actively support constitutional and statutory proposals that address the process concerns that are now barriers to legislative support of a convention (e.g., double dipping, legislators' service as delegates, use of Senate Districts and at-large balloting to select delegates, nominating process for delegates, partisan election of delegates, possibility of a limited convention, etc.).[32]

7. Prepare a set of rules for a convention that assures that it will be run fairly and democratically, and that distinguishes its operation from that of either of the legislative houses.

8. Sponsor and support a competition in the state's law schools to draft one or more model alternative constitutions for New York.

9. Develop a realistic cost estimate for holding a convention and presenting its results to voters.

10. Argue for the convention as a real life venue for testing political process reform ideas—e.g., public financing of alternative nominating procedures for state office—before applying them in ways that might disadvantage incumbent officeholders.

11. Develop systematic responses to convention critics, especially regarding the collective benefits of potential changes balanced against the particular risks of potential changes.[33]

12. Understanding the difficulty, seek to generate a consensus agenda particularly focused on restructuring state government and politics through constitutional change (e.g., fair districting, professional election administration, term limits for statewide elected officials, constitutionally based ethics provision, local government restructuring).

13. Make the case that a convention, an exercise in democracy, has the prospect of not only achieving particular reforms, but of renewing faith in democracy.

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24. Gov. David B. Hill, *Annual Message to the Legislature, 1887*, *in* 8 Messages From the Governors of New York 309 (Charles Z. Lincoln ed., J.B. Lyon Co., 1909); *Veto of a Bill entitled "An act to provide for a convention to revise and amend the constitution," May 10, 1897*, *id.* at 393; *Assembly Report on Veto of Constitutional Convention Bill*, *id.* at 470.
25. 9 Messages From the Governors of New York 13, n.3 (Charles Z. Lincoln ed., 1909) (citing Chapter 398 of the Laws of 1893).
26. *See* 2 Revised Record of the Convention of 1894 10, 11(Argus Company, 1900) (quoting the remarks of Louis Marshall, Chair of the Committee on Constitutional Amendments) ; *see also id.* at vol. 4, 826–32, 892–901 (discussing the debate).
27. Dullea, *supra* note 11, at 125.
28. *See* Gerald Benjamin et al., The Temporary State Commission on Constitutional Revision, The Delegate Selection Process: An Interim Report (1994).
29. Dinan, *supra* note 15, at 44.
30. *See* Richard J. Meislin. *Constitution Review a Sleeper on the Ballot*, N.Y. Times, Oct. 23, 1997, at 42.
31. *See* Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, Alb. L. Rev. 1017–50 (2002).
32. *See* Appendix A.
33. *See* Gerald Benjamin & Mario Cuomo, *Convene to Fix Constitution*, Albany Times Union, Jan. 11, 2010, *available at* http://www.timesunion.com/AspStories/story.asp?storyID=887321&category=OPINION.

Appendix A

Summary of Constitutional Convention-Related Legislation Introduced as of August 1, 2009, with Notes and Questions

I. Proposals to Call a Convention

A. **Brodsky—A02471**—Calls a Convention.

COSPNSR Hoyt, Galef, Koon, Powell, Schroeder, Stirpe, Jaffee, Peralta

MLTSPNSR Reilly, Robinson

Note: Very good bill memo. Bill memo specifically references budget process.

Note: A core of interest in the Assembly, some from senior members.

B. **Kavanaugh—A00416**—Amends the constitution to allow a limited convention to focus on Article III. (Legislature) (See Q under "D" below.)

C. **Lavalle—S06088**—Provides by statute for a convention to consider property tax reform and lt. governor succession.

Q: May the Legislature limit the reach of a convention by statute?

D. **Griffo—S6093**—Amends the constitution to allow a convention to consider articles II, IV and V of the constitution only.

Q: May we have a limited convention with the current language?

II. Delegate Eligibility and Selection

A. **Theile—A01237**—Halves number of signatures required stateside and district-based for nomination for delegate.

Q: Still uses current election law. Should other ways of qualifying be considered?

B. **Theile—A01955**—In accord with Commission recommendation, amends election law to allow voting for one in three member district races for delegate to address VRA concerns.

C. **Theile—A01959**—By statute, prohibits statewide elected officials, members of the Legislature, policymakers in the executive and legislative branches of state government, local elected officials, registered lobbyists and officials of political parties from serving as delegates to a Constitutional Convention.

Note: Broader in reach than Galef (Democrat) bill, A05277.

Q: May be a constitutional issue in this. Invidious classification.

Other approaches: bar dual office holding, bar compensation for serving in two offices simultaneously.

D. **Galef—A05277**—By statute, bars the Governor, Lieutenant Governor, Attorney General, Comptroller, any state legislator and any elected county or city official or any person currently holding elected office from serving as delegates.

COSPNSR Koon, Paulin, Calhoun, Fitzpatrick, Magee, Alfano, Giglio, Clark, Barra, Schroeder, Thiele

MLTSPNSR Burling, Christensen, Conte, Corwin, Crouch, Duprey, Hoyt, Kolb, Latimer, McDonough, Miller, Molinaro, Oaks, Raia, Sayward

Note: Begins to be bi-partisan.

Q: See comment under "C."

E. **Boyle—A8202**—Constitutional Amendment to bar legislators from serving as delegates.

Q: May be accomplished legislatively, see above.

F. **Brodsky—A04146**—By statute, creates a public finance system for delegate elections, reforms the delegate election process by substituting a system whereby each voter votes for one candidate instead of three, and makes it easier for citizens to gain access to the delegate election ballot.

COSPNSR Hoyt, Lifton, Paulin, Koon, Powell, Ramos, Magnarelli, Fields, Schroeder, Stirpe, Jaffee, Peralta

MLTSPNSR Alessi, Cahill, DelMonte, Gunther, John, Latimer, Reilly, Robinson

Ballot access—Reduces number of signatures required for access (similar to A01237). Allows greater ease in curing errors in petitions during one-week period after filing.

Voting—allows one vote per voter to be cast in Senate Districts used as three member delegate districts with top three vote-getters elected, addressing Voting Rights Act concerns. (Similar to A01955.) Voters still vote for all fifteen at large delegates.

Q: Not clear on required party slate voting, and alternative if any.

Limits contributions to persons running for both delegate and any other post subject to election law in a following year.

Fully developed public financing provision. Creates NYS Constitution Convention Campaign Finance Fund. Public matching funds for contributions to Constitution Convention candidates up to $500, after specified threshold is reached, with contribution limits, campaign spending limited and objects of expenditure limited.

Provision for lobbying contact log for registered lobbyists in contact with delegates to a constitutional convention.

Note: Commission proposed to use convention delegate election to test pubic financing in NYS.

G. Golden—S06065

Creates a registry of all those lobbying for or against substantive matters that might come before a convention.

Bars lobbyists from service as delegates.

Limits contributions to delegate candidates to $100.

H. Griffo—S06094—Requires that no person acting as a political party chairperson, an elected public officer, an individual who is subject to the rules established by the Commission on Public Integrity and any other person who is an officer of an organization, association or corporation that receives public funding shall be elected as a delegate to a constitutional convention.

Note: One legislative response to restricting members service at a convention is to enter further restrictions and limits. Same issues on such limits prevail.

The Budget Process and the New York State Constitution

By Henrik N. Dullea

The word "budget" originally meant the money bag or the public purse, which served as a receptacle for the revenue and expenditure of the state. In Britain, the term was used to describe the leather bag in which the Chancellor of the Exchequer carried to Parliament the statement of the Government's needs and resources.[1]

As 2009 drew to a close, the people of New York State increasingly felt that they had been left holding the bag.

The State Capitol in Albany is seldom the focus of national media attention, but 2009 provided more coverage than anyone might have anticipated, leading many rank and file citizens to exclaim, "Throw them out! Throw them all out!" The governor elected in 2006, Eliot Spitzer, had resigned in disgrace and been replaced by the lieutenant governor, David Paterson. The State Comptroller, Alan Hevesi, had similarly resigned in disgrace, and was succeeded by Thomas DiNapoli, elected to the position by the Assembly and Senate voting as one body. The State Assembly continued to have stable leadership and an overwhelming majority of Democrats, but the State Senate was in turmoil.

Democrats appeared to have a Senate majority for the first time since 1965, but initial in-fighting over leadership positions at the start of the legislative session suggested that this was a very fragile majority indeed. The Republicans also had relatively new leadership, since the previous long-time leader of the Republicans, Joseph Bruno, had resigned in the prior year and was facing federal trial on multiple abuse of public office charges. At one point in the spring, the Republican minority in the Senate staged a "coup" by encouraging two Democratic senators to vote for a change in Senate leadership to the Republicans, in return for which one of the dissenters was named Temporary President of the Senate, next in line for the governorship. Lock-outs, judicial challenges, and dueling press conferences ensued, as the other dissenting Democratic returned to the fold and created a 31-31 tie. When the Court of Appeals, by a slim majority, upheld Governor Paterson's appointment of Richard Ravitch to fill the vacancy in the office of lieutenant governor, the remaining Democrat dissenter returned to the fold, albeit with a new and enhanced title, since he no longer was second in line and the new lieutenant governor would be able to cast a tie-breaking vote in the Senate. The Republican coup was abandoned, but the image of state government was severely tarnished.

Throughout this turmoil, the governor attempted to deal with the fiscal impacts of the continuing national economic recession. By fall, he had taken to calling the legislature into special session for the purpose of approving his deficit reduction proposals, but legislative opposition ultimately caused him to sign a set of alternative measures which he declared were still inadequate to the task at hand. As the year went on, the political leadership in the State Capitol was in a tailspin; the governor was unable to secure the adoption of his fiscal agenda, and the legislature appeared to be even more dysfunctional than ever.[2]

"[A]s 2009 drew to a close, many political and fiscal observers began to wonder aloud whether the constitution needed to be significantly amended in an effort to assure fiscal responsibility for the state and its subdivisions in the years ahead."

Despite the eventual agreement between the governor and the two houses of the legislature on the provisions of an enacted budget and a $2.7 billion deficit-reduction plan in December, the governor insisted by the end of the year that the cash flow situation of the state demanded that he unilaterally delay the payment of $750 million in scheduled state funding to schools districts and local governments for education, Medicaid and other authorized expenses. Leading members of the legislature claimed that the governor lacked the power to take such action, and the union representing the vast majority of the state's teachers filed suit to block the delay in payments.

New York's state constitution has much to say about the budget process, and indeed many of its provisions have served as models for other states, but as 2009 drew to a close, many political and fiscal observers began to wonder aloud whether the constitution needed to be significantly amended in an effort to assure fiscal responsibility for the state and its subdivisions in the years ahead. This article traces the history of the strong executive budget process in New York, identifies a number of issues that have created public concern, and offers several short-term and long-term reforms, some of which will require constitutional amendment.

The Constitution and the Budget Process

The budget has been described as "state government's biggest job." "[A]doption of the state budget is the single most important job the governor and the legislature perform every year."[3] Primarily located in Article VII, the budget-making process is affected in one way or another by 12 of the 20 articles of the state constitution.[4] New York has long been recognized as having a strong executive in charge of its budget process. This pattern followed significant developments at the national level which were reflected in the recommendations of the state's Constitutional Convention of 1915.[5] Members of the presidential Commission on Economy and Efficiency appointed by William Howard Taft gave testimony to the delegates of the Convention, which proposed a budget system with strong gubernatorial leadership and severe limitations on the power of the legislature: "The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein.…"[6]

The principal proponent of the executive budget system at the 1915 Convention was Henry L. Stimson, the unsuccessful Republican candidate for governor in 1910. Stimson, who in later life would serve in many capacities at the national level, including as Secretary of State and Secretary of War, chaired the Convention's Committee on State Finances, Revenues, and Expenditures; he believed that it was essential that the governor, not the legislature, should have the responsibility of constructing and subsequently being held accountable for the budget:

> We cannot expect economy in the future unless some one man will have to lie awake nights to accomplish it. The only way to stop waste is for the people of the State to know exactly whose fault it is if waste occurs, or if the cost of government steadily rises without compensating increase in service rendered.[7]

Although the recommendations of the Constitutional Convention of 1915 were rejected in their entirety by the voters for reasons other than the proposed budgeting system, primarily those dealing with reapportionment, they set the stage for further budgetary developments along these lines sought primarily by reformers and by business interests seeking reductions in spending and taxation.

In Washington, continued support from President Woodrow Wilson led Congress in 1920 to adopt a national budget system, but the legislation was vetoed by Wilson due to a provision that allowed the President to appoint a Comptroller General to head a new General Accounting Office but prohibited him from removing that individual. The legislation, in much the same form as that vetoed by Wilson, was signed into law by Warren G. Harding on June 10, 1921, as the path-breaking Budgeting and Accounting Act of 1921. In his first budget message to the Congress, Harding referred to the adoption of this legislation as "the greatest reformation in governmental practices since the beginning of the Republic."[8]

With this national action as a backdrop, many states moved to adopt similar reforms. In New York, a bipartisan coalition led by Governor Al Smith, former governor Charles Evans Hughes, and Henry L. Stimson finally secured the adoption of an executive budget system in 1927 as part of an extensive executive branch reorganization. The budget provisions were initially adopted as Article IV-A and later transferred to a new, comprehensive Article VII, "State Finance," by the Constitutional Convention of 1938. The budget process secured by Governor Smith remains essentially intact today.

Constitutions have several basic roles. Fundamentally, they spell out the rules of the game for the political process in a particular jurisdiction. New York's state constitution provides for the separation of powers among the several branches of the state government and sets forth their basic structures; it delineates the relationship between the state and its many subdivisions; it prohibits the legislature from certain actions; and it affirmatively sets forth policies and goals for the government and society to implement.

The constitution is but one very important foundation for the political process that results in the annual adoption of a state budget in New York. The overall political environment is obviously a factor, as are judicial decisions, legislation governing lobbying and political campaign contributions, rules of procedure of the two houses of the legislature, media attention, and the quality of the individual decision makers deeply involved in the process.

New York's constitution is longer than most and is filled with detail—detail that many would refer to as statutory rather than constitutional in nature, but those details are present because at some point in time their proponents believed that they had to be incorporated in the constitution to prevent their modification by the normal legislative process. In the midst of the fiscal crisis of the 1970s, the level of detail of the budget process itself was challenged in *Wein v. Carey*. Writing for the Court of Appeals, Chief Judge Charles Breitel argued that "it would be ludicrous to deny prima facie validity to this constitutionally mandated and meticulously directed process."[9]

The Budget Cycle

The official web site of the New York State Division of the Budget sets forth a model calendar for the budget process, in which agency budget preparation takes place from June through September/October of each year; Budget Division review occurs from September/October through December; governor's decisions take place in the November-January period; legislative action is from January through March; and budget implementation then oc-

curs on a year-round basis from April through the end of the state fiscal year in March.[10] This budget calendar is, of course, simply a model. In reality, budgets over the last 25 years have seldom been adopted prior to the start of the fiscal year, agencies lobby on behalf of their hoped for appropriations on a year-round basis, governors make their minds up on a host of budget detail for the year ahead as they experience the current year's negotiations, legislators seek to involve themselves in budget execution, and external players such as public employee unions, local government officials, and business leaders may have more influence on certain areas of the budget than the cabinet officers theoretically responsible for those areas.

The heart of the constitution's Article VII budget process is its requirement that the governor present to the legislature by a defined date early in the legislative session a budget containing a complete plan of proposed expenditures and estimated available revenues. Significantly, it also requires the governor to submit "a bill or bills containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein."[11] These legislative proposals are the so-called Article VII bills that are key elements of every budget presentation. The power to submit these bills is critical, since the constitution prohibits the legislature from altering appropriation bills submitted by the governor, other than to reduce or strike out items. The legislature may add items, but it must state them "separately and distinctly" and limit each to a "single object or purpose."[12]

The governor obviously has help in making these decisions. He appoints a budget director who oversees the Division of the Budget, an agency which employs over 350 staff and serves as the executive branch's principal source of institutional expertise on issues ranging from local government finance to the operations of public authorities.[13]

Typically by mid-January, or by February 1 in a year following a gubernatorial election, the governor submits his Executive Budget to the legislature, along with the related appropriation, revenue, and budget Bills. The State's five-year Financial Plan, Five-Year Capital Program and Financing Plan, and financial information supporting the Executive Budget are also submitted to the legislature and are available to the public. Budgets for the operations of the legislature itself and of the judicial branch of state government are prepared by these two branches separately and must be contained without revision in the Executive Budget submitted by the governor. The governor may comment on these legislative and judicial budgets but cannot revise them.

It has long been established that the constitution requires the governor to submit a balanced budget, but there is no such consensus that the legislature must enact a balanced budget or that the governor is required to maintain budget balance throughout the fiscal year. The Court of Appeals, in *Wein v. State*, strongly suggested that the legislature must enact a balanced budget, at least at its regular session:

> Critical to understanding State finances is that the constitution mandates a balanced budget.… There is no express treatment in the Constitution governing appropriations made after the regular session and during the fiscal year at extraordinary sessions, but the implication is, and an essential one, that additional appropriations must be covered by matching revenues, or else the balanced budget of the regular session would be a device easily evaded.…[14]

Four years later, in a case dealing with the governor's ability to impound funds authorized by the legislature, the Court returned to the *Wein* case by noting that it had previously recognized the governor's constitutional obligation "to *propose* a balanced budget.… But at no time has the Court suggested that once a budget plan is enacted, revenues and expenditures must match throughout the fiscal year." There must, practically, "be some gap between the two. Recognizing this reality, the Court has but recently disclaimed any obligation on the part of the State to *maintain* a balanced budget.…There must…in every year be either a deficit or surplus.…"[15]

As the two houses of the legislature consider the governor's proposals, perhaps the most fundamental decision they are required to make is a judgment on the estimated disbursements and available revenue from all sources for the upcoming fiscal year. The State Finance Law now requires the executive and both houses of the legislature to prepare estimates of revenues and expenditures by November 5, to hold negotiations over these estimates and to publish a joint report by November 15. In the event that they are unable to agree, the State Comptroller is authorized to set a revenue estimate. This procedure, while imperfect, has been followed in the last three years and has reduced to some degree the conflict over available spending for the next fiscal year.

The two fiscal committees of the legislature—the Senate Finance Committee and the Assembly Ways and Means Committee—and their respective majority party staffs are responsible for the review of the Executive Budget and for whatever modifications each chamber wishes to make. Given the importance of the budget process to the entire operations of the legislature, this review process is actually under the tight control of the Senate Majority Leader and the Speaker of the Assembly, who brief their respective party conferences regularly on the substance and pace of budget negotiations. Since the adoption in 2007 of budget reform legislation, the two houses are supposed to resolve differences in their budgetary deci-

sions through a conference committee structure, but this practice has been used unevenly if at all in the recent past, leaving the real negotiations to take place among the proverbial "three men in a room"—the governor, the speaker of the assembly and the senate majority leader. The minority party conferences also have relatively small fiscal staffs available to them, but their actual participation in decision-making has been almost non-existent for many decades.

Additional spending and revenue items added by the legislature are subject to the governor's item veto of appropriations, which has been part of the constitution since 1874. Much of the recent conflict between governors and the legislature has involved this issue of the governor's or the legislature's inclusion of statutory material in Article VII bills.[16] When the governor vetoes legislative additions to his budget, that veto can be overridden by a two-thirds vote in each house, as was done repeatedly in 2003 when the legislature added billions of dollars of new spending and taxes. Annual reports of the State Comptroller indicate that from 1996 to 2005, the ten-year total for added spending by the legislature amounted to $12.125 billion.[17]

The enacted budget for 2009-2010 amounted to $131.9 billion in the All Funds category, of which $78.7 billion constituted State Operating Funds and $54.9 billion was in the General Fund. The mid-year update issued by the Division of the Budget reported that the $17.9 billion deficit forecast for the 2009-2010 fiscal year had been eliminated by actions taken as a result of the adoption of the Executive Budget, but that annual deficits totaling $24.6 billion remained to confront the state over the next three fiscal years.[18]

Frustrated by the conflict with Governor Pataki in 2003 that had produced so many line-item vetoes and subsequent veto overrides, the two houses of the legislature in June, 2004 adopted a proposed constitutional amendment and gave that same proposal second passage in 2005 so that it could be submitted to the voters for approval by referendum. The legislative proposal, which strengthened the legislature's hand in the budget-making process in many respects, was supported by many "good government" groups such as the League of Women Voters, the New York Public Interest Research Group (NYPIRG), and Common Cause. Its opponents included Governor Pataki, then-Attorney General Eliot Spitzer, the Business Council of New York State, the Citizens Budget Commission, and Citizens Union.[19] The proposal went down to defeat on November 5, receiving only 35% of the vote. No further constitutional amendments have been put forward to the people since that time.

The governor's power is not limited to the submission of the budget. As the state's chief executive, he also has the ability to cut back the spending of state agencies below the level established by the legislature. This is an important tool for the governor as he or she attempts to maintain a balanced budget throughout the course of the fiscal year, but when it comes to impounding funds for items added by the legislature that had not been deleted by the governor's item veto, the Court of Appeals found that he did not have such express or inherent power. Since there was no obligation to maintain a balanced budget, there could be no justification for the governor's implied power to impound funds to achieve that end.[20] Conscious of the Court's ruling in the *Oneida* case, Governor Paterson made clear that his December, 2009, decision to withhold aid amounting to 10 to 19 percent of funds that would otherwise have been distributed to school districts and local governments did not constitute either "a cut" or an "impoundment" but was rather a deferral which ultimately would be paid to the eligible recipients as soon "as sufficient revenues become available."[21]

Issues of Concern to the Public

1. Late Budgets

With a few notable exceptions since 1984, the legislature has generally been unable to adopt the State Budget prior to the start of the fiscal year on April 1. The timing of the fiscal year is set in statute, not in the constitution, and many legislators have claimed that the budget calendar gives them too little time to make informed judgments about the governor's proposals. In addition, it has been argued that changing the date of the start of the fiscal year to May 1 or later would allow the state to have a much better idea of its available revenues due to the April 15 income tax filing date and the improved revenue forecasting ability related thereto. The legislative leadership has repeatedly argued that it is better to have a "good budget" rather than a "bad budget," and that if it takes a few additional weeks or months to achieve that objective, the wait is well worth the cost. Local governments, school districts, and a host of other service providers dependent upon state funding, on the other hand, complain that the lateness of the state budget adoption makes their own fiscal forecasting not only more difficult but costly to their local taxpayers when they are forced to borrow funds to make payrolls and other commitments. Late budgets also contribute adversely to the state's credit rating.[22]

The legislative fiscal committees receive copies of departmental and agency budget requests at the same time that they are provided to the governor's Division of the Budget. By the time that the governor submits his or her executive budget in mid-January, the principal fiscal policy issues are well known, and interested lobbyists have a clear picture of what they must fight for or against within ten days of a budget's release. Recent timely adoptions of a budget by the legislature suggest that they are the exceptions that prove the rule that there is no reason other than the normal political dynamic that causes the legislature to fail to act in a timely manner. Budget-making is difficult, and it is particularly difficult when substantial reductions in spending have to be made. It is far

from easy when one person, the governor, is responsible for that task; it is near impossible when literally hundreds of legislators are participating.

Recent statutory actions to penalize legislators and others for failure to pass a budget on time by withholding their pay appear to have had little success, other than to further poison the atmosphere for negotiation. Requiring both houses to remain in continuous session until a budget has been passed has had little effect as well other than to further damage the image of the legislature, since no other legislation having a fiscal impact can be adopted prior to action on the appropriation bills. An alternative would be the automatic imposition of a contingency budget authorizing the temporary continued expenditure of funding at some predetermined and prorated percentage of the prior year's budget. To increase the pressure for passage of the budget, the percentage would be reduced incrementally on a biweekly basis.

2. Require the Legislature to Adopt a Balanced Budget

It is clear from court decisions and historical precedent that the governor is required to submit a balanced budget to the legislature. In New York practice, that has been a budget balanced on a cash basis rather than an accrual basis. No such obligation presently applies to the legislature. It has been argued that the constitution should be amended to require the governor to submit, and the legislature to adopt, a budget balanced in terms of GAAP, or Generally Accepted Accounting Principles. When coupled with the comprehensive review of the state's relation to its public authorities and the issuance of public debt, this reform could have a significant impact on the state's fiscal situation. It is, of course, one thing to require the adoption of a balanced budget and another to require the maintenance of a balanced budget throughout the course of the fiscal year. Nonetheless, a constitutional requirement on adoption would be an important first step.

3. Transparency—Three Men in a Room

No subject seems to resonate more consistently with editorial writers, good government groups, and minority party members in both chambers than that of budget negotiations taking place among only "three men in a room." The three are the governor, the speaker of the Assembly, and the majority leader of the Senate. Demands are made that range from increasing the number of participants to five, by including the minority leaders of the two chambers, to requiring the utilization of multimember conference committees meeting in public to resolve whatever differences exist between the two houses in their response to the governor.

The constitution is silent on the question of who negotiates the budget on behalf of the governor and the legislature. At one level, the negotiations take place by legislative and executive staff representing their respective principals. For the most important questions, it is generally the leaders themselves. The legislative leaders and their staff participate in these negotiations after extensive discussions with their party conferences, and they all have a fairly clear idea of what will be acceptable to most of their members. The legislative leaders continue to wield enormous power in their respective houses, appointing the members and the chairs of all standing and special committees and controlling the legislative agenda of which bills come to the floor for a vote. These matters are all governed by the rules adopted by each house at the start of the legislative session, and they can be changed by a simple majority. Legislators who want to change this dynamic can do so if they can persuade a majority of their colleagues. That they have not done so despite these repeated calls for change is due to the fact that from the political perspective of the majority party in each chamber, the system works reasonably well.[23] In a political system that is as tightly disciplined as that of the New York State legislature, greater transparency may not necessarily lead to more successful negotiation; the recent examples of the governor meeting with the majority and minority leaders in front of the press and public offered repeated glimpses of political theater rather than the real give-and-take of substantive negotiation.

4. Transparency—Messages of Necessity

One aspect of transparency in the budget-making process that cries out for reform is the use of gubernatorial "messages of necessity" to exempt appropriation bills and other Article VII-related legislation from being on the desks of the members of the legislature for at least three legislative days prior to their being voted upon. The three-day rule was designed with the idea that legislators ought to have at least that minimal amount of time to read, comprehend, and debate proposed legislation prior to its adoption.[24] Even more significantly, the provision is designed to let the public, through the media and representatives of various interests, special and otherwise, examine what is under consideration and to respond accordingly to their elected representatives. The message of necessity exemption makes this public protection provision a sham when it is utilized routinely and uniformly for appropriation measures that may have been negotiated only hours prior to their introduction.

There are definitely emergency situations that demand rapid action by the executive and legislative branches of government, and the message of necessity authority is in the constitution for that reason. However, it is unseemly to believe that the entire budget needs to be passed under this fast-track provision. Appropriation bills should generally be excluded from the message of necessity provision, with the exception that it could be utilized for appropriations that receive not less than the affirmative vote of three-fourths of the membership of both houses of the legislature.

Consolidations Requiring Major Constitutional Reform

1. Executive Branch Reorganization

The constitution contains a limit on the number of state departments and agencies, setting the limit at twenty. 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 public sector employee organizations affected by the changes.

2. Judicial Branch Reorganization

Former Chief Judge Judith Kaye and a host of professional and civic organizations have repeatedly called upon the legislature to authorize the streamlining of 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.[25]

There is little that the governor can do in relation to the judiciary budget, other than to comment on it as he submits it without change to the legislature. The system is costly to the state itself, with savings in excess of $59 million per year estimated from the Special Commission on Court Reform's consolidation proposal. More importantly, the savings to litigants and the affected businesses and individuals touched by the legal system may amount to more than $450 million annually.[26] 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 a terrible financial burden for the State itself and for the state economy.

3. Legislative Branch Reorganization

Ever since the reapportionment cases of the 1960s required that legislative bodies be comprised of members selected 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 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.

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.

Then, why do we continue to have this duplication of function at the state level? For the last fifty 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 was in control of the executive branch. This practice vastly complicates the budget-making process in Albany, often encouraging the majority party in the Assembly to champion higher spending while the majority in the Senate presses for greater tax cuts. The result is all too often acceptance of the prevailing view in both houses by increasing spending, cutting revenues, and thereby further expanding the annual deficits that have to be filled with one fiscal gimmick after another.

To streamline state government, improve transparency and accountability, and ultimately save billions of dollars for the taxpayer, radical surgery is required. 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 reapportionment commission. Gerrymandering in all its forms would be prohibited.[27] 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, resulting in their increased participation in the budget-making process.

"Thorough reform of the legislative budget review and decision-making process will be essential in the years ahead and should be a major focus of attention when the people of New York are asked to vote in 2017 on the question of whether to hold a constitutional convention."

Under this proposal, the members of the House of Delegates through their fiscal committee would have been developing the outlines of the budget throughout the fall, given their receipt of the same departmental requests that are submitted to the governor. Working cooperatively with the governor and the state comptroller, agreement would be reached on the available revenues prior to the submission of the governor's budget in mid-January. With the detailed attention already paid by the House of Delegates to the budgetary requests of the departments throughout the fall, there should be no excuse for legislative failure to meet the statutory start of the state fiscal year on April 1.

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 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.

Conclusion

New York State faces a rapidly increasing fiscal crisis, with little reason to believe that a *deus ex machina* solution will be readily discovered. We have continued to encourage levels of public spending at the combined state and local levels that make us the most expensive state in the nation in terms of expenditures and tax burdens. That may have been an accepted, and perhaps even a desirable, position when we were the most dynamic economy in the nation, but such is no longer the case today. The executive budget system first envisioned by the Constitutional Convention of 1915 needs to be retained and strengthened, with the governor's line item veto effectively utilized to ensure accountability. Thorough reform of the legislative budget review and decision-making process will be essential in the years ahead and should be a major focus of attention when the people of New York are asked to vote in 2017 on the question of whether to hold a constitutional convention.[28]

Endnotes

1. Jesse Burkhead, Government Budgeting 2 (1956), *citing* Henry Carter Adams, The Science of Finance: an Investigation of Public Expenditures and Public Revenues 104 (1898).
2. "Dysfunctional" is the term applied to the New York State Legislature by two reports issued by the Brennan Center for Justice at New York University School of Law. *See* Jeremy M. Creelan & Laura M. Moulton, The Brennan Center For Justice, The New York State Legislative Process: An Evaluation and Blueprint for Reform 42 (July 21, 2004), *available at* http://brennan.3cdn.net/1f4d5e4fa546eaa9cd_fxm6iyde5.pdf; Lawrence Norden, David E. Pozen & Bethany L. Foster, *Unfinished Business: New York State Legislative Reform 2006 Update* 6 (Oct. 11, 2006), *available at* http://brennan.3cdn.net/0961322f1132c4f8b4_u9m6ivo30.pdf. *See also, e.g.*, Andrew Stengel, Lawrence Norden & Laura Seago, *Still Broken: New York State Legislative Reform 2008 Update* 1 (Jan. 2 2009) *available at* http://brennan.3cdn.net/ec21bc2f8e70edb787_j9m6b0k88.pdf.
3. Robert B. Ward, New York State Government 279 (2d ed., 2006).
4. Especially Articles I, III, IV, VII, VIII, XIV, XV, XVII, and XVIII. Robert P. Kerker, *State Government Finance*, *in* Decision 1997: Constitutional Change in New York 81 (Gerald Benjamin & Henrik N. Dullea eds., 1997).
5. Faced with recurring budget deficits and charges of misappropriation of funds appropriated by the Congress, President William Howard Taft in December, 1909, requested an appropriation to allow him to appoint what eventually became known as the Commission on Economy and Efficiency. The Commission's report, *The Need for a National Budget*, was transmitted to the Congress on June 27, 1912, and called for a series of budget reforms that examined the entire organizational structure of the federal government in detail and pointed to the Chief Executive as responsible for the government's financial planning and the management of the "government's business." H.R. Doc. No. 62-854, (1912).
6. Art. V, § 1 of the proposed constitution. Burkhead, *supra* note 1, at 24.
7. Henry L. Stimson, Saving the State's Money: The sound and far-reaching reforms contained in the proposed Constitution 8, *quoted in* Pataki v. New York State Assembly, 4 N.Y.3d 45, 82 (2004).

8. The Brookings Institution, Brookings Institution History, http://www.brookings.edu/about/History.aspx.

9. Wein v. Carey, 41 N.Y.2d 498, 505 (1977), *cited in* Kerker, *supra* note 4, at 83. Much of the detail concerning the existing constitutional provisions of the budget process is taken from Kerker's excellent article.

10. N.Y. Div. of the Budget: Citizen's Guide, The Budget Process, http://www.budget.state.ny.us/citizen/process/process.html (last visited Mar. 4, 2010).

11. N.Y. CONST OF 1938, art. VII, § 3.

12. *Id.* at § 4.

13. WARD, *supra* note 3, at 243.

14. Wein v. State, 39 N.Y.2d 136, 141-142 (1976), *quoted in* Kerker, *supra* note 4, at 85.

15. Oneida v. Berle, 49 N.Y.2d 515, 521 (1980), *quoted in* Kerker, *supra* note 4, at 84-85 (Emphasis in original; the court was quoting from the decision in *Wein v. Carey.*).

16. Soon after the adoption of the executive budget system in 1927, Governor Franklin D. Roosevelt utilized his item veto power to strike out language that had been inserted by the legislature seeking to limit the use of certain appropriations. Roosevelt's position was endorsed by the Court of Appeals in the first *Tremaine* case. *See* People v. Tremaine, 252 N.Y. 27 (1929). *See also* Pataki v. New York State Assembly, 4 N.Y.3d 75, 81 (2004). Robert S. Smith, J. for the Court: "In these cases, the governor and the legislature accuse each other of overstepping limitations placed by the constitution on their roles in enacting the budget. We resolve the dispute in the Governor's favor. We hold, in both of these cases, that the Legislature altered the Governor's appropriation bills in ways not permitted by the Constitution. In *Pataki v. New York State Assembly*, we also hold that the Governor did not exceed constitutional limits on what his appropriation bills may contain." *Id.*

17. Robert B. Ward, The Public Policy Institute of New York State, New York Needs Real Budget Reform 3 (Sept. 2005).

18. N.Y. Div. of the Budget: 2009-2010 Enacted Budget, http://publications.budget.state.ny.us/budgetFP/enacted0910_planAtaGlance.html (last visited Mar. 4, 2010).

19. WARD, *supra* note 3, at 268-269.

20. Oneida v. Berle, 49 N.Y.2d 515, 522-523 (1980).

21. Kareem Fahim, *Paterson Trims Aid to Schools and Localities*, N.Y. TIMES, Dec. 14, 2009, at A1.

22. "A consistent failure to pass a budget on time also may affect a state's credit rating. California and New York, two states with frequently late budgets, are often pointed to as examples." National Conference of State Legislatures, Late State Budgets, http://www.ncsl.org/default.aspx?tabid=17823 (last visited Mar. 4, 2010). A 1999 report of the Office of the State Comptroller stated: "New York's chronically late budgets are one of the most visible manifestations of the State's dysfunctional budget process and overall lack of fiscal stability. Late budgets are a contributing factor to New York's abysmal credit rating." The Comptroller referenced an earlier 1997 report of his office that estimated that an upgrade of one rating level would have resulted in total savings of $158 million over the life of state debt issued over a 20-month period under examination. OFFICE OF THE STATE COMPTROLLER: LATE STATE BUDGETS (June 1999), *available at* http://osc.state.ny.us/reports/budget/1999/6-99.pdf.

23. In response to the criticisms from the Brennan Center and many public interest groups and media outlets, the two houses of the legislature have adopted a number of reforms in their rules over the last few years, but these continue to fall far short of what has been called for by their critics.

24. "No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon, in which case it must nevertheless be upon the desks of the members in final form, not necessarily printed, before its final passage…." N.Y. CONST. OF 1938 art. III, § 14. More than a century ago, the Court of Appeals noted that the object of this section "is to prevent hasty and careless legislation, to prohibit amendments at the last moment, and to secure more publicity than had been required before." People ex rel. Hatch v. Reardon, 184 N.Y. 431, 439 (1906).

25. SPECIAL COMMISSION ON THE FUTURE OF THE NEW YORK STATE COURTS, A COURT SYSTEM FOR THE FUTURE: THE PROMISE OF COURT RESTRUCTURING IN NEW YORK STATE 7 (Feb. 2007).

26. *Id.* at 45.

27. The 1967 Constitutional Convention's proposed new constitution contained the bold provision, "Gerrymandering for any purpose is prohibited." Had the new constitution not gone down to defeat by the electorate, this far-reaching provision would have been unique among state constitutions at the time. The chair of the Convention's Committee on the Legislature, Judge Irwin Shapiro, had successfully argued against the inclusion of detailed redistricting guidelines in the constitution on the grounds that they would ultimately restrict the ability of the courts to strike down unfair plans of whatever type. HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 210-211 (1997).

28. "New York is one of 14 states with a mechanism for the people to call a constitutional convention.…The 1846 Constitutional Convention proposed, and voters approved, a section providing that, every 20 years, the statewide ballot would automatically include a question: 'Shall there be a convention to revise the constitution and amend the same?' If a majority of voters are in favor, three delegates are to be elected from each Senate district and 15 delegates elected statewide." WARD, *supra* note 3, at 187.

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"Who's in Charge?": Proposals to Clarify Gubernatorial Inability to Govern and Succession

By Michael J. Hutter

The New York Constitution provides in Article IV, section 1 that "[t]he executive power shall be vested in the governor.…" The Constitution further provides in Article IV, section 5 that this power devolves on the Lieutenant Governor in two situations: (1) "In case of the removal of the governor from office, or his or her death or resignation, the lieutenant governor shall become governor for the remainder of the term"; and (2) "In case the governor is impeached, 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." Further gubernatorial succession from the Lieutenant Governor is provided for in Article IV, section 6, which specifies that gubernatorial succession from the Lieutenant Governor was to the Temporary President of the Senate and then to the Speaker of the Assembly, and the situations when that succession will occur.

The recent decision of the Court of Appeals in *Skelos v. Paterson*[1] added to these gubernatorial succession provisions in the situation where there is a vacancy in the office of Lieutenant Governor. The Court held that a Governor, whether an elected Governor or a Lieutenant Governor who becomes Governor by reason of the incumbent Governor's resignation, removal from office, impeachment, or death, has the authority to fill the vacancy by appointment.

These constitutional provisions and judicial ruling have the laudable goal of ensuring smooth executive power transitions lest the State is left without leadership when the incumbent Governor leaves office before the expiration of his or her term or is for some reason unable to govern. But do these succession procedures meet that objective and as well lead to a gubernatorial successor legitimate and acceptable to the public? In that regard, the constitutional provisions do not define the term "absent from the state" nor do they specify when a Governor can be found to be "unable to discharge the powers and duties of the office," and how and by whom such inability is to be made. As to the power to appoint a Lieutenant Governor, such power is not subject to any legislative approval, much less vetting, and allows the Governor to appoint anyone of his or her choosing so long as the person meets the constitutional requirements, as set forth in Article IV, section 6 of age—"not less that thirty years"—and residency—"five years preceding the election a resident of the state." There is simply no assurance that a person not capable of performing the powers and duties of the office of Lieutenant Governor, or upon succession to the office of Governor the powers and duties of that office, will not become Lieutenant Governor. While these concerns have not been the subject of any litigation or been the cause of political strife or rancor, they nevertheless should be addressed by constitutional amendments.

In 1982, the New York State Law Revision Commission commenced a study of these concerns, a study which continued through 1987. This study was not the result of any specific incident or request by the Governor or the Legislature. Rather, it was undertaken because of the passage of the 25th Amendment in 1967, which addressed similar concerns as it applied to presidential succession under the Constitution of the United States and subsequent experience with that Amendment, and the Commission's belief that the above referenced concerns should be addressed before they become the source of litigation and uncertainty in the future when an issue of gubernatorial succession might arise.

In 1984[2] and subsequent[3] years, the Law Review Commission published its "Recommendation Relating to Gubernatorial Inability and Succession." Various amendments to the pertinent constitution provisions were advocated addressing these concerns. However, the Recommendation was not adopted by the Legislature. While the Recommendation was favorably received, the general legislative consensus was that in the absence of any actual problem then existing with the gubernatorial successor provisions, legislative action was not necessary.

Some twenty-five years later, New York is experiencing great turmoil in the office of Governor. As a result, now is an appropriate time to reconsider and upon reconsideration enact the Commission's proposals. In support of that goal, this article will address these proposals and show how they reflect sound public policy.

Absence of Governor from the State

Article IV, section 5 automatically effects a transfer of all gubernatorial power to the Lieutenant Governor as acting Governor when the Governor is "absent from the state." During such absence the Lieutenant Governor as Acting Governor can legitimately approve or veto legislation, appoint people to public office, issue Executive Orders (or not) declare states of emergency (or not) and call out the National Guard (or not). As contemplated by this provision, this assumption of gubernatorial power would terminate when the Governor is no longer "absent from the state."

While the consequences of a Governor being "absent from the state" are clear, there is uncertainty as to when the Governor should be considered to be "absent from the state." This uncertainty is the result of conflicting interpre-

tations among the states of the phrase as contained in their state constitutions, and the absence of a New York court decision construing the phrase.

Several state courts, construing the phrase in accordance with its literal common meaning, have held it to mean any physical absence from the state.[4] In support of this interpretation, the courts emphasized that the provision was adopted at a time of limited means of communication and travel and as a result was intended to ensure that there was someone in the state at all times able to exercise gubernatorial power when the Governor was traveling outside the state.[5] Under this interpretation, if the Governor were to leave the State to conduct state business or to attend to personal affairs, whether for a short period of time, for example one day, or an extended period of time, such as several days, all gubernatorial power devolves to the Lieutenant Governor. Obviously, there exists under this interpretation the potential for a Lieutenant Governor to undo gubernatorial policies and authorize actions that could haunt the State for many years in the future.

Other state courts have rejected this literal interpretation of the phrase and instead have construed the phrase to mean "effective absence," meaning presence outside the State which prevents the Governor from exercising his or her gubernatorial power.[6] Examples would be when the Governor is incommunicado, such as in a jungle or mountain wilderness, or because of a natural disaster or other catastrophe, or the result of a total communication failure.[7] This interpretation found support in modern conditions of travel and communication, as compared to the horse and buggy era, which permit a Governor to exercise gubernatorial power while outside the state.[8] This interpretation also prevents a Lieutenant Governor from frustrating gubernatorial policies during the slightest absence of the Governor from the state.[9] Nonetheless, such interpretation can be viewed as "judicial activism" by which a constitutional provision and its original purpose are improperly "modernized" through judicial fiat.[10]

A case can be made for the adoption by a New York state court of the "effective absence" interpretation of the phrase.[11] This position is based upon other language in Article IV, section 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" (emphasis added). 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].'"[12] 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, section 6, and the Constitution of 1846, Article III, section 6.[13] Nonetheless, it is not a foregone conclusion that such a position will ultimately prevail in the courts.

Unlike the experiences in other states,[14] the mere physical absence of the Governor from the State has not been a problem in New York. This is due to the fact that no Lieutenant Governor has ever tried to exercise gubernatorial power contrary to the policies of a temporarily absent Governor. Despite the uncertainty in the meaning of the phrase "absent from the state," past experience, that is, the absence of any attempt by a Lieutenant Governor to misuse gubernatorial power when the Governor was out-of-state, suggests there is no need to do anything with respect to the phrase—remove it or clarify that it relates solely to "effective absence."

Nevertheless, there exists the potential for abuse by a Lieutenant Governor while serving as acting Governor when the Governor is out-of-state. As recent events strongly suggest, there is no assurance that this potential will not turn into reality. This concern becomes even more problematic when one considers that in the aftermath of *Skelos v. Paterson*, the acting Governor will be a person who was neither elected as Lieutenant Governor nor subject to approval through a confirmation process by the Legislature. In short, there is a need to address the uncertainty now.

But how? As the Law Revision Commission has recommended, Article IV, section 5 should be amended by deleting the phrase "is absent from the state."[15] Why? The speed of modern modes of communication and transportation, which permits 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. 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.[16]

Gubernatorial Inability

Article IV, section 5 also effects 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. This exercise of gubernatorial power is for a limited tenure as it ends when the "inability shall cease."

Notably, this gubernatorial 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.[17] Inability to discharge gubernatorial power first became a contingency in the New York Constitution of 1846.[18] Its origin can be traced to Article II,

section 1, clause 6 of the Constitution which provides in pertinent part that "[i]n case of…inability [of the President] to discharge the power and duties of the said office, the same shall devolve on the Vice President."

This presidential succession provision was the subject of much discussion during the Constitutional Convention.[19] It was clearly intended to address the situation where the President suffers an affliction, mental or physical, which impairs his or her ability to thrive, clearly make decisions, and run the country.[20] 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 matters were not fully addressed either at the Convention or in the constitutional provision.[21]

It was not until the mid-1960s that these deficiencies were fully addressed during the congressional debate on the Twenty-Fifth Amendment.[22] 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;[23] 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.[24] 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.[25] As the Amendment is read in its entirety, this provision relates to an inability to perform the presidential duties for some reason other than removal, death or resignation. Implicit is that this other reason relates to a physical or mental disability, either of a temporary or permanent nature. As to 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.[26] This assumption of presidential power continues until the President submits a written declaration that the inability no longer exists.[27]

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.[28] 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.[29]

In the aftermath of the ratification of the Twenty-Fifth Amendment, thirty-one states have established procedures for implementing the general gubernatorial "inability" language of their constitutions, including a voluntary declaration of inability.[30] The twenty states providing for a voluntary declaration of inability closely adhere to the procedure set forth in the Twenty-Fifth Amendment.[31] As to an involuntary declaration of credibility, a wide variety of approaches have been implemented.[32] 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 officials, or a disability commission composed of public officials and medical experts.[33]

New York is one of nineteen states that have not established procedures to implement the inability provision in their state constitution. Such absence reflects poor public policy as the sudden or unexpected occurrence of an incapacitating illness or accident affecting the Governor would leave the State without leadership as there would be inevitable strife and partisan bickering as to whether the Governor is truly unable to discharge the duties of the office among legislators, the Governor, and executive officials.

To prevent such a situation and ensure no interruption in the continuity of government, there can be no question as to the need to enact procedures relating to a determination of when the Governor is unable to perform his or her duties. The only question relates to the nature and form of those procedures.

The Law Revision Commission in 1984, upon an exhaustive study of the discussions and proposals leading to the passage of the Twenty-Fifth Amendment,[34] 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, section 5.[35] The procedure is "weighted heavily in favor of the elected Governor, involved representation by all branches of government, and yet is limited to a two-step process."[36]

The Commission's proposal, like the Twenty-Fifth Amendment, provides 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.[37] 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.[38] If gubernatorial inability is controverted, the Court of Appeals would convene to adjudicate the matter.[39] Once there has been an adjudication of inability, the Lieutenant Governor would become Acting Governor pursuant to the existing provision in Article IV, section 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.[40]

The rationale for the Commission's proposal some twenty-five years after it was initially released remains well-reasoned. To be sure, there may be a call for a medical panel to determine a Governor's inability due to a claim that an "inability to govern" is much too vague and unprovable as has occurred recently with respect to the Twenty-Fifth Amendment.[41] Adoption of such a proposal is ill-advised as creation of such a panel would be contrary to the underlying philosophy of the proposal that weighs in favor of an elected Governor and that all branches of government, which are all ultimately accountable to the public, be represented in the inability determination.[42]

Vacancy in the Office of Lieutenant Governor

When there is a vacancy in the office of Lieutenant Governor, Article IV, section 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 v. Paterson*,[43] decided in September 2009, was that the Constitution did not mandate the office be filled prior to the next general election of Governor and Lieutenant Governor.[44]

However, the Court of Appeals in *Skelos v. Paterson*, as previously mentioned, held that the vacancy could be filled prior to a general election through an appointment by the Governor. The Court found this appointing power to exist through an interpretation of Section 43 of the Public Officers Law.[45] The provisions of Article IV, section 6 were viewed, with little analysis, as not barring such appointment.[46] Notably, since this appointing power was found to exist solely by reason of section 43, the Governor's appointee is not subject to any legislative confirmation or even vetting. As a result, 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."[47]

Putting aside the issue of whether the Court of Appeals correctly decided that the New York Constitution permits the Governor to fill a vacancy in the office of Lieutenant Governor by gubernatorial appointment prior to the next general election, it is surely good policy to fill the vacancy 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, section 6. The Law Revision Commission concluded as much when it proposed that a vacancy in the office be filled, stating:

> [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.[48]

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, which is accomplished by gubernatorial appointive power, augur in favor of an appointive power. The Law Revision Commission has so concluded, noting that "this policy 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."[49]

What is bad public policy is that under *Skelos* the gubernatorial appointee is not subject to any legislative confirmation, thereby allowing a Governor by his or her own action alone to designate his or her own successor. This is an anomalous result, inconsistent with democratic process,[50] which rejects the so-called divine right of succession.[51]

The proposal is, as originally made by the Law Revision Commission, to have the Governor's appointee

confirmed by both houses of the Legislature.[52] Each house would vote separately, by concurrent resolution, rather than joint ballot in joint session. This method is preferable as each house of the Legislature is given equal status.[53] It also is the method adopted under the Twenty-Fifth Amendment, which has received favorable acceptance upon its application in 1974 and 1976.

Conclusion

These proposals will remove most, if not all, of the uncertainties and valid criticisms of the present gubernatorial succession mechanism without altering its basic stature. Their enactment will help to ensure needed stability and legitimacy when issues of gubernatorial succession arise.

Endnotes

1. 886 N.Y.S.2d 846 (2009). The author submitted an *amicus curiae* Brief in support of plaintiff on behalf of himself, two political scientists, Gerald Benjamin and Peter Galie, and former Lieutenant Governor Stan Lundine.
2. 1984 Report of NYS Law Revision Commission, Recommendation, Act and Memorandum Relating to Gubernatorial Inability and Succession 93 (*hereinafter* "1984 Report").
3. 1985 Report of NYS Law Revision Commission, Recommendation, Act and Memorandum Relating to Gubernatorial Inability and Succession 51 (*hereinafter* "1985 Report"); 1986 Report of NYS Law Revision Commission, Recommendation, Act and Memorandum Relating to Gubernatorial Inability and Succession 40 (*hereinafter* "1986 Report"); 1987 Report of NYS Law Revision Commission, Recommendation, Act and Memorandum Relating to Gubernatorial Inability and Succession 49 (*hereinafter* 1987 Report").
4. *See, e.g.*, White v. Hall, 154 S.W.2d 573, 577 (Ark. 1941); Petition of Comm'n on the Governorship of California v. Brown, 60 P.2d 1357, 1362 (1979); Bratsensis v. Rice, 438 A.2d 789, 791 (Conn. 1981); Montgomery v. Cleveland, 98 So. 111, 112-113 (Miss. 1923); Ex Parte v. Hawkins, 136 P. 991, 993 (Okla. 1913).
5. *See White*, 154 S.W.2d at 577; *Bratrensis*, 438 A.2d at 791.
6. *See, e.g.*, Markham v. Cornell, 18 P.2d 158, 162-163 (Kan. 1933); Ashcroft v. Blunt, 813 S.W.2d 849, 853 (Mo. 1991); Johnson v. Johnson, 3 N.W.2d 414, 415 (Neb. 1942); Sawyer v. First Judicial Dist. Court, 410 P.2d 748 (Nev. 1966).
7. *See Petition of Comm'n on the Governorship of California*, 603 P.2d at 1367 (Newman, J., concurring).
8. *See Markham*, 18 P.2d at 162-163.
9. *See* People ex rel. Parker, 3 Neb. 409, 411 (1872).
10. *See Petition of Comm'n on the Governorship of California*, 603 P.2d at 1363.
11. *See* N.Y. Const. art. IV; Charles Z. Lincoln, Constitutional History of New York 479-480 (1905).
12. 1984 Report, *supra* note 3, at 109-110.
13. *Id.* at 110; Lincoln, *supra* note 11, at 176, 201, 243.
14. *See supra* notes 4, 6.
15. 1984 Report, *supra* note 3, at 111-112.
16. *Id.*
17. N.Y. Const. art. XX (1777).
18. N.Y. Const. art. III, § 6 (1846).
19. *See* John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 Fordham. L. Rev. 73, 81-87 (1963).
20. *Id.*
21. *Id.* at 83.
22. *See* Calvin Bellamy, *Presidential Disability: the Twenty-Fifth Amendment Still An Untried Tool*, 9 B.U. Pub. Int. L. J. 373, 379-380 (2000). The underlying debates are fully discussed in John D. Feerick, The Twenty-Fifth Amendment (1992 ed.).
23. U.S. Const. amend. XXV, § 1.
24. U.S. Const. amend. XXV, § 2.
25. U.S. Const. amend. XXV, §§ 3, 4.
26. U.S. Const. amend. XXV, § 3.
27. *Id.*
28. U.S. Const. amend. XXV, § 1.
29. *Id.*
30. *See*, Bellamy, *supra*, note 22, at 386.
31. *Id.*
32. *Id.*
33. *Id.*
34. 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.
35. 1984 Report, *supra* note 3, at 97-108, 115-117, 118-120.
36. *Id.* at 107.
37. *Id.* at 115-116.
38. *Id.* at 116.
39. *Id.*
40. *Id.* at 117.
41. *See* Kirath Raj, *The President's Mental Health*, 31 Am. J.L. & Med. 509 (2005); Herbert L. Abrams, "The President Has Been Shot": Confusion, Disability, and the 25th Amendment in the Aftermath of the Attempted Assassination of Ronald Reagan 249-63 (1992).
42. *See generally* John D. Feerick, *The Twenty-fifth Amendment: An Explanation and Defense*, 30 Wake Forest L. Rev. 481, 489-503 (1995).
43. 886 N.Y.S.2d 846 (2009).
44. *See* Letter, dated July 1, 2008, on behalf of the Committee on Election Law of the Association of the Bar of the City of New York (Jerry H. Goldfelder, Chair) to Charles O'Byrne, Secretary to the Governor, *available at* www.nycbar.org/pdf/report/Governor_re_Succession.pdf; Statement of Attorney General Cuomo Regarding Lieutenant Governor Appointment Proposal, dated July 6, 2009, *available at* http://www.oag.state.ny.us/media_center/2009/july/july6a_09.html; 1987 Report, *supra* note 3, at 65-70, 73.
45. 886 N.Y.S.2d at 842.
46. *Id.*
47. *Id.* at 852 (Pigott, J., dissenting).
48. 1987 Report, *supra* note 3, at 73-74.
49. *Id.* at 74.
50. *See* 1943 N.Y. Op. Att'y. Gen. 378, 382 (Aug. 2, 1943); Message to Congress by President Harry S. Truman, dated June 19, 1945, Public Papers of the Presidents of the United States 129 (1961).
51. *See* J.S. McClelland, A History of Western Political Thought 214-15 (1996); J. Locke, Two Treatises of Government and A Letter Concerning Toleration (ed. Shapiro et al., 2003).
52. 1987 Report, *supra* note 3, at 75-76.
53. *Id.* at 76-77.

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Appendix

Proposed Amendment to the Constitution

Section 1. That section five of article four of the constitution be amended to read as follows:

§5. In case of the removal of the governor from office or of his death or resignation, the lieutenant-governor shall become governor for the remainder of the term.

In case the governor-elect shall decline to serve or shall die, the lieutenant-governor shall become governor for the full term.

In case the governor is impeached, [, is absent from the state] or is otherwise unable to discharge the powers and duties of his office, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.

In case of the failure of the governor-elect to take the oath of office at the commencement of his term, the lieutenant-governor-elect shall act as governor until the governor shall take the oath.

Whenever the governor transmits to the chief judge of the court of appeals, the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate, and the minority leader of the assembly his written declaration that he is unable to discharge the powers and duties of the office of governor, and until he thereafter transmit to them a written declaration to the contrary, such powers and duties shall be discharged by the lieutenant-governor, or other person next in line of succession, as acting governor.

Whenever the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate, and the minority leader of the assembly, acting unanimously, transmit to the chief judge of the court of appeals their written declaration that the governor is unable to discharge the powers and duties of the office of governor, together with the reasons for their declaration, the chief judge shall, upon due notice to the governor, convene the court for the purpose of determining the ability or inability of the governor to discharge the powers and duties of the office of governor. The court shall provide for a speedy adjudication of such matter under such rules of procedure as it shall have promulgated and published. However, if at any time prior to the final adjudication by the court, the governor transmits a written declaration of inability to the chief judge, lieutenant-governor, temporary president of the senate, speaker of the assembly, minority leader of the senate, and minority leader of the assembly, all further procedure will be as provided in the paragraph immediately above.

After an adjudication of gubernatorial inability by the court of appeals, whenever the lieutenant-governor, temporary president of the senate, speaker of the assembly, minority leader of the senate, and minority leader of the assembly, acting unanimously, transmit to the chief judge their written declaration that the inability has ceased, such declaration shall be conclusive. Absent such declaration, but no earlier than thirty days after an adjudication of gubernatorial inability by the court of appeals, whenever the governor transmits to the chief judge his written declaration that no inability exists, the chief judge shall, upon due notice to the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate, and the minority leader of the assembly, reconvene the court for the purpose of determining whether the inability has ceased.

If there is a vacancy in the office of lieutenant-governor, temporary president of the senate, speaker of the assembly, minority leader of the senate, or minority leader of the assembly, the procedure set forth above for determining the ability or inability of the governor to discharge the powers and duties of the office of governor shall proceed with the unanimous declaration of the remaining four officers.

Section 2. That section six of article four of the constitution be amended to read as follows:

§6. The lieutenant-governor shall possess the same qualifications of eligibility for office as the governor. He shall be the president of the senate but shall have only a casting vote therein. The lieutenant-governor shall receive for his service an annual salary to be fixed by joint resolution of the senate and assembly.

In case of vacancy in the offices of both governor and lieutenant-governor, a governor and lieutenant-governor shall be elected for the remainder of the term at the next general election happening not less than three months after both offices shall have become vacant. No election of a lieutenant-governor shall be had in any event except at the time of electing a governor.

In case of vacancy in the offices of both governor and lieutenant-governor or if both of them shall be impeached [, absent from the state] or [otherwise] unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected.

In case of vacancy in the offices of both governor and lieutenant-governor alone, or if the lieutenant-governor shall be impeached [, absent from the state] or [otherwise] unable to discharge the duties of his office, the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability until a lieutenant governor is appointed and confirmed.

In case of a vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, the governor shall nominate a lieutenant-governor who shall take office for the remainder of the term upon confirmation by a majority vote in each house of the of the legislature of the members present, assuming the presence of a quorum.

If, when the duty of acting as governor devolves upon the temporary president of the senate, there be a vacancy in such office or the temporary president of the senate shall be [absent from the state or otherwise] unable to discharge the duties of governor, the speaker of the assembly shall act as governor during such vacancy or inability.

The legislature may provide for the devolution of the duty of acting as governor in any case not provided for in this article.

§3. That subdivision b of section three of article six of the constitution be amended by adding a new paragraph ten to read as follows:

(10) The court of appeals shall have original and exclusive jurisdiction to determine all questions of gubernatorial inability as provided under article four of this constitution and shall promulgate and publish rules of procedure to govern such adjudications. The determination of gubernatorial inability shall have preference and priority over all other matters.

Ethics and the Constitution

By Karl J. Sleight and John A. Mancuso

"The constitution does not prohibit legislatures from enacting stupid laws."

—Justice Thurgood Marshall[1]

Introduction

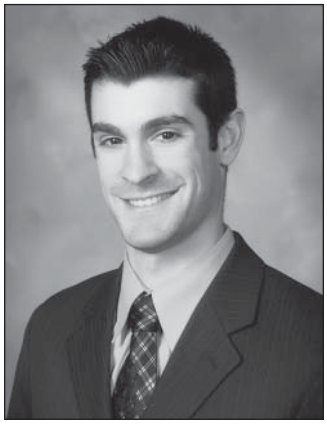
Karl J. Sleight

As the first 10 years of the 21st century came to an end, writers and columnists searched for a name for this decade. More often than not their search was not satisfied. In the field of New York state government integrity and ethics, however, this decade could easily be known as the Decade of Upheaval. Indefensible behavior by government officials spanning the spectrum from embarrassing to criminal became more commonplace. The drumbeat for a statutory response grew and culminated with the passage of the Public Employee Ethics Reform Act of 2007. PEERA was purportedly designed to fully address the State's ethics issues. Less than three years after its passage the law was under severe criticism for failing to address the problem and new "sweeping legislation" was under consideration, which would rollback certain PEERA "reforms" including abolishing the Commission on Public Integrity.

In New York, for more than 50 years since the Code of Ethics became law, state government officials have struggled with recrafting, redrafting, and retooling existing state statutes in the name of "sweeping change" to the ethics law which are packaged as a surefire way to end corruption in government. Each time, the law has fallen far short of the stated goal. But the blunt reality is that ethics statutes are often used as a foil for larger issues of personal behavior and corrosion of government processes. Ethics laws rarely have any chance of accomplishing the stark and lofty enforcement goals they are supposedly written to address, because unlike criminal statutes that is not the fundamental purpose of ethics laws.

The essence of ethics laws was succinctly captured by the Special Legislative Committee on Integrity and Ethical Standards in Government, which in 1954 stated:

> This problem of ethical standards is not the simple issue of bribery and corruption on which there is no difference of opinion; it involves a whole range of border-line behavior, questions or propriety, and the question of conflict of interests …. Involved is not only the raw material of partisan politics but the lives and reputations of honorable men and women who have made a career of public service. Also involved are changing standards. Integrity in government has never been and probably never will be subject to an absolute standard.… Conduct in public office which was once condoned would now be universally condemned. A century ago it was taken for granted that legislators represented special interests; public officers who used inside information to feather their own nests were not condemned but envied; the use of public office for private gain was the order of the day. Today we have progressed far beyond these 19th century standards of political morality. The best evidence of this progress is that we…expect not only the fact of personal honesty but the absence of any reasonable suspicion of dishonesty or even impropriety.[2]



John A. Mancuso

The landscape is littered with states and commonwealths including Kentucky, Connecticut, New Jersey, and now New York, which saw their version of the ethics laws and its regulators disintegrate under internal and external pressure. Often, the collateral damage of scandal washes over an ethics commission and the commission ends up being replaced with a "new and improved" commission (always of a different name), which in reality changes little.

With a seemingly perpetual cycle of failure or non-responsiveness, perhaps it is time to explore ethics and integrity issues in the context of the state constitution and to consider new ways to address erosion of government integrity at the state level.

I. The Role of Modern Ethics Regulation in State Constitutional Government

Following the Watergate scandal in the 1970s, Congress passed several pieces of legislation, most notably the Ethics in Government Act of 1978 (hereinafter "EGA"), designed to "repair the political process and rejuvenate public confidence in their elected officials."[3] The driving force behind

the legislation was a kind of "symbolic policy making," referred to by most authors as the "post-Watergate mentality," which contended that "(1) public servants are suspect; (2) laws must protect against all possible breakdowns of public integrity; (3) the law is the only protection; and (4) new corps or regulators must be engaged…(who are) specialists in the ethics laws they implement."[4] As a result, the restrictions placed on government employees—federal, state, and local—were anything but *de minimus*, imposing restrictions on outside income, requiring the filing of annual income reports and/or disclosures of personal finances, and placing limitations on political contributions and campaign financing.

The backlash created by these new ethics laws, as well as those enacted subsequently, has been persistent, as public officers and employees have repeatedly challenged the legality of new laws regulating governmental ethics. Most frequently, the challenges have been to laws mandating disclosure of financial conditions, interests or relationships to the public. The public officers' weapon of choice, has, not surprisingly, been the Constitution of the United States. Public officials at all levels of government have challenged ethics laws on numerous constitutional grounds, including invasion of right to privacy, restrictions on the right to vote or hold office, discriminatory classifications, equal protection, due process, self-incrimination, vagueness, and over breadth. Although an exception to the general rule always exists, the state and federal courts analyzing these issues have generally found that financial disclosure laws do not offend the Constitution. Oftentimes, the courts primary justification for upholding these laws was the public's interest in deterring official corruption.

Along with the substantive regulations enacted by federal, state, and local governments also came a shift in the method of enforcement of ethics laws, from a concept of regulating legislatures who are directly answerable to the citizenry to an appointed commission enforcing the law against them. This too raises constitutional questions, as these newly created commissions, which were designed to deal with corruption within the executive and legislative branches of government, arguably could violate the separation of powers doctrine under certain circumstances. Justice Scalia recognized these concerns in his dissenting opinion in *Morrison v. Olson*, arguing that the judiciary's overlapping role under the federal Ethics in Government Act raised concerns about "the allocation of power among the three branches and the preservation of the equilibrium of power the Constitution sought to establish."[5] Some have even analogized the power granted to the judiciary under the EGA to the English parliamentary system, arguing that:

> The EGA creates a quasi-parliamentary system by merging the executive and judicial branches together for the purpose of investigating alleged criminal wrongdoing by high level officials. Fusing two branches of government for this limited purpose strengthens the judiciary branch at the expense of the executive branch. This shift in power is contrary to the intent of the Framers.[6]

Indeed, "no single branch of government may assume a power, especially if assumption of that power might erode the genius" of the system of checks and balances.[7] "The erosion need not be great. Rather should we be alive to the imperceptible but gradual increase in the assumption of power properly belonging to another department."[8] The mixed entity status enjoyed by ethics commissions, which can, at times, function in a legislative, executive, and judicial capacity, raises similar concerns to those recognized by Justice Scalia in *Morrison*.

In New York, as with the rest of the country, numerous constitutional issues relating to ethics laws enacted by the Legislature have been raised. In *Watkins v. New York State Ethics Commission*, for example, the plaintiff, a senior attorney with the New York State Department of Social Services, challenged the state's 1987 Ethics in Government Act provisions concerning financial disclosure on numerous federal and state constitutional grounds, including the right to privacy, freedom of association, Fourth Amendment due process, privilege against self incrimination, and equal protection.[9] Balancing the rights and interest of the government employees, as citizens, against the rights and interests of the government, as employer, the Court found that the statute "unquestionably" furthered the "compelling state interest in deterring governmental corruption and in fostering public confidence in our system of government.…"[10] This principle, first pronounced by the Court of Appeals in *Evans v. Carey* noted above, is the lynchpin on which the ethics laws hang their constitutional validity.

This is not to say that state ethics laws, at times, have not run afoul of the Constitution. Indeed, the existing case law has clearly established that ethics laws, even though designed for the noble purposes of deterring government corruption and fostering public confidence in our system of government, must operate within the protections afforded under the Constitution. In *Forti v. State Ethics Commission*, for example, the Court of Appeals addressed a portion of the state ethics law that granted the Ethics Commission the ability to refer certain violations of the ethics laws to the "appropriate prosecutor" for criminal prosecution.[11] The language of the referral mechanism in question stated that "*only after such referral*, such violation shall be punishable as a class A misdemeanor."[12] Although the Court of Appeals upheld the constitutionality of the state law, the Court, in dicta, noted that the "provision for criminal prosecution only upon referral by the Ethics Commission [is] highly troublesome" and was likely violative of the doctrine of separation of powers.[13] In 2007, with the passage of PEERA, this "troublesome" phrase was removed from the statute, perhaps creating new issues and frontiers for local district attorneys and the attorney general to charge and prosecute violations of the Public Officers Law.[14]

In addition to the doctrine of separation of powers, the First Amendment right to free speech has also been implicated by ethics reform, most notably in the landmark Supreme Court decision of *Buckley v. Valeo*.[15] In *Buckley*, before the Court was a constitutional challenge to the Federal Election Campaign Act of 1971, a comprehensive effort by Congress to control and regulate campaign contributions and spending. Although the Court upheld many of the disclosure and reporting provisions, the Court held invalid on First Amendment grounds the limitations on campaign expenditures, especially those from the politician's personal funds.

On January 21, 2010, the Supreme Court again revised the area of campaign contributions in *Citizens United v. Federal Election Commission*, reversing prior precedent in the area of campaign spending and invalidating part of the 2002 McCain-Feingold campaign finance law.[16] The government's argument for regulation of corporate political speech was a familiar one—"corporate political speech can be banned in order to prevent corruption or its appearance."[17] The Court, however, found that this interest, relied upon by the Court in *Buckley*, was only sufficient justification for the regulation of "*quid pro quo* corruption."[18]

> The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:
>
> Favoritism and influence are not…avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.[19]

While this sort of "generic favoritism" may be at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle, the Supreme Court's implicit endorsement of the "fact of life" begs a fundamental question: Is the First Amendment now at odds with ethics regulation?

The treatment of government employees who are also attorneys is yet another area in the field ethics reform that crossed paths with constitutional doctrine, specifically, the separation of powers. In *Shaulis v. Pennsylvania State Ethics Commission*, the issue before the Supreme Court of Pennsylvania was whether a provision of the Public Official and Employee Ethics Act governing conflicts of interest of former government attorneys violated a provision of the Pennsylvania Constitution granting the Supreme Court exclusive authority to regulate the conduct of attorneys.[20] The Court, as is usually the case, recognized the "sound rationale for prohibiting a former government employee from 'representing a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.'"[21] However, insofar as the state legislature was not vested with the power to enact this restriction, the Legislature's attempt to regulate the ethical conduct of lawyers exclusively violated the Pennsylvania Constitution.[22] While New York's Constitution does not contain an express provision analogous to that of the Pennsylvania Constitution, the supremacy of the Court of Appeals in regulating the conduct of lawyers has long been justified based on the separation of powers doctrine.

II. Integrity Commissions as Panacea and Punching Bag

Although a purpose of ethics laws, "in promoting both the reality and the perception of integrity" in government, is to prevent unethical conduct before it occurs,[23] the political and social landscape surrounding ethics reform during the past several decades suggests that a reactive, not proactive, purpose dominates the area of ethics reform. In fact, "[e]thics laws are typically a response to scandal, enacted with the immediate goal of stemming public or media outcry."[24]

Ethics commissions, whose power is derived from the ethics laws they enforce, follow a cyclical formula. Phase 1—a governmental scandal occurs. Phase 2—the public reacts, demanding remedial legal measures to deter and punish scandalous behavior. Phase 3—the Legislature appeases their constituents, passing a law described by many as "sweeping reform." But because the new laws were enacted "with the immediate goal of stemming public or media outcry," the new laws are, unfortunately, "hastily designed."[25] Phase 4—a new scandal erupts, one not regulated by the existing ethical laws and, therefore, beyond the reach of the ethics commissions. As one New York Court noted, "The contours of corruptive practices and conflicts of interest are frequently impossible to discern until well after the fact.… [P]ractical experience has borne out that to underestimate the creative artifices and ingenuity of corrupt influences in these situations would be folly."[26] Phase 5—the ineffectiveness of existing ethics laws warrants no other action except dissolution of the former ethics commission. Phase 6—repeat as often as scandal and public pressure warrant.

Ethics reform in New York is a prime example of this type of "misdirection play"—blaming the lack of strong ethics laws for scandal. This can rightly be described as an intellectually dishonest approach of blaming the inanimate object, here the statute, for the anathema of a government that failed to meet our expectations.

> The ever-present news reports of misconduct by government officials amply illustrate that the government's coercive

> approach to ethics has neither prevented notorious and outrageous corruption by government officials, nor reduced cynicism about government service. More likely, the government's heavily regulated workplace has led to what…has [been] described as "superficial compliance," where employees learn to navigate around the detailed rules instead of complying with the broader ethical principles involved.[27]

If the solution were as easy as creating a new law, murder would have went out of vogue with Moses and the Ten Commandments and there would be no questions of whether buying a cup of coffee for a government employee is unethical.

Why is it so hard to get ethics laws right? Unlike statutes of general application, these laws directly affect the government officials and define the parameters of acceptable and unacceptable behavior. This is not to say that there is necessarily an overwhelmingly reflexive instinct to resist reasonable standards. It may simply be more difficult to find consensus among government officials on what the parameters should be.

There is another theory to posit. A review of the recent failings of state government officials would not on its face seem to support a cry for new laws. Indeed, over the last decade lawmakers who became law breakers have been held accountable by a number of federal and state agencies for unethical activity that in some cases rose to the level of criminal transgressions. The subjects' names are widely known and there is no need to rehash them here. It is important, however, to consider that there have been numerous successful prosecutions and investigations of illegal behavior that at its core is based on unethical activity. To acknowledge that, however, removes the purported need and momentum for a new and improved ethics law and shifts the focus to a basic consideration of the core reality that sometimes government officials simply fail to live up to their constitutional oath and obligation. In politics, a profession that is an odd mix of collegiality and bloodsport, for the drafters of statutes it may be easier to rewrite a law in the pursuit of perfection where none is possible, rather than to face the more complex issue of the rapid erosion of governmental integrity.

The general consensus appears to be that "there are limits on what an ethics code can do to assure the observance of high standards of conduct."[28] Among these limits are "the inability of language to define precisely all ethical obligations in a potentially vast range of factual settings, the difficulty of integrating moral principles with the type of mandatory standards found in codes, and the political compromises in the code-adoption process that often weaken codified ethical regulations."[29] Would raising the ethics commission to constitutional status end the cycle of blaming weak ethics laws for the trials and tribulations of a state government that some would argue is coming unbound from its ethical moorings?

III. Is Ethics and Integrity Regulation Deserving of Constitutional Treatment?

During Governor Paterson's State of the State address on January 6, 2010, the Governor proposed "sweeping reform to fundamentally change the culture of Albany."[30] The reform agenda sought to, once again, drastically change existing ethics regulations, by seeking to "reduce campaign contributions; require disclosure of outside income; strip the pension from any public official convicted of a felony; phase in public financing of campaigns; and impose terms limits on all State office holders through Constitutional amendment."[31] The theme underlying the Governor's call for ethics reform was again familiar—to remedy "what is still legal and rampant through the entire system of government. The corrosive effects of outside influence and inside decay have bred cynicism and scorn from the people of New York."[32]

Weeks later, the New York State Legislature responded to the Governor's call for reform, passing a "comprehensive" ethics reform bill requiring greater disclosure of outside sources of income for legislators, and activity of lobbyists, restoring an "independent" lobbying commission, and empowering a "bipartisan" enforcement unit within the New York State Board of Elections to impose strict adherence to campaign finance laws.[33] But while the bill was quickly anointed the "strongest ethics reform bill in a generation,"[34] Governor Paterson vetoed the bill, indicating that the bill "falls short" of his call for independent oversight of the Legislature.[35] A majority of editorial boards around the state had panned the Legislature's bill as inadequate. The Governor's veto survived an attempt to override it.[36]

In the wake of Governor Paterson's position that current ethics reform has not gone far enough, is it time to consider a Constitutional amendment covering governmental ethics? To remove the foil that ethics laws and the regulating commissions have become, is New York's last remaining option to grant constitutional status to ethics laws and the regulating commissions?

If a moral issue, such as ethics, were to be deserving of constitutional status, it would not be the first time in our nation's history that a primarily moral issue has received constitutional treatment. An excellent example of this is the constitutional amendment of Prohibition. During the pre-Prohibition era, alcohol was seen as a serious threat to the family, causing a "widespread belief that alcohol could disintegrate social and family loyalties and that this disintegration would be followed by poverty and crime and a frightful depth of conjugal squalor."[37] Ethics laws designed to remedy the moral deficiencies associated with political decision-making are the modern day equivalent of the early attempts to regulate alcohol. Indeed, the "push for Prohibition was in part recognition of the seriousness

of these dangers as well as an acknowledgment that earlier legislative measures had been inadequate to deal with the problem."[38] The only question, then, is whether the regulation of ethics by constitutional amendment would suffer the same fate as Prohibition.

Some states, such as Colorado and Oklahoma, have already elevated their ethics regulators to constitutional status.[39] Should New York do the same? What extra value does this have, if any? Arguably, the legal effect of the change would be mixed. The state constitutions, like state statutes, must generally yield to the principles established by the United States Constitution. Thus, the issues which arose in cases such as *Buckley* and *Citizens United* would still exist. On the other hand, an ethics commission established pursuant to a state constitution would address issues such as those raised in *Shaulis*, specifically, the separation of powers, and the conflicts between state constitutions and state laws. But what about the moral authority a constitutionally created ethics commission could wield? As a practical matter, any mention of a "constitutional right" carries with it an increased sense of importance in the court of public opinion. And, perhaps, the increased weight afforded to constitutionally created rights and entities by the public is the "push" ethics commissions need to combat the ethical dilemmas facing current public officers. But then again, perhaps the cyclical formula plaguing ethics reform will once again be followed, eventually bringing the ethics law back to where it started—responding to a government scandal.

Endnotes

1. Justice Marshall's famous observation was also quoted by Justice John Paul Stevens in a recent case from New York before the United States Supreme Court. *See* New York State Board of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring).
2. 1954 N.Y. Sess. Laws 1408 (McKinney).
3. Mark Stencel, *The Reforms*, Washington Post, June 13, 1997, *available at* http://www.washingtonpost.com/wp-srv/national/longterm/watergate/legacy.htm.
4. G. Calvin Mackenzie, The Brookings Institution, Scandal Proof: Do Ethics Laws Make Government Ethical? 32 (2002).
5. Angela L. Beasley, Note, *The Ethics in Government Act: The Creation of a Quasi-Parliamentary System*, 5 Widener L. Symp. J. 275, 292 (2000).
6. *Id.* at 288.
7. Rapp v. Carey, 44 N.Y.2d 157, 167 (N.Y. 1978).
8. *Id.*
9. *See* Watkins v. New York State Ethics Comm'n, 147 Misc. 2d 350 (Sup. Ct., Albany Co. 1990).
10. *See id.*; *see also* Evans v. Carey, 40 N.Y.2d 1008, 1009 (N.Y. 1976).
11. Forti v. State Ethics Comm'n, 75 N.Y.2d 596, 616 (N.Y. 1990).
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More Voice for the People?

By Eric Lane and Laura Seago

Eric Lane

The question is whether the New York State Constitution should be amended to provide a broader and deeper voice for New Yorkers in their government. Our answer is unequivocally "yes." But any constitutional changes should directly address the failures of New York's notoriously dysfunctional legislature, including the system by which its members are elected. Specifically, we focus on the operations of the legislative chambers, the campaign finance system, and the system of legislative reapportionment. The reforms we suggest are intended to make our current institutions more democratic and to preserve the integrity of New York's system of representative democracy. If implemented, they should help to restore the voices of New Yorkers to the halls of state government. We argue against "reforms" such as initiatives and referenda and term limits, which have historically allowed factions to tighten their holds on the jurisdictions in which they have been employed.

Our conclusions reflect the perspective on public voice that informs the United States and New York Constitutions. For the Framers, freedom required the representation of the nation's broad array of voices (which would grow broader with the expansion of the franchise) in government, but also demanded that no particular voice (interest) be easily able to dominate another. "There is no maxim in my opinion," Madison wrote, "which is more liable to be misapplied and which therefore more needs elucidation than the current one that interest of the majority is the political standard of right and wrong."[1] To thwart this tyranny of the majority, bicameralism, separation of powers, and checks and balances became the hallmarks of the both the United States and New York Constitutions. History taught the Framers of the dangers of both unheard and unstrained voices and history continues to teach their lesson. From these lessons, we draw our proposals for a more accessible, less leadership- and special interest-dominated legislature, which at the same time protects a restrained lawmaking process that acknowledges the founders' justified wariness of the tyranny of the majority.

The New York State Legislature

Even the least observant New Yorkers are likely aware of the deafness of the New York State legislature to the voice of the people. Newspapers throughout the state have long reported on and editorialized against the legislature's dysfunction,[2] and three reports by the Brennan Center for Justice have provided both qualitative and quantitative support for their conclusions.[3] In Albany, only a few people are heard, typically wealthy political donors and special interests with a stake in legislative business. And in Albany, "to be heard" is to be heard by those who are in charge of virtually all decision-making, the "Three Men In A Room:" the Governor, the President Pro Tempore of the Senate, and the ultra-powerful Assembly Speaker.

Laura Seago

This is not because New York legislators do not spend time with their constituents in their home districts. They do. In fact, given the small amount of time occupied by their legislative responsibilities, they spend plenty of time at home performing constituent services. And it is not because legislators do not translate constituent concerns into legislation. In fact, New York legislators introduce more bills than members of Congress or the members of any other state legislature. In 2008, for example, members of the New York Legislature introduced more than 18,000 bills. Just 1,634, or 9%, passed both chambers.[4] In that same year, members of the United States Congress introduced fewer than 11,000 bills and members of the New Jersey legislature, the state with the next-highest bill introduction rate, introduced only one-third the number of bills introduced in New York. While the Brennan Center has cited these figures as evidence of legislative dysfunction,[5] it can also be read as evidence that bill introduction is the only point at which rank-and-file legislators are given the power to substantively weigh in on many issues. The problem is not that legislators do nothing, but rather that their attempts to represent their constituents through their policy decisions are undermined by Albany's leadership-dominated culture in which, reports the Brennan Center, "[m]ost legislators [regardless of party] are effectively shut out of the legislative process, particularly at the most significant stage, when the leadership determines which bills should be passed and in what form. As a result, New Yorkers' voices are not fully heard, and bills are not tested to ensure that they reflect the public's views."[6]

In Congress and in most state legislatures, legislators and their staff study an issue in the course of a committee process that includes hearings, debate, and a public reading for amendments called a "mark-up." Bills reported out of committee are accompanied by reports showing the substantive work of the committee on the bill, which guide the

rest of the chamber in deciding how to cast their votes and which can be used by the courts in determining legislative intent. Members' votes on bills with budgetary implications are further informed by a fiscal analysis prepared by a qualified state employee. Legislation is then subject to an aging period to allow members adequate time to review the legislation, and debate prompts further examination of the specific language of the legislation and protects against hasty decision-making. Once a bill passes both houses, most legislatures subject it to a conference committee to collaboratively reconcile differences in each chamber's version before sending it to the governor.[7]

In New York, almost none of these things occur. This is largely attributable to New York's history of a leadership-dominated legislative process, which undercuts normal legislative procedures from the outset. A hollow committee process ensures that legislation with which the leadership does not agree—even that with broad support amongst the public and rank-and-file legislators—will never gain momentum through early exploration; instead, leadership shapes and solicits support for important legislation in closed-door party conferences that are not subject to the public disclosure requirements in the state's freedom of information or open meetings laws. Committees rarely substantively deliberate on bills and never read them for amendments, acting instead as a rubber stamp for those bills that have the support of chamber leadership and a bottleneck for those that do not. By the time a bill reaches the floor of the full chamber for a vote, its passage is a foregone conclusion, and as a result, rank-and-file members have little interest in debating or even reading the legislation on which they must vote. Members are further shut out of the process through the abuse of messages of necessity, a constitutional provision allowing the governor to circumvent the regular aging of bills for emergency legislation or non-emergency legislation that might be stymied by regular review and debate. Bills that are not guaranteed to pass almost never make it to the floor.

Leadership control over the legislative process effectively prevents the public voice from influencing or even being a part of lawmaking. In addition to weakening the rank-and-file to the extent that they cannot represent their constituents' interests, the tight control over the legislative process maintained by chamber leadership also makes it all but impossible for the public to effectively convey their views to their elected representatives in the first place. The opacity of the legislative process makes it difficult to ascertain where legislators stand on an issue, a prerequisite of an effective advocacy strategy. And the limited resources that allow a member of the public to determine where a legislator stands on a bill are available through public records requests that often take weeks or months to process.[8] Unlike many other state legislatures, the New York State Assembly does not, as of this writing, provide minutes, hearing and debate transcripts, committee voting records, and fiscal analyses to the public in an easily accessible online format. The Senate provides many of these resources, but it can take weeks to post debate transcripts. The "active list" of bills selected by chamber leadership to receive floor consideration on the following session day is often a secret, even to legislators, until the eleventh hour.[9] Other materials critical to public understanding of where a bill stands, such as written committee meeting minutes, earlier versions of amended bills, or substantive reports setting forth a committee's work on a bill do not exist at all.[10]

Examples of the impact of Albany's legislative dysfunction on public input abound, but perhaps the most egregious example in recent years is the 2008 proposal for establishing a system of congestion pricing in New York City. Although the proposal had the support of the City Council and a majority of voters statewide,[11] legislative leaders killed the bill in secret negotiations, skipping even New York's perfunctory committee process. The Assembly majority deemed a proposal to establish congestion pricing "so important that the [Democratic] conference substituted for a committee meeting."[12] In other words, the legislation was "so important" that minority party members—representing 5.5 million New Yorkers—were stripped of the opportunity to weigh in on legislation either in committee or before the full chamber. Negotiations ended when Speaker Silver emerged from a closed-door meeting and proclaimed the proposal dead. Majority party members argued that all members had the opportunity to voice their opinions by expressing them to the speaker individually or at the party conference,[13] but any such activity occurred outside the formal legislative process and away from the public eye.

Recommended Amendments

Although many of the problems that silence New Yorkers' voices in the legislature could be solved with reforms to both chambers' operating rules, constitutional reforms may be the best solution to the most critical problems that the legislature has proven itself too obstinate to solve. Despite the New York State Constitution's commitment to legislative discretion in adopting their own rules of behavior, historically poor legislative processes have resulted in constitutional amendments that imposed narrow operating rules on the legislature. Examples of this include the rules that require all bills to be printed and all bills to remain on the desks of the members at least three days before they can be acted upon. Constitutional amendments that would ameliorate the leadership's stranglehold on the legislative process should include:

- Eight-year limits on the terms of legislative leadership.
- A requirement that all bills enacted into law pass through standing committees and are accompanied by a report showing staff analysis of the bill, transcripts of hearings, statements of support for and opposition to the bill received by the committee, the minutes of committee debate on the bill and, where

appropriate, copies of amendments and technical changes introduced in committee.

- A requirement that no bill shall be reported out of committee of first reference until it is subject to a public hearing, unless 2/3 of the membership of that committee votes to dispense with a hearing.
- A requirement that all party conferences be open to the public unless a 2/3 supermajority of the conference votes to close them.
- A requirement that legislative committees keep a journal of their proceedings, as the full house is currently required to do under the constitution.
- An explicit statement that New York is a full-time legislature and a ban on legislators collecting secondary income in excess of 35% of their legislative base salaries.

The Voice of Money

New York's byzantine campaign finance laws also obscure New Yorkers' ability to participate in government and have their voices heard by amplifying the voice of the wealthy few at the expense of the majority. Individuals in New York are allowed to contribute up to $94,200 annually to political parties; a total of $55,900 to cover the primary and general election campaigns of statewide candidates; a total of $15,500 to state senate candidates and $7,600 to assembly candidates. By contrast, contributions to candidates for President of the United States are limited to $4,800 for both the primary and general election. New York's astronomically high contribution limits aren't limits at all. Donors can also give an unlimited amount of money to party "housekeeping" accounts, and parties can transfer unlimited funds from their accounts to the candidates of their choice. This effectively shrinks legislators' constituencies to a few wealthy individuals whose donations vastly overshadow those given by average voters.

New York's campaign finance laws also favor special interests. While twenty-nine other states impose restrictions on campaign fundraising during the legislative session and on lobbyists' involvement in campaigns,[14] New York's combination of high contribution limits and the commonplace practice of incumbents holding fundraisers near the Capitol during the legislative session promotes a heavy reliance on donations from special interests, typically those with business before the government. Moreover, since first campaign filings are due July 15th, there is no way to know who is making contributions while the legislature is in session. As the New York State Commission on Government Integrity wrote in 1991, "the central purpose of New York's disclosure requirements—informing the public in a timely fashion of the nature and extent of sponsorship of candidates for public office—is defeated."[15] Since the commission concluded its work, the only improvement in campaign finance disclosure laws has been the introduction of electronic filing; many donors remain obscured by the nondisclosure of business affiliations or corporate subsidiaries, and many contributions are not disclosed at all. As the trial of former Senate Majority Leader Joseph Bruno this fall revealed, lawmakers are able to collect significant amounts of money from individuals who do business with the state without disclosing that income. When policy choices affecting these entities arise, lawmakers are far more beholden to their special interest donors than to the people of New York.

Recommended Amendments

It is entirely possible to set stricter campaign finance requirements through statutory remedies, but as with rules reform, it may be prudent to codify the basic outlines of these remedies through constitutional requirements in order to shore against the political whims of the legislature. While specific dollar limits and expenditure requirements needn't be constitutionally mandated, a constitutional amendment could create a new public financing system in New York, as was done in the New York City charter:

- Establish a voluntary system of public financing of elections that provides matching funds for small contributions. Authority over the specific rules of this system, including the ceiling on the size of donations matched and the matching ratio, should be given to the State Board of Elections.

Redistricting

One of the most pernicious ways in which New York's leaders undermine the voice of the people is by limiting their opportunities to vote their representatives out of office, thereby removing voters' key failsafe for circumstances in which elected officials do not represent their interests. Legislators are responsible for drawing the districts from which they are elected, rendering meaningful challenges extraordinarily difficult. Incumbents create districts that provide them with the maximum electoral advantage, distorting the democratic process: neighborhoods are split, competing candidates are drawn out of contention, groups of voters are "cracked" or "packed" to manipulate their voting power.

For example, in the 2000 Democratic primary for a Brooklyn legislative seat, then-newcomer Hakeem Jeffries challenged a long-time incumbent and won more than 40% of the vote. When New York redrew its districts the next year, the legislators in charge of the redistricting process—including the incumbent whom Jeffries challenged—cut the block where Jeffries' house was located out of the district. In the 2004 election, with Jeffries out of the picture, the incumbent ran unopposed. This type of gerrymandering is a likely, even expected, outcome of a system in which legislators draw district lines with no meaningful oversight from an independent body: "the motivation usually fueling any legislatively drawn district plan is the protection of incumbents. Other goals are a gain in party advantage and

the reward or punishment of particular members."[16] Even when each house of the legislature has been controlled by a different political party, no sparks have flown. Each house has historically agreed with the other to defer to the other house's districting plan for its own members.

This incentive structure serves to diminish the voice of the people. As discussed above, the protection of incumbents dilutes voters' ability to voice their dissatisfaction with their elected representatives by voting against a challenger. Similarly, a gain in party advantage translates to a larger majority in the legislature. This is not necessarily a problem if it represents the political persuasions of voters in the state, but as the Assembly has demonstrated, large majorities entrenched through redistricting serve to stifle debate in the legislature and render dissent virtually meaningless. Finally, rewarding or punishing individual legislators is both the exercise and the further entrenchment of the leadership stranglehold of the legislative process, which, as discussed above, diminishes the voice of the people by rendering the job of rank-and-file legislators largely irrelevant.

The process by which redistricting plans are drawn also ignores the voice of the people. Redistricting plans are created and reviewed in secrecy; by the time the plans are made available to the public, the decisions have been made. While perfunctory hearings on the redistricting plans do typically occur in New York, legislators are never required to—and typically do not—revise their plans based on public input, or even justify their redistricting decisions to the public. New York's statutorily-mandated redistricting advisory commission, the Legislative Task Force on Demographic Research and Reapportionment, is appointed by legislative leadership and comprised primarily of legislators. Unsurprisingly, it does not serve as an effective check on the power of legislative leaders, who employ the same strategy in redistricting that they do with all important decisions in Albany—convening the "three men in a room" to devise a plan, and pushing it through the formal legislative process once it is set in stone.

Recommended Amendments

The New York State Constitution already provides for the apportionment of legislative districts by the legislature, based on census data. Two constitutional amendments could provide a check on the legislature's power and open the redistricting process to public view:

- Set an explicit requirement that no redistricting plan shall be enacted before a 45-day public comment period has passed.
- Establish an independent backup commission not comprised of members of the legislature and separate from the statutorily-established redistricting advisory commission, to draw the district lines if 2/3 of each chamber cannot agree on a redistricting plan. Connecticut uses this model.

Two "Reforms" to Ignore

Even the most optimistic, sage observers of New York and national politics cannot help but wonder whether New York would be better served by (here we bite our tongues) initiatives and referenda or even a term limited legislature. Such observers ask how anything could be worse than the government we already have. But these "reforms" could actually make New York's abysmal political system worse. Both are based on a view of human nature rejected as utopian by the framers and both have proven the framers wise as, in practice, they have transformed idealism into factionalism.

Initiatives and referenda. The initiative and referendum process, found in the Constitutions of twenty four states, was a product of the Progressives' "reforms" at the close of the nineteenth century. Their goal was to weaken the growing power of legislatures, which were becoming more and more active, as the nation became fully settled and industrialized: "[The Progressives'] democratic reforms were all aimed at minimizing, even spurning, the role of the representative intermediaries that stood between the public and its government—parties, legislators, private interests, ultimately politics itself." The corrupting influence of special interests on legislators was a concern then, as it is now. But behind this narrative was a darker, more accurate one, described by the historian Richard Hofstadter as a movement "to a very considerable extent led by men who suffered from the events of their time not through a shrinkage in their means but through the changed pattern in the distribution of deference and power." This ominous observation by one of the nation's premier historians rings true today. Throughout the country, groups (called "factions" by the framers), thwarted by either the pace of lawmaking or legislative outcomes, turned to initiatives to avoid the obstacles and delays deliberately built into our system of representative democracy. As the journalist David Broder observed,

> Government by initiative…is…a big business, in which lawyers and campaign consultants and signature-gathering firms and other players sell their services to affluent interest groups or millionaire do-gooders with private policy and political agendas…. These players…have learned that the initiative is far more efficient way of achieving their ends than the cumbersome process of supporting candidates for public office and then lobbying them to pass or sign the measures they seek.[17]

Of course, the attraction of factions to initiatives is to be expected. The underlying nature of humans is self interest, and self-interested groups organize themselves according to their interests (whether economic, religious, cultural) to advance their personal and factional goals which they often confuse and conflate with the common good. Initiatives provide an efficient means for their success.

Witness California. An initiative (Proposition 13) that made it nearly impossible for the legislature to raise taxes was followed by many others requiring the government to spend money on programs favored by various factions. This disparity between revenues and expenditures has basically destroyed the capacity of the California government to govern, brought its once great public university system to its knees, and nearly bankrupted the state. Journalists, policymakers, and public intellectuals have begun to refer to California as the nation's first failed state. And to make matters worse, the *New York Times* recently reported that there are now thirty different—and often conflicting—initiatives heading toward the ballot with the goal of repairing the problem.

Initiatives stand American representative democracy on its head, amplifying the voice of factions over the consensus voice of the public at large as conveyed through their elected representatives. As Professor Julian Eule put it:

> The Framers' vision…combined a deliberative idealism which inspired representative government with a pluralistic realism which prompted cautionary checks….
>
> The problem with substitutive [initiative] democracy is different. When naked preferences emerge from a plebiscite, it is not a consequence of system breakdown. Naked preferences are precisely what the system seeks to measure. Aggregation is all that it cares about. The threat to minority rights and interests here is structural. This is how the system is supposed to work.[18]

In other words, the notion that initiatives and referenda amplify the voice of the people is fallacious; they distort the chorus of voices representing all New Yorkers, amplifying the voices of some at the expense of popular consensus.

Term Limits. Term limits suffer from the same problems as initiatives and referenda, although they have been around for a lot longer. Limits were imposed on the terms of the members of the Continental Congress before the concept was rejected by the Framers at the Constitutional Convention. Term limits were also a serious point of contention between the Federalists and anti-Federalists during the ratification debate. After that, little was heard of them until the early 1990s, when a number of states changed their constitutions to mandate term limits through initiatives and referenda. As with initiatives and referenda, supporters of term limits claim that they will reintroduce the will of the people into the halls of government. Through term limits, advocates have argued, careerists would be swept from office, special interests vanquished from the capitol, and citizens returned to their rightful place in government. Cleta Deatherage Mitchell, the director of the national Term Limits Legal Institute, has argued that Americans' faith in their government, which had been "systematically destroyed by the special interests, the professional lobby groups, and career politicians working in concert against the interest of the ordinary voters,"[19] would be restored by limits on the terms of elected officials.

One, perhaps ironic, aspect of the term limit movement is how quickly it follows on the heels of another "reform" movement that supported the opposite direction. Only twenty years earlier, a national reform movement sought to professionalize state legislators. The strategy was "to recruit lawmakers who would stay around long enough to become seasoned professionals."[20] The concern was that growing demands for extensive state involvement in resolving multiple social and economic problems was outstripping the capacity of state legislatures to meaningfully respond.

Term limits have failed to deliver on the benefits promised by their advocates and, worse, they have strengthened special interests. The hope for the infusion of public life with private citizens has proven false. For example, under New York City's term limit law, one study found that "almost all of those elected since the City's term limit law became effective have had political backgrounds and intend to remain in elective politics."[21] This pattern proves true throughout the country. As a result, members of legislative bodies have become more competitive with one another, both undermining the discipline needed to build legislative consensus and creating new opportunities for special interests to promise support in return for special access. In New York City,

> many members of the City Council run against each other for mayor, comptroller or for borough president. As they do, competition among them grows to gain support (financial and otherwise) from the same core special interests—vesting in those interests unprecedented power to influence policy outcomes.[22]

Finally, term limits force newly elected members to turn to special interests for information. New legislators, regardless of their background, typically know little about particulars of subject matter on which they will now have to make decisions. They need a lot of information quickly and they will turn to various entrenched interests to find it. Nationally, interviews of lobbyists have indicated that interest groups have gained influence due to the inexperience of the newly elected in term limit states.[23] The only way to break the bond between lobbyists and newly elected members is to ensure that new members have access to more senior legislators with the knowledgeable staff and policy expertise to necessary develop their own, nuanced views of an issue.

Term limits, like initiatives, do not promote a stronger bond between citizens and their government. Rather, they foster disruption in the legislature and provide greater opportunity for bureaucratic or special interest influence. Also, as the New York Times has editorialized, term limits

deny Americans their most important civic right, the right to vote for the candidates of their choosing. "Worst of all, term limits violate democracy. They deny citizens the right to vote for the candidate of their choice, whether that's someone who has served with distinction for decades, a one-term hack or challengers who seek the office."[24]

Conclusion

It is New York's debasement of representative democracy that muffles the voice of the people, not the political model itself. New York's leadership-dominated legislative process, byzantine campaign finance system, and incumbent protection-driven redistricting model all serve to undermine the ability of voters to elect the candidates of their choosing and prevail upon their representatives for their desired policy outcomes—both fundamental tenants of representative democracy. Our proposed reforms serve to remove the barriers to civic participation in government by allowing rank-and-file legislators to fully represent their constituents, preventing wealthy individuals and special interests from holding disproportionate sway over elected officials, and ensuring that competitive elections provide voters with choice and compel legislators to be responsive to their constituents. These reforms will allow New York's state government to function as the founders envisioned, rather than as the mockery of democracy that it is today. Reforms that seek to undermine the legislative process and assert the public will directly prevent this vision from becoming a reality by rendering secondary the deliberative mechanisms designed to foster sound policymaking informed by popular consensus.

Endnotes

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3. See Jeremy M. Creelan and Laura M. Moulton, Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law, The New York State Legislative Process: An Evaluation and Blueprint for Reform (2004), *available at* http://www.brennancenter.org/programs/downloads/albanyreformfinalreport.pdf (*hereinafter* 2004 Report); Lawrence Norden, David E. Pozen & Bethany L. Foster, Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law, Unfinished Business: New York State Legislative Reform 2006 Update (2006), *available at* http://www.brennancenter.org/page/-/d/download_file_37893.pdf (*hereinafter* 2006 Report); Andrew Stengel, Lawrence Norden & Laura Seago, Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law, Still Broken: New York State Legislative Reform 2008 Update (2009), *available at* http://www.brennancenter.org/page/-/publications/Still.Broken.pdf (*hereinafter* 2008 Report). At the crux of all three of these reports is the problem of dominant leadership that stifles public and rank-and-file legislator participation in the lawmaking process.
4. 2008 Report, *supra* note 4, at 25; Jenny Lee-Adrian, *Most Bills Don't Become a Law in New York*, Poughkeepsie J., Sept. 26, 2008, at A1.
5. 2004 Report, *supra* note 4, at 38.
6. 2004 Report, *supra* note 4, at 42.
7. This is not to say that there are not many exceptions to this general format. Congress and other state legislatures do occasionally stray from these typical procedures, but these instances remain the exception. In New York, deviation from the standard of legislative legitimacy is the rule.
8. 2008 Report, *supra* note 4; *see also* Cathy Woodruff, *Just Post Everything for Ease of Access*, Times Union (Albany), Dec. 6, 2009; Aaron Ancel, *Agencies Fail to Obey Freedom of Information Rule*, Times Union (Albany), Mar. 19, 2008.
9. 2008 Report, *supra* note 4, at 12–13 (stating that the legislative leaders "have full control over the order of bills on the calendar and whether a bill is placed on the calendar at all").
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Gambling and the New York State Constitution

By Bennett Liebman

Gambling and New York State seem to be a perfect fit. New York State now has pari-mutuel betting on horse racing for seventy years, which now includes a massive off-track betting system, a State lottery, a video lottery system which has approximately 12,500 terminals located in racetracks throughout the State, games of chance for charities, charitable bingo, and five significant tribal gaming casinos. Hundreds of thousands of people play poker on the Internet. Yet, all of this gambling takes place in a state with a Constitutional provision in its Bill of Rights proclaiming unambiguously that all gambling is illegal with four discrete exceptions. By now in New York, it is not merely the case that the exceptions have been gnawing at the general rule. The exceptions have swallowed the anti-gambling rule in New York State. The question really is how did we reach this stage, and what can we do to create a more rational Constitutional and jurisprudential basis for the conduct of gambling in New York State.

Early Gambling History

New York State has always had a long and curious involvement with gambling. Much of the early history involved the lottery, which was basically what we today would consider a raffle. "Playing lottery games came as natural to English colonists as drinking tea."[1] People would hold prize raffles. Lots would be drawn. The person who won the drawing would receive the prize, and the proceeds would go to the organizer of the drawing. This process was likely to cause considerable mischief, and the colonial legislature limited the lottery to public ends.[2] In short, a legitimate lottery had to be authorized by the legislature. In the British colonies from the 1740s until 1776, legislatures authorized a total of 157 lotteries.[3] Both the New York colonial legislature and the early State legislature often authorized lotteries in the seventy-five year period between 1746 and 1821.[4] There was no provision in the first Constitution banning lotteries. In fact, it might be said that the lottery functioned as the 18th and early 19th century version of today's legislative member item. Constituencies throughout the State lobbied the legislature to get the members to authorize a lottery on their behalf.

For example, in 1814, a number of colleges competed to obtain a lottery for their benefit. The chief competitors were Union College, Columbia College, and Hamilton College. Union was the big winner,[5] and was the recipient of the lottery which stood to raise $200,000 for the college.[6] Hamilton received as solace a grant of $40,000. Columbia also lost and was given as a consolation prize a parcel of land "situate in the ninth ward of the city of New-York, 'The Botanic Garden.'"[7] That garden ended up being a grant by the State to Columbia of the site of Rockefeller Center.[8]

All lotteries in the nation came out of fashion in the early 19th century. Frauds were uncovered, and the lottery found itself considered a pernicious form of gambling.[9] The second State Constitution in 1821 banned all new lotteries. An act basically providing for the gradual discontinuance of existing lotteries was passed in 1822.[10] Under these enactments, the number of lottery offices in New York City actually increased from 60 in 1819, to 190 in 1827,[11] but all lottery activity in New York eventually ceased on January 1, 1834.[12] The provision banning lotteries was continued in the Constitution of 1846.

At the Constitutional Convention in 1894, the delegates were dealing not with the any renewed interest in lotteries but the seeming inability to restrict gambling on horse racing. Anti-gambling laws had seemingly had little effect in curbing the growth of horse race gambling in New York. In order to deal with the issue, the delegates determined that since legislative efforts to restrict gambling on horse racing had failed,[13] they would simply ban all gambling in the State. The delegates added language to the state's bill of rights in Article 1, Section 9 of the Constitution stating, "Nor shall any lottery or the sale of lottery tickets pool-selling, book-making, or any other kind of gambling hereafter be authorized or allowed within this state."[14] The proponents of the total ban on gambling were mindful that their actions would not fully eliminate gambling in New York State, but they were hopeful that a Constitutional ban would make it almost impossible to continue most forms of public gambling, especially on horse racing.[15]

Their efforts were in vain. The legislature returned the next year and passed legislation that made gambling at licensed racetracks not a crime but a mere civil penalty.[16] The legislation was sustained by the Court of Appeals,[17] and de facto gambling at racetracks continued to thrive under this civil penalty system. During the heart of the Progressive Era, Governor Charles E. Hughes, who argued vehemently that the 1895 act had been in violation of the Constitution, obtained legislation making all bookmaking and pool-selling criminal regardless of the location of the activity.[18] Nonetheless, the courts continued to allow wagering, if not formal bookmaking, on

horse racing,[19] and horse racing activity—except for a two and a half year span from 1910–1913—continued in New York State.[20] The growing popularity of horse race wagering and the need for increasing governmental revenues in the midst of the Depression caused the legislature in 1934 to pass legislation reverting to the 1895 system.[21] The success of pari-mutuel wagering on horses in other jurisdictions then caused the State to eventually authorize an exception to the Constitution for pari-mutuel wagering in 1939.

The first exception was followed eighteen years later with an exception for bingo for charitable, religious, and certain not-for-profit corporations. After New Hampshire started a State lottery in 1964, New York became the second state to legalize a government-operated lottery in 1966. Finally in 1975, the voters added the fourth exemption for games of chance for the same groups that were allowed to operate bingo. Much like the bingo exception, the games of chance exception was designed to shield from prosecution many existing gambling games conducted in the not-for profit section which had provided revenues for the not-for-profit operator and had largely been deemed of little harm to the overall community.[22]

As of 1975, apart from pari-mutuel horse racing, these four exemptions brought the State relatively no money. The State lottery was a failure, and had been discontinued by Governor Carey in 1975.[23]

The exceptions were simply exceptions. The general anti-gambling ban still prevailed, but in the past third of a century, the exceptions have taken over.

Horse racing. Initially, the exemption for betting on horse racing was simply to allow wagers to be placed on the limited number of races that were conducted at the racetracks. In 1970, the legislature expanded the horse racing exemption to encompass off track betting under which regional public benefit corporations conduct pari-mutuel wagering at locations other than within the enclosure of the racetrack. Off-track wagering was found constitutional by the Court of Appeals in 1972 in Finger Lakes Racing Association v. N.Y. State Off-Track Pari-Mutuel Betting Commission.[24] Despite finding that "a gambling enterprise is entirely prohibited by article I (§ 9) of the Constitution,"[25] the court found that the 5% state pari-mutuel tax on wagering at the OTB's was "on its face a 'reasonable revenue' for the support of government within the constitutional language."[26] Moreover, providing revenue to local governments from OTB would also support the constitutionality of OTB since the State and local governments in New York are so interrelated that "fiscal through a State agency to the political subdivisions of the State must be regarded as revenue for the support of State government, since it may, and the Legislature could reasonably conclude that it will, proportionately benefit the State's revenues."[27]

Besides the advent of OTB, the State now allows televising of horse racing into homes,[28] phone and Internet wagering,[29] and allows bettors to wager on most any horse race throughout the United States and into much of the world.[30] The exemption for pari-mutuel betting on horse racing has come a long way from 1940 when people were able only to wager on-track with win, place, and show bets on the seven or fewer races that the track conducted that day.

While bingo has largely not changed that much, it no longer is strictly a game played with one sheet. Instead for individuals, it can be played with electronic aids.[31]

The games of chance exemption has also been the cause of considerable expansion of wagering. Initially, as construed, it was limited to traditional table games played at casinos where the games were banking game. Banking games are games where the players played against the house and not against each other. That was expanded in 1989 to include so-called bell jar games which are basically little different than instant lottery rickets.[32] Players buy tickets, and the players scratch off the emblems or symbols to see whether they have won the predetermined prizes. The legislation was also broadened to include raffles, and raffles are not banking games. Instead, they are pari-mutuel games where the players play against each other. Raffles also can be conducted in municipalities which have not passed a games of chance ordinance where the municipality is adjacent to a municipality with a games of chance ordinance where the sponsor of the raffle is located.

There is a lotto game that is played entirely instate and a Mega Millions lotto game played in a variety of states. There are variations in the numbers game involving Pick 4 numbers and a Take 5 and a Pick 10 game. There are instant lottery scratch-off tickets, with ticket prices ranging from $1 to $30. There is a Quick Draw game played every four minutes in restaurants, bars and bowling alleys. This Quick Draw game was found constitutional in Trump v. Perlee[33] since it fulfilled all the requirements of a lottery. A player put up money, the winners were based totally on luck in matching numbers, and there was a monetary prize.

Perhaps most significantly, New York State now has over 12,500 video lottery terminals at eight racetracks. These video lottery terminals play in the same manner as slot machines. You put a voucher in the machine, the game starts up, and you watch the video to determine if you have won. The video lottery terminal setup was also upheld in Dalton v. Pataki on the basis that the machines simply operated as vendors of electronic video lottery tickets. The player simply received electronically an electronic ticket from a central computing system on which it was predetermined that the player was a winner or a loser. Thus, under this central determinant system, assum-

ing that there was no skill implicated in the play of these machines, there was no problem in authorizing these electronic games as lotteries.

The Division of the Lottery suggested in 2009 that it has the authority to include more offerings under the rubric of a video lottery. It has suggested that it has the ability to offer electronic table games as well as the video lottery machines.[34] In its desire to offer table games, the Lottery Division has stated that a valid lottery does not have to depend on total chance. There can be a skill element, but so long as chance predominates over skill, then the game would be considered a lottery.[35] This definition would threaten to make a lottery out of most any game or endeavor in which chance predominated over skill, thus making the terms gambling and lottery indistinguishable.[36] The Lottery has also taken the position that it does not need a separate legislative authorization for these electronic games.[37] Nevertheless, in 2009, the State Senate passed legislation under which the Lottery Division was authorized to promulgate rules for electronic versions of table games capable of generating random results such as roulette, baccarat, poker, and "twenty-one."[38]

So where does this leave New York's general prohibition against gambling? In short, it leaves it nowhere. Swiss cheese has fewer holes than the state's ban on gambling. The tribes under Dalton v. Pataki and the Indian Gaming Regulatory Act can and do employ all forms of gambling other than sports gambling.[39] The tribes even have been allowed to have poker under an opinion of the National Indian Gaming Commission.[40] The tribes do not currently take wagers on horse racing, but this would certainly be possible pursuant to a gaming compact.

The State through the Division of the Lottery basically has a series of lotto, raffle, and policy games that can be played throughout the State at approximately 16,000 locations.[41] It has machines denoted as video lottery machines that look, smell, play, and sound like slot machines to the general public. The Lottery Division believes, and the State Senate assumedly also believes,[42] that the lottery authorization can be broadened to encompass at the very least electronic versions of traditional table games such as roulette, poker, blackjack and craps. If the electronic versions of these games can be considered lotteries, why can't non-electronic (human operated) versions of these games also be considered to be lotteries as well? As suggested by the Division of the Lottery, most any form of gambling could be defined as a lottery.[43]

Now, while currently the video lotteries are only located in eight racetracks licensed by the New York State Racing and Wagering Board,[44] there is nothing that would prevent these video lottery facilities—so long as the games were operated by the State—to be opened in other business facilities. In his budget proposals, Governor Pataki had suggested extending video lottery operations to off-track betting facilities,[45] and there have been bills introduced to place video lottery facilities at OTBs.[46] Arguably, any business could house and benefit from the various vendor fees, vendor's capital awards, and vendor's marketing allowances currently being paid from video lotteries to racetracks.[47] Many businesses, much like horse racing, have been victimized by technology changes and changes in consumer preferences over the past half century. Arguably, video lottery terminals in malt shops, drive-in theaters, television repair shops, five and dime stores, trading stamp redemption centers, non-digital photo processing stores, or video rental retail outlets, could revitalize these entities.[48]

So we now have tribal casinos that can offer most every form of gaming and a State lottery that offers most forms of gaming and believes that it is empowered to offer most every form of gaming. The State lottery must be operated by the state, but its games can be offered through the facilities of private vendors, who can receive substantial fees for their vendor services.

While the Constitution was designed to prevent most gambling in the State, the only forms of gambling prohibited in New York State now are: (a) sports gambling, (b) betting on dog racing and jai-alai, and (c) commercial casinos. Most every other form of gambling is already on the table.

Efforts to rationalize the provision or to authorize commercial casinos have been unavailing. The main effort to rationalize the provision probably occurred at the 1967 Constitutional Convention. "The Bill of Rights Committee had proposed the deletion of the lengthy and contradictory section of the article dealing with divorce, gambling pari-mutuel betting, bingo games, and lotteries."[49] In the floor debates, this position was pressed by delegate Richard Bartlett. Bartlett noted that the Bill of Rights committee "was overwhelmingly opposed to continue the inclusion in our constitution of a constitutional prohibition against gambling. We do not deal with any other proscribed activity of this kind in our constitution except gambling. To my mind, it would make as much sense to have a provision forbidding murder in our constitution.…It does not seem to me that we ought to continue this fiction, or indeed continue to require a constitutional amendment if the legislature in its wisdom determines that some kind of gambling ought to be permitted that is not now permitted."[50]

Delegate Bartlett's views were countered by others who claimed that the absence of the existing provision "would give notice to the outside world that New York State is now wide open for gambling and all sorts of pressure will be exerted on the Legislature to legalize various forms of gambling."[51] Additionally, it was suggested that ending the constitutional provision against gambling would give the legislature a power "that has always been reserved to the people."[52]

The Convention largely retained the existing general ban on gambling and the exemptions from the ban.[53] Its

only change was to move the gambling provision out of Article I of the Constitution, the State's Bill of Rights.[54]

The effort to expand the gambling provision to allow for some commercial casinos has also been unsuccessful. Regularly, over the past four decades, resolutions have been introduced to bring commercial casino gambling into areas of New York that have seen economic deterioration and/or have suffered losses through diminished tourism.[55] In general, these areas have included the Catskills and the Niagara Frontier. At times, other areas suggested for private casinos have included the Rockaways, Long Beach, and the Lake George Region. At no time have the casino resolutions ever achieved second passage by the legislature.

The most significant battles in the legislature over private casinos occurred in 1979 and in 1997. The State legislature in the 1978 session passed three separate resolutions for casinos in unspecified "resort areas." In near Goldilocks fashion, one measure was for state-operated casinos,[56] one was for privately owned casinos,[57] and one did not specify the manager/operator of the casino.[58] Second passage of any of these measures, however, proved elusive. There was no agreement between Assembly Speaker Stanley Fink and Governor Hugh Carey over the operation of these casinos. Speaker Fink favored public ownership of the casinos, and Governor Carey, allied with Senate Majority Leader Warren Anderson, supported private operation of these casinos. Without any agreement, the casino resolutions never came up for vote in either the 1980 or 1981 legislative sessions.[59]

The other major legislative battle over casinos came in 1997. In 1995, both houses of the legislature had passed a resolution in favor of private casinos in a variety of locations.[60] The bill would have authorized, subject to local approval, casinos in the Catskills, one casino in Buffalo, one casino in Niagara Falls, one casino in either Warren or Saratoga County, and slot machines at most racetracks. In 1997, the second passage of the resolution came on for voting before the Senate early in the session.[61] The resolution was voted down by a vote of 41–19 with only two Democrats voting for the legislation and all the Republicans from Nassau County voting in opposition. The opposition was driven by an odd coalition of anti-gambling groups, OTB officials (who were fearful that casinos might harm their existing business) and Donald Trump, who was acting to protect his casinos in Atlantic City. Since 1997, there has not been a vote on a second passage of a Constitutional change governing casinos.

So all efforts to substantially alter the State constitutional provision on gambling have proven unsuccessful. What might be the rational thing to do to make some sense of gambling policy in New York? For one, it no longer makes any sense to state that all gambling is illegal with certain exceptions. As is currently the case, most all forms of gambling in New York are now legal in New York. Might it not be better to state the gambling provision in a different positive manner?

The existing exception could be stated in a positive tone affirmatively stating that the legislature was empowered to enact provisions authorizing pari-mutuel horse racing, bingo, a State lottery, and games of chance. Instead of a ban on all other forms of gambling, the legislature would be free to add other forms of gambling subject to a vote of the electorate. This would accommodate all the views of the delegates to the 1967 Constitutional Convention. An anomalous and totally ineffective ban on gambling could be dropped from the State Constitution that should satisfy the views of Delegate Bartlett. At the same time, a mandatory referendum on provisions adding gambling would satisfy those individuals who believe that increasing forms of gambling in New York State should not be easy. Thus, measures to expand permissible gambling should be subject to a public referendum similar to the referendum requirement for state debts in Article VII, Section 11 of the State Constitution. Similarly, much like the work of the 1967 Convention, there is no reason why the gambling provision should be contained within the State's Bill of Rights. It makes the most sense to place it in Article III placing limitations on the powers of the legislature.[62]

The provision might read as follows: The legislature may pass appropriate laws to provide for (1) the conduct of bingo or lotto, and games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance, subject to local referenda, only by bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations, the entire net proceeds of which are to be applied exclusively to the lawful purposes of such organizations, (2) lotteries operated by the state and the sale of lottery tickets in connection therewith the net proceeds of which shall be applied exclusively to or in aid or support of education in this state, and (3) pari-mutuel betting on horse races from which the state shall derive a reasonable revenue for the support of government. No other laws authorizing additional forms of gambling shall take effect[63] until they shall have been submitted to the people, at the next general election held at least three months after passage of such laws, and have received a majority of all the votes cast for and against it at such election.

Nobody would claim that this draft provision would end the State's problems with gambling. It does, however, rationalize the Constitution by continuing the existing forms of gambling, eliminating a totally ineffective ban on gambling, simplifying the provision by eliminating some of the extraneous, detailed limitations on charitable gambling, and allowing for a better interplay between the legislature and the public in establishing future gambling policy. It, hopefully, will be viewed as a better alternative.

Endnotes

1. Richard McGowan, State Lotteries and Legalized Gambling 6 (1994).
2. *See* Charles Z. Lincoln, The Constitutional History of New York 34 (1905).
3. David G. Schwartz, Roll the Bones 144 (2006).
4. *See* Lincoln, *supra* note 2, at 35–38.
5. It had previously been the beneficiary of $80,000 from a lottery authorized in 1805. *See* 1805 N.Y. Laws ch. 62.
6. 1814 N.Y. Laws ch. 120 ("An act instituting a lottery for the promotion of literature and for other purposes").
7. *Id.*
8. *Id. See* Claire Klein, *Columbia and the Elgin Botanic Garden Property*, 31 Colum. U. Q. 272–297 (1939); *Topics of the Times*, N.Y. Times, July 17, 1941, at 18. *See also* McGowan, *supra* note 1, at 7.
9. There was a scandal involving the 1818 New York Medical Science Lottery where lottery officials tipped off prominent people, especially political people, about the prospective winning numbers. *See* McGowan, *supra* note 1, at 13; Schwartz, *supra* note 3, at 150.
10. 1822 N.Y. Laws ch. 71, 163.
11. *See* Schwartz, *supra* note 3, at 149.
12. *Id.* at 150.
13. *See* 1887 N.Y. Laws ch. 479, known generally as the "Ives Pool Law."
14. 1894 Constitutional Convention Record IV 1114–1115, 1124 (remarks of Delegate De Lancey Nicoll and Delegate John McIntyre).
15. See *id.*; *see also* Lincoln, *supra* note 2, at 50–51.
16. 1895 N.Y. Laws ch. 570.
17. People ex rel. Sturgis v. Fallon, 152 N.Y. 1 (1897).
18. *See* 1908 N.Y. Laws ch. 507; 1910 N.Y. Laws ch. 488.
19. People ex rel. Lichtenstein v. Langan, 196 N.Y. 260 (1909); People ex rel. Shane v. Gittens, 155 A.D. 921 (App. Div. 2d Dep't 1913).
20. *See generally* Bryan Fields, *Ends a Farcical System*, N.Y. Times, Apr. 18, 1934, at 26.
21. 1934 N.Y. Laws ch. 233.
22. *See generally* Robert Allan Carter, New York State Constitution Sources of Legislative Intent 7–9 (2d ed. 2001).
23. *See* Frank J. Prial, *Carey to Overhaul Lottery and Dismiss Entire Staff*, N.Y. Times, Nov. 29, 1975, at 1.
24. 30 N.Y.2d 207 (1972).
25. *Id.* at 220.
26. *Id.* at 217.
27. *Id.*
28. N.Y. Rac. Pari-Mut. Wag. & Breed Law § 1003.
29. N.Y. Rac. Pari-Mut. Wag. & Breed § 1012.
30. N.Y. Rac. Pari-Mut. Wag. & Breed §§ 1014, 1015, 1016, 1017, and 1018.
31. *See* 9 N.Y. Comp. Codes R. & Regs. pt. 5823. Specifically, "not more than 54 computerized bingo face-cards per electronic bingo aid may be sold to one player per bingo game and programmed into an electronic bingo aid." *Id.* at pt. 5823.7(e).
32. 1989 N.Y. Laws ch. 684 (noting that since the players are competing against each other to purchase the winning tickets, bell jars are not a banking game).
33. 228 A.D.2d 367 (1st Dep't 1996).
34. Dennis Yusko, *State Wants More Games at Racinos*, Albany Times-Union, July 7, 2009, at B1; Tom Precious, *Legality of State's E-Gaming Tables Questioned*, Buffalo News, June 25, 2009, at A7; Kenneth Lovett, *Virtually Sure N.Y. Is Getting' 'Casinos*,' Daily News, June 25, 2009, at 4; Joseph Spector, *N.Y. May Take Chance on More Video Betting*, Rochester Democrat & Chronicle, June 12, 2009.
35. Precious, *supra* note 34.
36. *See generally* People ex rel. Ellison v. Lavin, 71 N.E. 753 (N.Y. 1904) (establishing the predominance test as the test which governed whether an activity was gambling).
37. Lovett, *supra* note 34.
38. Jeffrey D. Klein, N.Y. State S., Introducer's Memorandum in Support, S. 706c, 233d Sess. (2009), ("This legislation recognizes that in addition to the electronic versions of games currently offered, the State's video lottery program can offer other games that are based on the same game features that have been traditionally included in the State Lottery's online games and allows for such other games to be offered at vendor tracks in New York State.").
39. Sports gambling in the United States is basically illegal under the Professional and Amateur Sports Protection Act. 28 U.S.C. §§ 3701, *et seq.*; *see* Office of the Comm'r of Baseball v. Markell, 579 F.3d 293 (3d Cir. 2009). Also, there is no gambling on dogs or jai alai since New York's constitutional exemption for pari-mutuels only applies to "pari-mutuel betting on horse races." N.Y. Const. art. I, § 9.1.
40. *See* letter from Barry W. Brandon, General Counsel State of New York Racing and Wagering Board, to Markham C. Erickson (June 17, 1999) *in* National Indian Gaming Commission, Poker Club—Non-Banked Card Games are Class II Card Games in the State of New York, *available at* http://www.nigc.gov/ReadingRoom/GameClassificationOpinionsold/ClassIIGames/ClassIIGame20/tabid/429/Default.aspx.
41. *See* New York Lottery's Mission Statement, http://www.nylottery.org/ny/nyStore/cgi-bin/ProdSubEV_Cat_305_NavRoot_305.htm (last visited Mar, 4, 2009).
42. At least by a vote of fifty-two to eight. *See supra* note 39.
43. This seems contrary to prior decisions of the Attorney General in 1984 N.Y. Op. Att'y Gen. 1 and 1981 N.Y. Op. Att'y Gen. 68.
44. While video lottery terminals were authorized for Aqueduct Racetrack operated for racing purposes by the New York Racing Association, Inc., in Queens no operator of the video lottery business had been named as of the date of writing this paper.
45. *See* S. B. 6060, Pt. R., Reg. Sess. 2004-2005 (N.Y. 2004) *available at* http://www.budget.state.ny.us/pubs/archive/fy0405archive/fy0405articleVIIbills/revenue_bill.html.
46. *See* S. B. 4588, Reg, Sess. 2009- 2010 (N.Y. 2009) (Assembly Bill No. 8211); S. B. 6049 Reg, Sess. 2009-2010 (N.Y. 2009).
47. See N.Y. Tax Law § 1612 (McKinney 2009).
48. A new variation of the 1928 Herbert Hoover political slogan could emerge. Instead of "a chicken in every pot, a car in every garage," we could have "Craps in every drive-in, slots in every Woolworth."
49. Henrik N. Dullea, Charter Revision in the Empire State 263 (1997).
50. 1967 Constitutional Convention Record III 342 (1967).
51. *Id.* at 345 (quoting Delegate Aaron Koota).
52. *Id.* (quoting Delegate Willard Genrich).
53. *Id.* at 340 (quoting Delegate Harold Fisher).
54. *See* Resolution No. 1395-E.
55. From 1968 to 1993 about half the resolutions introduced to amend Article 1 of the Constitution were introduced to add casino gambling. *See* Gerald Benjamin & Melissa Cusa, *Amending the New York State Constitution through the Legislature*, 55, 61 *in* Temporary

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

56. S. B. 10465-A, Reg. Sess. 1978-1979 (N.Y. 1978).
57. S. B. 10467-A, Reg. Sess. 1978-1979 (N.Y. 1978).
58. S. B. 10468-A, Reg. Sess. 1978-1979 (N.Y. 1978).
59. E. J. Dionne, Jr., *Albany Session Closes in Flurry of Late Voting*, N.Y. Times, June 18, 1979, at A1; Joyce Purnick, *Carey Says Idea Of State Casinos Suffers Setback*, N.Y. Times, Feb. 6, 1980, at 30.
60. S. B. 5557, (N.Y. 1995).
61. S. B. 762 (N.Y. 1997).
62. The 1967 Convention placed the gambling provision into a miscellaneous article of the Constitution. Since the gambling provision functions as a restriction on legislative power, it makes sense to place it in the legislative article. *See* Robert F. Williams, *New York's Constitution in Comparative Context*, 17, 20 *in* The New York State Constitution: A Briefing Book, *supra* note 55.

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Would a State Constitutional Amendment Promote Public Authority Fiscal Reform?

By Scott Fein

Recent interest in the reform of State public authority borrowing practices has increased discussion about the need for a constitutional amendment to place limits on the ability of the State to borrow in the absence of voter approval. The growth of the number of State and local public authorities in New York, now numbering more than 600, and the fact that State public authorities are responsible for 85 percent of the State's infrastructure and 93 percent of the State's indebtedness incurred outside of the constitutionally mandated voter approval process, has fueled the discussion. This article examines the background of the issue and the likelihood that a new constitutional provision limiting the role of authority borrowing could make any meaningful change in the State's fiscal practices.

Background

Although public authorities do not fit neatly into the framework of government, most commentators believe that they play an important role in ensuring that there are sufficient revenues to support key government functions, and that those functions are managed and operated outside of political influence and electoral cycles.

Public authorities have a long and celebrated history. Despite popular perception, public authorities were not created primarily as a means to circumvent New York State's constitutional requirement for voter approval of State debt. Public authorities or their precursors have roots that extend back more than 500 years. European monarchs realized that they did not have the revenue to prosecute and defend wars, underwrite global exploration, and live in high style. They turned to Crown Corporations, essentially private corporations chartered by the monarch, to manufacture weapons, liquor, snuff, textiles and underwrite exploration. At the behest of financially struggling sovereigns, these private corporations agreed to undertake exploration, including the provisioning ships and paying seamen, in exchange for a monopoly on trade from any newly discovered lands. The sovereign would extend the realm and the charted corporation would use trade revenue to pay off the incurred debt and enjoy profit. The Dutch East India Company, Hudson Bay, and Plymouth Bay Company were among the more noteworthy of these private-public partnerships.

In the early 1800s, the United States was dealing with unprecedented industrial expansion and western migration. Railroads and canals needed to be constructed, banks established, and infrastructure created. Government turned to the public authority model (chartered private corporations) to raise debt to finance the improvements and then apply revenue generated by the new infrastructure to defray the debt. Unfortunately, in several notable instances the revenue earned by the public authorities proved insufficient to pay the debt, and default and bankruptcy of the authority followed. At about the same time a nationwide recession was ongoing, causing State governments to default on a significant percentage of their debts. The financial chaos prompted voters in many states to impose limits on state borrowing. In New York, this limitation took the form of an amendment to the State Constitution, which provided that no debt will be contracted on behalf of the State, unless such debt shall be authorized by law for some single purpose and shall be approved by a majority of the votes cast by the electorate. In large measure the amendment achieved its objective. The public became cautious in its approval of expenditures and by the turn of the century New York State was on stable fiscal footing. However, beginning in the 1920s and through the Depression, public authorities in New York and elsewhere became increasingly popular. During World War I, they were relied upon to construct and operate a merchant fleet, acquire and sell sugar and grain, and pay for housing. In the 1930s the Public Works Administration, Tennessee Valley Authority, Federal Deposit Insurance Corporation, and the Federal Savings and Loan Corporation were just of few of the entities formed. In New York, the Port Authority of New York and New Jersey and the New York Power Authority were added to the list. In the late 1930s, a New York State court found that, despite what had been represented by the Legislature, the liability of a public authority constituted the liability of the State. In response the State Constitution was amended to provide additional control over public authorities, including an express statement that public authority debt was not to be an obligation of State or local government.

Public authorities in New York through the 1930s were largely revenue neutral entities that performed important public services, charged tolls, fees and rents and obviated the need to materially increase taxes. Robert Moses, a government 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 Au-

thority and other transportation improvements, he largely remade the transportation and recreation infrastructure of New York City and Long Island.

With the 1940s came a further expansion on the use of public authorities. To raise the considerable 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 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 Rockefeller's administration promoted new debt practices which materially expanded the manner in which authorities could operate. The Governor upon taking office confronted a State university system that lagged behind those of other large states, urban blight, and a deteriorating transportation infrastructure. Rockefeller, seeking to honor the State 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 rejected on five separate occasions a proposal to raise money for housing, on two occasions for transportation and on four occasions for higher education. The Governor's staff, with the assistance of John Mitchell, developed an innovative approach to the issuance of public authority debt which would allow the authorities to operate outside the State budget and, without any need to seek public approval, raise money to pay for the improvements …even for matters that had been rejected in earlier public referenda. To make the debt more 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. A moral obligation was not deemed the equivalent of a State debt requiring voter approval.

The most recent expansion of Authority borrowing has proven to be the most unsettling and has sowed the seeds of the current movement for a third State constitutional amendment to constrain public authority debt. Throughout the late 1970s and 1980s, State and local elected officials confronted the imperfect storm. There was an increased demand for services, opposition to additional taxes and continuing rejection of public referenda necessary to fund the improvements (in New York, since 1946, voters were asked to approve 34 bond proposals; 22 passed and 12 failed). The public's misgivings about bond proposals so alarmed the legislators that they were reluctant to place such proposals on the ballot. Faced with unfunded needs, the New York State Governors and Legislators increasingly used authorities to supplement the State's general fund by using a scheme not so fondly referred to as "State supported public authority debt," also known as "appropriation backed debt." Unlike most of the earlier versions of public authority debt which relied upon revenue generated from tolls, fees or other payments, and the actual construction or lease of an improvement of some sort, State supported debt requires public authorities, at the Legislature's and Governor's behest, to simply issue debt. Typically, a large State authority directed by the Legislature and Governor to issue bonds, without approval of the electorate, for purposes that often have little relationship to the mission of the authority. The proceeds of the bonds are used to pay for a capital costs that historically would be paid from the State budget. The State then pays the debt service on the bond issued by the public authority using annual appropriations.

Appropriation backed borrowing has become increasingly popular. When pressed for a justification, the Legislature asserts 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 as required by State law. However compelling the Legislature's rationale, appropriation backed borrowing which occurs in the absence of voter approval has become the single largest source of the State's funds, and the use of the funding mechanism for both capital and operations needs is largely uncontrolled.

It bears note that 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. Internationally, the concept has also taken root. Japan has more than 3,000, Germany 5,000, 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.

The Need for a Constitutional Amendment

The common concern expressed by reform groups and commentators is that the State supported public authority bonding process has so dramatically increased the State's accumulated debt, in the absence of voter approval, that something must be done. Absent a constitutional amendment to eliminate State supported borrowing or provide for the imposition of a rigid cap on public authority debt, the electorate will have lost all control over State borrowing and State finances.

It is difficult to take issue with the concerns raised by the proponents of a constitutional amendment. The issue is not only that appropriation backed public authority debt supported by appropriations taken from personal income tax reserves (referred to as PIT bonds) has grown dramatically. But of equal concern, the investment community grades PIT bonds higher, that is require smaller interest payments, than the State's conventional public ap-

proved debt, referred to as General Obligation (GO) State debt. This alone encourages the State to emphasize the use of PIT bonds. Currently, GO debts constitute 12 percent of State supported debt while appropriation backed debt constitutes 23 percent of the State's debt. Legislators have increasingly looked to appropriation backed bonds for short term operational needs, in addition to capital projects, and short term borrowing for school districts and support of localities.

In 2000, recognizing that the State's debt practices needed to be controlled, the Legislature enacted a Debt Reform Act (Chapter 59 of the Laws of 2000). 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 glaring weakness. The Legislature omitted appropriation backed public authority debt from the definition of "debt" in the Act. 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) establish to impose new numerical limits on State and municipal debt, and (ii) limit the issue of appropriation back borrowing by State public authorities absent voter approval. The details of the proposed amendment differ from commentator to commentator but, generally, 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 effect a material change in the manner and scope to which the legislature uses 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 the Legislature. Moreover, as discussed in the following section, the State courts have evidenced a disinclination to enforce the two prior constitutional amendments in any circumstance in which the decision might unsettle the State's finances.

The Courts' Reluctance to Enforce Certain Constitutional Limitations

Theoretically, the two existing Constitutional provisions prohibiting State borrowing in the absence of public approval are unambiguous and self executing. No further clarification or implementing legislation is required to give the provisions force and effect. Yet, that is not the reality.

In the mid-1800s public debt to support large infrastructure projects had increased, including debt to pay for the Erie Canal. This increase, together with an economic recession beginning in 1837, resulted in a decline of State investments and in certain instances default on State debts. New York, and other states, sought to mitigate the problem by enacting limitations on the manner in which the State could issue debt, particularly as would pertain to State chartered entities. Article VII, Section 9 was amended to provide, "the 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, Section 12 of the same article of the State Constitution provides that, "no 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 import of the 1837 and 1938 Constitutional amendments was unambiguous.

Despite the constitutional provisions, New York State courts over the years have with some consistency declined to enforce the Constitutional restrictions limiting public authority bonding. A handful of cases decided by the State's highest court, the Court of Appeals, reflect the judiciary's antipathy about meddling with legislative action involving public authority bonding.

In 1955, the City of Elmira agreed to pay the debt service for the Elmira Parking Authority. The agreement was challenged as contravening of the State Constitution. The Court of Appeals, affirming the arrangement, concluded, "We should not strain ourselves to find illegality in such programs. The problem of a modern city can never be solved unless arrangements like this are upheld, unless they are patently illegal." "Since the city cannot itself meet the requirements of the situation the only alternative is for the State, in the excise of police power, to provide a method of constructing the improvements and financing their cost."

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 "the financing scheme is 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 question of the 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 courts 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 in court as a violation of the State Constitutional requirement that State debt be subject to voter approval. The State Court of Appeals affirmed the legislative decision, holding that, "(w)here as here we are called upon to deal with an intricate scheme of 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 decision, enacted into law, out of a mere preference for a different more restrained approach."

Finally, 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 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, New York's courts are not alone. Many other states have adopted statutory and constitutional requirements that prohibit debt from issuing in the absence of voter approval. In virtually all of these states, the courts have declined, in the context of public authority debt issuance, to enforce the provisions of law. Whether in Massachusetts, Wisconsin, California, Texas, Michigan, Maine, or North Carolina, courts have not been inclined to defend debt limits or the growth of public authorities.

The courts' hesitancy is not the product of political pressure; rather it is an expression of the courts' concern that tinkering with a financing scheme could destabilize a state. The courts confronting fiscal reality strain to find legality.

A second factor may influence the judicial perspective. 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 can dissuade the boldest judge from wading in to the fray. The most noteworthy example occurred in the 1981 UDC litigation. The UDC had already sold nearly $300 million in bonds for prison construction before the case contesting the sale reached the State Court of Appeals. Mindful of the delay, the Court noted any adverse judicial action at this point would '"cause unacceptable disorder and confusion."

The Alternative

It appears the value of a new, the third, State Constitutional amendment to constrain public authority borrowing is questionable. The unrelenting pressure on the legislature to use public authorities to fill budget gaps and the courts' disinclination to question the legislative prerogative, renders it unlikely a constitutional amendment would address the commentators' concerns and restore to the public primary debt approval authority. Rather it might well give birth to more creative and less transparent financing schemes which would take years to unravel.

In New York, appropriation backed public authority debt is the current reality and likely here to stay. It is an imperfect and suspect financing mechanism, but no one has identified a suitable alternative to address the State's needs. If the capital markets conclude that in the absence of appropriation backed public authority debt the State cannot meet its obligations, the market could close its doors to the State as it did to the City of New York in 1975. The result could be catastrophic. An alternative to extinguishing appropriation backed public authority debt is to adopt statutory changes to provide for greater transparency, more careful coordination of the debt and evaluation of the projects. For the past twenty years, a

number of statutory reforms have been suggested which, individually and certainly collectively, would introduce sunlight into the process and perhaps give birth 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 or 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.
- Centralizing the issuance of public authority debt to take advantage of market conditions.
- Continuing to ensure that public authorities are making available to elected officials and the public performance and fiscal measures.

Endnotes

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Liberty of the Community: Addressing an Age-Old Conflict

By Paul M. Bray

> *The inhabitants of Persia, Egypt and Mesopotamia, and the Mediterranean nations, who once enjoyed heaven on this side of the grave, have thus perished together with their forests, leaving us a warning in the ruins of their former glory, which nothing but a plea of religious insanity can excuse us for having left unheeded for the last eighteen hundred years. The physical laws of God can not be outraged with impunity, and it is time to recognize the fact that there are some sins against which one of the scriptural codes of the East contains a word of warning. The destruction of forests is such a sin, and its significance is preached by every desolate country on the surface of the planet. Three million square miles of the best lands which ever united the condition of human happiness have perished in the sand drifts of artificial deserts, and are now more irretrievably lost to mankind that the island ingulfed by the waves of the Zuyder Zee.* (Zunder Zee. F.L. Oswald, in *North American Review*, January 1897, p. 135)

Introduction

Global warming[1] with potentially catastrophic consequences to the peoples of New York State and of the world is a challenge for which nations have collectively been unable to agree upon in a cooperative response. Internationally, the line has been drawn between the rich and poor nations over where responsibility for costly actions rests. Some level of equity is needed and has not been found between rich nations that have been carbon emitters for centuries and poor nations with growing dependence on carbon emitting fossil fuels to build their economies. Within rich nations like the USA, the federal government has been unable to establish meaningful carbon limits that would restrict big industries like coal generator or result in a carbon tax.

At the root of global warming is the interplay and, in effect, a conflict between human treatment of nature and nature itself. Nature is both a provider of air, water and nourishment for humans and, at times, for example, when it manifests itself as a tornado, hurricane, earthquake, tsunami or erupting volcano, a very destructive force. Humans are dependent on nature but selective and often ambivalent in their stewardship and at times wanton in

their ill treatment of natural resources. While husbandry and silviculture protective of nature is a tradition in many cultures, Earth Day in the USA began only 40 years ago and we are still groping our way to become a green, sustainable society. Extractive, consumptive, and polluting human use of natural resources continue to be a norm.

The destructive intersection between humans and nature has manifested itself over time without giving us a legacy of principles and viable approaches for resolving conflicts between man and nature.[2] In the case of global warming, for example, despite scientific evidence many people are susceptible to arguments that deny human actions as a cause of global warming. Global warming is viewed by some as the result of natural forces and not human activities.

The purpose of this article is to discuss a concept of liberty of the community that addresses the relationship between man and nature and the idea of a state constitutional provision that provides fundamental status to liberty of the community and a collective action to protect against the human threat (in this case, global warming) to nature.

Liberty of the Community

Almost 100 years ago in 1912, a State Senator with a future, Franklin D. Roosevelt, gave a luncheon speech at the People's Forum in Troy, New York, that remains as provocative and relevant today as it was when delivered.[3]

Roosevelt began by saying that wherever you looked around the world, there was a "spirit of unrest."[4] One can say the same today. While he started with reference to "the tariff," "oppression of capital," and "the awakening and education of the labor classes," Roosevelt was primarily making a strong case for conservation of natural resources under the rubric of "liberty of the community" with the bedrock of "cooperation."[5]

Reference was first made to liberty of the individual. As the fruit of a thousand year struggle to obtain individual freedom, Roosevelt declares "as a whole to-day,

in Europe and America, the liberty of the individual has been accomplished."[6] Yet, he went on to say that individual freedom has not created "Utopia."[7]

This set the stage for "the new theory of liberty of the community" where "co-operation must begin where competition leaves off." Conservation is given as the prime example of this liberty. Germany's prohibition of denuding land of growing trees to preserve water power and therefore the health of the people is praised. By mandating scientific forestry, the liberty of the community appropriately superseded the liberty of the individual.

More graphically and profoundly, Roosevelt points out:

> There are many persons left to-day that can see no reason why if a man owns lands he should not be permitted to do as he likes with it. The most striking example of what happens in such a case, that I know of, was a picture shown me by Mr. Gifford Pinchot last week. It was a photograph of a walled city in northern China. Four or five hundred years ago this City had been the center of the populous and prosperous district. A district whose mountains and ridges were covered with significant trees. Its streams following without interruption and its crops in the valleys prospering. It was known as one of the most prosperous provinces in China, both as a lumber exporting center and as an agricultural community.
>
> To-day the picture shows the walled town, almost as it stood 500 years ago. There is not a human being within the walls. There are but few human beings in the whole region. Rows upon rows of bare ridges and mountains stretch back from the City without a vestige of tree life, without a vestige of flowing streams and with the bare rocks reflecting the glare of the sun. Below in the plains the little soil which remains is parched and unable to yield more than a tiny fraction of its former crops. This is the best example I know of the liberty of the individual without anything further.[8]

"As a whole," Roosevelt using New York State as an example, "we are beginning to realize that it is necessary to the health and happiness of the whole people of the State that individuals and lumber companies should not go into the wooded areas like the Adirondacks and Catskills and cut them of root and branch for the benefit of their own pocket."[9]

It isn't hard to imagine what Roosevelt would say today in the face of the failure of the world community, our Congress, States, local governments, and the private sector to face up to the challenges of global warming threatening many areas with real prospects of flooding, drought and impacts of extreme weather from the effects of greenhouse gases in the atmosphere. Conservationist Bill McKibben says there are a "whole range of avoidance options" to control the buildup of greenhouse gases in the atmosphere, but "we don't want to deal with it because it's painful and it's going to hurt the economy, so we're going to stick our fingers in our ears and hope it goes away."[10]

Forever Wild

More than three decades before Roosevelt's liberty of the community speech, the leaders and citizenry of New York State first struggled and finally effectively responded to destruction of the forests of the State's North Country through constitutional action. It is a striking and enduring example of how liberty of the community was realized by constitutional action.[11]

Nineteenth century scientists and foresters debated the climate effect of forests threatened by both destruction from unregulated woodmen's axe and sparks from trains igniting the dry slash left where trees were cut. There was doctrine "that once the forests and their wet soils disappeared, a region's air became warmer and drier and there was less rainfall, thus hastening its conversion to a desert."[12]

While the most dire claims were "mildly exaggerated,"[13] protecting the forest of the North Country became a cause with wide backing. Sportsmen envisioned a "people's hunting ground." Some saw and invested in hotels because of the recreational value in a wild yet beautiful landscape captured in the paintings of artists like Winslow Homer. In 1864, a *New York Times* editorial declaring the Adirondack country was fit "to make a Central Park for the world." The tipping point for preservation came from downstate business interests and was "the issue of water supply, coupled with the specters of fire and the railroads."[14] Morris K. Jesup, President of the State Chamber of Commerce, declared on December 6, 1873, that "the effects of the diminution of water upon the Hudson is already so great that navigation above Troy is rendered almost impossible in dry seasons."[15]

The first public effort at preservation of the northern forest was the enactment in 1885 of a law establishing a state Forest Preserve and creating a three-member Forest Commission. Provisions were made for a forest warden and forest inspectors, penalties for deliberate burning of state land, a requirement that the railroads cut and remove brush and other flammable material along their

right-of-way twice a year and that their locomotives be equipped with devices to prevent sparks from escaping from ash pans or smokestacks.

This forest preserve was to include "all the lands now owned, or which may hereafter by acquired by the State of New York" in specified northern and Catskill counties and that the lands constituting the Forest Preserve "shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." [16]

A total of 681,374 widely scattered acres in the Adirondack North Country and 33,893 widely scattered acres in the Catskills were owned by the State at the time this law was enacted.[17]

Graham's history of the Adirondacks points out the 1885 statute was a failure marked by corruption, thievery and poor timber management. He declared, "Because the law creating the preserve had not specified how timber should be managed, the commissioners…came to see it not simply as a 'reserve' whose chief function was to mitigate water shortages, but as a source of managed timber."[18] Calling state land a "preserve" did little to preserve the trees of the forest and led to three significant public actions within a decade of 1885.

First, in 1892, a law creating the Adirondack Park, initially consisting of State Land with specified North Country counties and town, was enacted. It provided that all State Land (551,093 acres at that time) within a "blue line" area were to be "forever reserved…for the free use of all the people." The next year a new five-member Forest Commission was established with authority to sell timber from any portion of the Forest Preserve, including the Park. The Adirondack Park was established without guidance as to what its features were to be and the Forest Commission declared that one "couldn't call the Park into existence with the touch of a wand."

"The public had reached the limit of its patience"[19] with statutory protection of the forest preserve in 1894 after the Forest Commission approved a railroad application for a right-of-way through a portion of state lands within the Adirondack Park.[20]

The New York Board of Trade and Transportation and the Brooklyn Constitution Club "resolved that the only sure method to preserve the Adirondacks was to protect them with the Constitution."[21] Their advocacy at the Constitutional Convention in 1894 led to the Convention recommending to the citizens of the State that the forest preserve be protected with a new Constitutional provision providing: "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 taken by any corporation, public or private, nor shall the timber thereon be sold, removed, or destroyed."[22] Grouped with other constitutional proposals, they passed by a vote of 410,697 for and 327,402 against in the fall of 1894.[23]

Norman J. Van Valkenburgh, former Director of Land Resources and Forest Management at the NYS Department of Environmental Conservation and author of *The Adirondack Forest Preserve: A Narrative of the Evolution of the Adirondack Forest Preserve of New York State*, succinctly described the effect of the forever wild provision of the Constitution from the time of its adoption:

> From this day forward, decisions on the Forest Preserve were to be made by the People and each new law that was passed had to undergo the test of constitutionality. The extreme restrictions specified in the Constitution seemed proof that the People wished their lands be administered according to their wishes and not subject to the changing whims of the legislatures and commissions.[24]

Forever may be as short as the three years it takes for the approval of a Constitutional amendment by two different legislatures and a vote of the people. Yet, the forever wild clause in the Constitution has managed, on the one hand, to keep at bay major exceptions to the forever wild provision while through a number of small, targeted Constitutional amendments to allow for small improvements clearly in the public interest. One can say that the community was able to guarantee by the State Constitution its interests in the protection of a vast watershed with complementary recreational and scenic values.

Constitutional Solutions

While liberty of the individual has an explicit foundation in the bill of rights of the United States Constitution, liberty of the community, for example, as a "basic right to a clean and healthful environment," as Justice Douglas implicitly recognized in his dissent in the Mineral King Valley case has not found a place in the Constitution.[25]

The constitution of New York State is one of the few with an environmental policy reading in part:

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural land…. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters,…which

> because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people.[26]

This policy arguably establishing a community environmental right is complemented with a citizen suit enforcement provision stating "[a] violation of any of the provisions of this Article [XIV] may be restrained at the suit of the people, or, with the consent of the supreme court in the appellate division, on notice to the attorney-general at the suit of any citizen."[27]

Yet, New York's constitutional environmental policy and citizen suit authorization has had very little if any impact with the significant exception of the aforementioned "forever wild" clause which for more than a century has worked through the support of courts and the citizenry to effectively protect the liberty of the community when it comes to protecting watershed, recreation, and scenic values.

What distinguishes the "forever wild" restriction is its clarity in providing that state land designated as forest preserve "shall not be leased, sold or exchanged, or be taken by any corporation, public or private, not shall timber thereon be sold, removed or destroyed."[28] Courts have found some ways around the literal language by, for example, adopting a doctrine of "inconsistent purpose"[29] to allow the state to acquire land within the Adirondack and Catskill Parks that will not be included within the forest preserve. But in general the courts have not strayed far from the constitutional restriction. The citizens by constitutional amendment also can circumvent forever wild, but like the courts citizens have been very circumspect in what they are willing to exempt from forever wild.

Fundamental Legal Status to Liberty of the Community

The success of the forever wild restriction in the New York constitution raises the question of whether it offers a model for giving liberty of the community fundamental legal status as a substantive right in the State Constitution and, with it, provides a provision capping the emission of greenhouse gas to be implemented by the state legislature and executive branch. This can be done with a limit on increases in emissions from sources and a phased cap over a period of a couple of decades. This leaves it to the political institutions to determine the means of reaching the limit whether through, for example, a carbon tax and/or regulation.

For example, a new section 18 could be added to Article 1 of the State Constitution to read as follows:

Section 18. Liberty of the community; emission limit on greenhouse gas. *The people of the state in order to maintain their health and welfare have a common interest and moral obligation to cooperatively manage nature wisely.*

Emission of carbon dioxide directly or indirectly as a result of human activity shall be prohibited from increasing and shall be substantially and expeditiously reduced, except as a result of extraordinary emergency. Implementation of these provisions may be compelled by a suit of any citizen.

This provision would elevate liberty of the community to the status of individual liberties, not necessarily resolving conflicts between substantive individual and community liberty, but at least leveling the playing field when it comes to resolving conflict.

There are arguments on both sides of the question of whether liberty of the community and limits to carbon emission should be elevated to a constitutional level. John R. Ross notes in his article on the origins of the conservation movement that today, like more than a 100 years ago, "society has again recognized the finite nature of natural resources and the delicate balance of ecosystems."[30] He elaborates on this by saying: "Whereas the first conservation movement wanted to check the depletion of certain resources, such as timber and soil, by working with nature, the 'new conservation' movement saw threats to the entire environment."[31] Climate change is a primary example of threat to the entire environment. It is a threat that organizations of state, national, and international governance have been so far unable to satisfactorily address, perhaps, in part , because of lack of a guiding principle like liberty of the community and the failure to adequately restrict greenhouse gas emissions.

Yet, the record of efforts to create a constitutional right to a clean and healthy environment at the federal or state levels as documented by Carole L. Gallagher has been one of failure, leaving Gallagher to wonder if state constitutional provisions "are really necessary."[32] The exception to that judgment is New York's "forever wild" restriction, but New York's so-called "conservation bill of rights"[33] has had modest if any direct effect on protecting natural resources and abating pollution.

Given the projected negative economic consequences of cutting greenhouse gas emissions, one can only wonder if the response to a constitutional directive on carbon emissions would be responsive like the "forever wild" clause or one of benign neglect like the constitutional conservation bill of rights. Obviously, for purposes of equity between the states, the United States Constitution would be the best home for addressing liberty of the community and restricting greenhouse gas emissions. Action by New York State might be the "imaginative environmental argument" to start "a movement for adoption of an amendment to the United States Constitution" for addressing liberty of the community and climate change.[34] It is at least worth starting a conversation on liberty of the community.

Endnotes

1. Numerous articles have been written on global warming or climate change including Intergovernmental Panel on Climate Change [IPCC], IPCC Fourth Assessment Report: Climate Change 2007, http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm#1.
2. John R. Ross, *Man Over Nature: Origins of the Conservation Movement,* AM. STUD., Spring 1975, 49, 53 (noting that George Perkin Marsh, author of *Man and Nature,* "saw that man did not own the earth and that, although he could master it, he had a moral obligation to manage nature wisely. Nature was indifferent to man's fate; if man destroyed himself it would not be nature's fault").
3. The fourteen-page speech draft, of which three pages are in Roosevelt's hand and the rest typewritten, is in the Franklin D. Roosevelt Library at Hyde Park. A portion of the speech is in EDGAR B. NIXON, FRANKLIN D. ROOSEVELT & CONSERVATION 1911–1945 17 (1957).
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. James Boyd, *Pushing the Political System: An Interview with Bill McKibben*, RESOURCES, Fall 2002/Winter 2003, at 21, 22, *available at* http://www.rff.org/Publications/Resources/Documents/149/RFF-Resources-149-pushing.pdf.
11. The history of the New York forest preserve is chronicled and discussed in a number of publications including FRANK GRAHAM JR., THE ADIRONDACK PARK: A POLITICAL HISTORY (1978) and NORMAN J. VAN VALKENBURGH, THE ADIRONDACK FOREST PRESERVE: A NARRATIVE OF THE EVOLUTION OF THE ADIRONDACK FOREST PRESERVE OF NEW YORK STATE (1979).
12. *See* GRAHAM, *supra* note 11, at 89.
13. *See id.* at 91.
14. *See id.* at 87.
15. *See id.* at 99.
16. *See id.* at 106.
17. *See id.* at 106.
18. *See id.* at 108.
19. VAN VALKENBURGH, *supra* note 11, at 59.
20. *See id.* at 58.
21. *See id.* at 59.
22. NY CONST. art. XIV, § 1.
23. THE FOREST PRESERVE OF NEW YORK STATE: A DESCRIPTION OF THE ORIGINS, VALUES, AND NEED FOR PROTECTION OF OUR GREAT PUBLIC FOREST 15 (1965).
24. *See* VAN VALKENBURGH, *supra* note 19, at 63.
25. Carole L. Gallagher, *The Movement To Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L. REV. 107, 117 (1997) (pointing out that courts have been reluctant to find a constitutionally-protected right to a healthful and clean environment within the Constitution, preferring to let legislatures and administrative agencies to define and apply these terms).
26. *See* N.Y. CONST. art. XIV, § 5.
27. *Id.*
28. *Id.* § 1.
29. Ralph D. Semerad, *Article XIV*, in 2 TEMPORARY STUDY COMMISSION ON THE FUTURE OF THE ADIRONDACKS, THE FUTURE OF THE ADIRONDACK PARK 11 (1971).
30. *See* Ross, *supra* note 2, at 60.
31. *Id.* at 60.
32. *See* Gallagher, *supra* note 25, at 152.
33. PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 250 (1991).
34. *See* Gallagher, *supra* note 25, at 154.

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The Judge of the Qualifications of Its Members

By Bennett Liebman

The recent case of State Senator Hiram Monserrate has brought renewed attention on a provision of the State Constitution that had largely been forgotten. The provision is the second clause of the second sentence of Article III, Section 9 of the Constitution. The provision states "Each house shall… be the judge of the elections, returns and qualifications of its own members."[1]

The issue concerning Senator Monserrate involves his conviction in October of 2009 for criminal assault. While Senator Monserrate was found innocent of two more serious felony charges, he was found guilty of "dragging his companion Karla Giraldo down the hallway of his apartment building in December of 2008."[2] Monserrate had been elected to the Senate for the first time in November of 2008. Thus, the assault took place after his electoral victory but before his term in the State Senate commenced. A special committee formed in the Senate[3] after the trial recommended that Senate sanction Senator Monserrate and vote on whether to censure or remove Monserrate.[4] On February 9, 2010, the full Senate voted to expel Monserrate by a vote of 53 to 8.

This article will review the history of Constitutional provision, review its usage in New York history, review the history of similar provisions in other states and the federal government, and try to identify some of the potential problems raised by the Monserrate case.

Judging the Qualifications of the Members of the New York State Legislature

The original State Constitution in 1777 stated that the Assembly shall "be judges of their own members."[5] This was altered slightly by Constitutional Convention of 1821 which provided that each house shall "be the judge of the qualifications of its own members."[6] At the 1846 Convention, the language was changed to its current form that each house is "the judge of the elections, returns, and qualifications of its own members."[7] The language has remained unchanged since 1846.[8]

There have been relatively few efforts made to amend the provision. The basic problem with the provision developed in the second half of the 19th century as the majority party in particular would use its power to judge the elections of its members to seat members of its own party in contested elections.[9] In 1883, an amendment was introduced authorizing that contested legislative elections be tried by the courts. In 1890, this amendment was suggested by Governor David Hill who "thought that the power vested in each house to determine the election, returns and qualifications of its members had been abused frequently and that the only remedy was a transfer of jurisdiction from the Legislature to the courts."[10]

The impetus to change the provision began in earnest after the election results in 1890. At the election, the Democrats took control over the Assembly. With their numerical advantage in the Assembly, minus the Republican majority in the Senate, the Democrats would have a very slim majority in the event there was a joint session of the legislature, and a joint session would be called in 1891 to determine, in the days before the 17th Amendment, the next United States Senator from New York State. With only a slim overall majority, it was assumed that Governor Hill would prevail on the Assembly leadership to make certain that the Democrats would win any contested races for the Assembly thereby ensuring that a Democrat would be named the next United States Senator from New York.[11]

In response to this possibility, Republican Senator Saxton submitted a concurrent resolution under which the legislature could enact laws under which the determination of contested elections would be made by the courts.[12] As it turned out in January of 1891, Governor Hill did not need to oust any putative Republican members of the Assembly. Governor Hill had sufficient backing that the joint legislative session ended up voting for Governor Hill, himself, as the next United States Senator from New York.[13] Governor Hill then proposed a concurrent resolution similar to that of Senator Saxton. He proposed that the courts, rather than the houses of the legislature determine contested elections for the legislature. He stated, "Legislative bodies are often loath to relinquish any of their privileges but the determination of contested elections of their members has become so much a matter of partisanship that wise statesmanship and a sense of justice would demand its transfer to a fairer tribunal."[14]

The wording of the proposal was as follows:

> The election, return and qualifications of any member of either house of the legislature, when disputed or contested, shall be determined by the courts in such manner as the legislature shall prescribe, and such determination, when made shall be conclusive upon the legislature. Either house of the legislature may expel

> any of its members for misconduct; but every person who receives a certificate of election as a member of either house, according to law, shall be entitled to a seat therein unless expelled for misconduct, or ousted pursuant to a judgment of a court of competent jurisdiction.[15]

The resolution was passed by both houses in 1891. It was endorsed in 1892 by incoming Governor Roswell Flower,[16] and it was passed a second time by both houses of the legislature in 1892. Nonetheless, at the general election in 1892, it was rejected by the people by a margin of 5, 352 votes.[17] There was speculation that the resolution's electoral difficulties were affected by the fact that it was the creation of the very controversial Senator Hill, and that people believed that the amendment would accomplish little since courts would ultimately act in the same partisan manner as the legislature.[18]

The 1892 vote was the last time that a serious effort was made to change the Constitutional provision making each house the judge of the returns and qualifications of its members.

Statutory Provisions

It can be seen from the express language of the Constitution that its language does not explicitly speak of the power of each house to expel or punish the behavior of its members. There has, however, been legislation to cover this issue. Section 3 of the Legislative Law states, "Each house has the power to expel any of its members, after the report of a committee to inquire into the charges against him shall have been made." This language has been unchanged since 1892.[19]

In turn, this language is derived from the original Revised Statues of the State. The language read,

> [e]ach house has the power to expel any of its members and to punish its members and officers for disorderly behavior, by imprisonment; but no member shall be expelled until the report of a committee, appointed to inquire into the facts alleged as to the grounds of his expulsion, shall have been made.[20]

One of the major questions involved in looking at possible expulsions of members is whether: (a) the statutory language on expulsions is simply a procedural mechanism under which each house of the legislature utilizes its power to judge the qualifications of its members, (b) whether the statutory language is a procedural mechanism to implement the inherent right of legislative bodies to discipline and expel members of their bodies,[21] and/or (c) the statutory language on expulsions stands on its own as a substantive grant of power to each house of the legislature. In the case of the New York State legislature there is the additional issue of whether the houses of the legislature even have any power to expel members.[22]

Historical Review of Legislative Expulsions in New York

Over the past ninety years, legislative expulsions in New York have been non-existent. In part, this has been due to the fact that individual legislators who have been guilty of felonies have left the legislature without much fuss. But, another major issue has been that New York State has largely avoided the issue of legislative expulsion since the expulsion of five members of the Assembly who were excluded from the Assembly in 1920 because of their membership in the Socialist Party. While seemingly a popular act at that time immediately after World War I, the Russian Revolution, and the Palmer Raids,[23] the removal of the Socialists has come to be viewed as a gross overreaction to a minimal threat that seriously undermined the free speech rights of Americans. Since the 1920 expulsion, only one member has been expelled. That came in 1921 when Assembly member Henry Jaeger was removed from office. Jaeger was a Socialist, but the stated basis of his expulsion was that he was not a resident of the district that he was elected from.[24] The other Socialists who were elected to the Assembly in 1921 were not removed from office.[25]

A number of the efforts to remove members from the New York State legislature were not successful. In the case of Assemblyman Lucas Decker, who had been accused of avoiding the draft and obtaining his election through fraudulent means, the Assembly found that "some question involving the election or returns is necessary before the Assembly has jurisdiction in the premises, or further that the person so elected must be entirely disqualified under the constitution, or by his conduct in the house disqualify himself."[26] In short, in the Decker case, the Assembly took a restrictive view of its powers and limited itself to an assessment of whether Decker met the constitutional qualifications for his office and whether he had engaged in heinous conduct before the house.

In the case of Senator James Wood, the effort to remove the Senator for accepting bribes was ultimately unsuccessful. The senator had not been found guilty of any offenses against the current Senate. Any offenses he committed were offenses against the prior meeting of the Senate.[27] This would lead to the belief that a legislator could only be removed for misconduct committed during the current legislative session.

On the other hand, in the case of Senator Jotham Allds, the Senate looked at misconduct that occurred at prior session when Allds had served as a member of the Assembly. Allds, who was the temporary president of the Senate in 1910, was accused that year of accepting a bribe in 1901. After a long hearing, Allds resigned just before a vote was to be taken on his removal. The Senate proceed-

ed to take a vote on his removal and voted 38-8 to remove him.[28] While Allds had resigned, his case can be viewed as one where the legislature considered misconduct which occurred before the legislative term.

In the case of the five Socialists in 1920, the essence of the case was that the Socialists had given an oath to the tenets of the Socialist Party of America. Those tenets clearly were inimical to the oaths required of a legislator in New York. They could not legitimately be supporting the Constitution of the United States and the Constitution of New York State. If they took the New York oath, they could only be taking a false oath.[29] They were, by definition, disloyal. The Assembly voted overwhelmingly to disqualify the five Socialists from holding seats in its body.[30]

In earlier cases, the Senate removed members in 1779[31] and 1781.[32] The Assembly removed member Jay Gibbons in 1861 for misconduct by a vote of 99-8. Gibbons' attorney argued that the Assembly lacked the power to expel a member, but the argument was unsuccessful. Efforts to reduce Gibbons' penalty to a censure or to a request for him to resign were rejected by the Assembly.[33]

There are no cases like the Monserrate case where either house of the legislature brought charges against a member who had been convicted of a misdemeanor. There are no cases where a member was removed after being found guilty of a felony. Rather, after a felony conviction, the member has normally resigned from his or her position because under the Public Officers Law, conviction of a felony creates a vacancy in the office.[34] From the limited number of removal cases, there really are few clear precedents. The legislative decisions seem to have been made on an ad hoc basis, and it is difficult to extract authoritative benchmarks from these decisions.

Qualifications in Other Jurisdictions

Nearly all states, and the federal government, are like New York State in making the members of each house the judges of the qualifications of their members.

The United States Constitution provides in language that is most similar to New York's constitution "each house shall be the judge of the elections, returns and qualifications of its own members."[35]

In 1915, the Constitutions of 46 states explicitly made each house the judge of the elections and qualifications of its members.[36]

An even more recent survey confirmed that 48 states still made each house the judge of the qualifications of its members.[37] The only two exceptions were Hawaii and North Dakota where judges make the decision on the qualifications of members in contested election cases.[38] Hawaii retains a provision that each house is to judge the qualifications of its members,[39] but in contested elections, that power is reserved for the courts under a separate provision of the Hawaiian constitution.[40] North Dakota makes each house "the judge of the qualifications of its members, but election contests are subject to judicial review as provided by law."[41]

Unlike New York, almost all states and the federal government provide for expulsion of members by each house. The United States Constitution authorizes each house with the "concurrence of two-thirds,"[42] to expel a member. Almost all states explicitly provide that each house can expel its members, and the vast majority require a two-thirds vote. Many states also place a restriction on expulsions so that a house may only expel a member once for the same offense.[43] Vermont restricts expulsions for conduct that only became known during the current term of the house.[44] Some states, including New York, New Hampshire, North Carolina, South Dakota, and Massachusetts lack any provision authorizing houses to expel their members. Kansas simply authorizes each house of the legislature to provide for expulsion or censure of the members in appropriate cases.[45] Others provide that certain expelled members are ineligible to serve in either house of the legislature,[46] and other states make persons convicted of certain crimes ineligible to serve as legislators.[47]

States without an explicit provision authorizing a house to expel a member of the legislature have not refused to take action to remove individual legislators. Instead acting on the authority of the inherent right of legislative bodies to discipline and expel members,[48] there have been removals in these states.[49] In the absence of any Constitutional language on the removal of legislators, it would be assumed that expulsion would be authorized pursuant to a majority vote.[50]

Traditionally, the power of each house to judge and/or expel its members was considered an absolutely exclusive power.[51] That remains basically the case today.[52] Nonetheless, over the past half century, there have been more judicial encroachments into what had been the exclusive legislative domain.[53] Courts have begun to take baby steps to enter the political thicket.

Potential New York Issues

Felonies and State Legislators—A first issue that needs to be reviewed is whether the provision of the Public Officers Law providing that conviction of "a felony or a crime involving a violation of his oath of office"[54] can constitutionally be applied to members of the legislature. If each house is truly the judge of the qualifications of its members, how can it legitimately cede its jurisdiction to another branch of government? This issue was raised in the lower courts in the case of *Ruiz v. Regan*.[55] Israel Ruiz had been convicted of a federal felony. The State Comptroller removed him from the State payroll, and Ruiz was seeking reinstatement as a member of the Senate. He raised the issue that the State Constitution required the

full Senate to remove him. The court quickly disagreed finding that by enacting the applicable portion of the Public Officers Law, the "State Legislature itself declared petitioner's office vacant."[56]

Nonetheless, the issue should have merited far greater scrutiny. The Court of Errors dealt with this issue in the major 19th century case of *Barker v. People*.[57] Barker involved a constitutional test of the state's anti-dueling law that had been passed in 1816. The portion of the law that was in question was the provision that a person convicted of the crime was made ineligible to hold public office. The statute was upheld by the court based on the power of the legislature to establish penalties for violations of the criminal law. Nonetheless, as to applying this law to members of the legislature, the court demurred and left the issue up to the houses of the legislature.

The court found, "The power of each house of the Legislature to judge the qualifications of its own members, does not determine or illustrate what is, or is not a qualification; the statute to suppress dueling does not propose to deprive, nor can any law deprive, the several houses of the legislature of their exclusive jurisdiction; and this part of the constitution, is therefore not infringed by the judgment of disqualification now in question."[58] In short, a law, providing that a person would lose his or her right to office if convicted of a certain crime, could not be applied to members of the state legislature. The power to judge the qualification of the members is not one that can be delegated. "The legislature cannot transfer its power to judge of the election of its members to the courts."[59] In short, this is a significant issue that needs to be handled in far greater depth than it received in the *Ruiz* case.

What are Qualifications?—If the power to expel a member from a house of the New York State legislature is premised on the ability of each to judge the qualifications of its members, then there may be little basis for expelling any members except for violations of the Constitution. In *Powell v. McCormack*,[60] the House of Representatives refused to seat longtime Harlem Congressman Adam Clayton Powell for a number of issues involving his personal misconduct. The court found that the refusal to seat Congressman Powell was improper. While the House was the judge of the qualifications of its members, those qualifications referred solely to qualifications contained in the Constitution. The House lacked the power to add non-Constitutional qualifications as a test of membership.

In the State Constitution, the only qualifications for membership in the legislature are a residency requirement and an oath requirement. A member has to be a citizen of the United States, a resident of the state for five years, and a resident of the district for the 12 months preceding his or her election.[61] The member must also take the prescribed oath authorized by the Constitution.[62] The New York State Constitution does not contain any age requirements or character requirements for legislators. As such, under the Powell case, if the legislature is trying to expel or exclude a member based solely on its power to judge qualifications, this power may be a minimal one.

Judicial Review of Legislative Seating Decisions—During the pendency of the removal actions against the Socialists in the Assembly in 1920, Governor Alfred Smith stated, "It is true that the Assembly has arbitrary power to determine the qualifications of its membership, but where arbitrary power exists it should be exercised with care and discretion because from it there is no appeal."[63] The attorney for the ousted Socialists said, "We regard the expulsion of our Assemblymen primarily a question for the people and not for the court to decide."[64] Justice Douglas in *Powell* added, "And if this were an expulsion case I would think that no justiciable controversy would be presented."[65]

Yet decisions over the past five decades have challenged this view of no role for the courts.[66] In the case of Powell, the Supreme Court overturned a decision of the House of Representatives not to seat a Congressman, finding that judging the qualifications of a Congressman involved a limited power to judge only those qualifications established by the Constitution.[67] In *Bond v. Floyd*, the Supreme Court determined that the First Amendment prevented the Georgia House of Representatives from excluding an electoral winner who had been severely critical of United States policy in Vietnam.[68] A state legislative body could not exclude an individual for exercising his or her First Amendment rights.[69] Additionally, courts have found that state legislators, subject to removal, have the due process rights of notice, a hearing, and a right to defend themselves.[70] Thus, legislators who are the subjects of a removal proceeding appear now to be able to have a limited judicial review of the constitutionality of their ouster.

The Statutory Authority—If the only source of authority that each legislative house has to remove a member is derived from § 3 of the Legislative Law, then it might be argued that this deprives each house of the ability to impose a lesser penalty than removal. The only power that the legislature has under § 3 is to expel members.

The Time of the Misconduct—In the case of Senator Monserrate, his misconduct occurred in December of 2008 after his election in November but before his term of office in the Senate began. In the case of James Wood, the Senate limited actionable misconduct to acts that occurred during the present term of office.[71] Other non-legislative sources suggesting that only acts that took place during the term of the member are actionable include the brief that former Supreme Court Justice Charles Evans Hughes filed on behalf of the Association of the Bar in support of the Socialists in the Assembly. Hughes argued that absent a constitutional disqualification on the part of the members "or of any misconduct in office" the members were entitled

to be restored to the privilege of their seats.[72] This issue is further complicated by the Senate review in the Allds case and the fact that the voters in the Monserrate case could not have passed judgment on his criminal action.

In short, the Monserrate case is likely to bring to the surface numerous issues presented under a Constitutional provision which has been somnolent for many decades.

Endnotes

1. N.Y. Const. art. III, § 9.
2. Jeremy W. Peters & Fernanda Santos, *A Call for a Monserrate Expulsion Vote*, N.Y. Times, Jan, 15, 2010, at 23. He was also found innocent of a second misdemeanor charge "of intending to cause physical injury to Ms. Giraldo by cutting her with a glass."
3. The committee was formed pursuant to § 3 of the Legislative Law which states, "Each house shall have the power to expel any of its members, after the report of a committee to inquire into the charges against him shall have been made." N.Y. Legis. Law § 3 (McKinney 1991).
4. Peters & Santos *supra* note 2; *see also* Joseph Spector, *Senate Panel Urges Vote on Monserrate*, Rochester Democrat & Chronicle, Jan. 15, 2010; State of N.Y. Select Committee to Investigate the Facts and Circumstances Surrounding the Conviction of Hiram Monserrate, Report (Oct. 15, 2009), *available at* http://www.nysenate.gov/files/pdfs/Final%20Monserrate%20Report.pdf.
5. N.Y. Const. of 1777, art. IX.
6. N.Y. Const. of 1821, art. I, § 3.
7. N.Y. Const. of 1846, art. 3, § 10.
8. N.Y. State Constitutional Convention Comm., Problems Relating to Legislative Organization and Powers 42 (1938).
9. *See, e.g.*, *The Twombley-Carey Case Settled in Accordance with the Desires of the Ring*, N.Y. Times, Feb. 1, 1871 (regarding the seating of a Democrat as an Assembly member). *See also* 189 N.Y. Red Book, 381–398, 418–507 (including the numerous times where the legislature determined the winner of a contested election).
10. *See* State Constitutional Convention, *supra* note 8, at 43.
11. *See Hill Will Imitate Reed*, N.Y. Times, Nov. 6, 1890, at 5 (arguing that the Governor would have the Assembly leadership "bundle out of the House every Republican whose majority is narrow enough to justify a contest."). *See also Hill's Policy of Eviction*, N.Y. Times, Dec. 31, 1890, at 1 ("Gov. Hill has been planning to oust a sufficient number of Republican Assemblymen to enable him to name the successor of Senator Evarts.").
12. *To Improve the Ballot Law*, N.Y. Times, Jan. 19, 1891.
13. Governor Hill was elected the next United States Senator from New York by a vote of 81–79. While the term began in March of 1891, Hill served out his entire term as governor, finally taking his seat in the Senate at the beginning of the 1892 calendar year.
14. *Governor Hill's Message*, N.Y. Sun, Jan. 7, 1891 at 5; Charles Z. Lincoln, Messages from the Governors VIII 1074 -1076 (1909).
15. Concurrent Resolution, Mar. 6, 1891, 1891 N.Y. Sess. Laws 749 (amending N.Y. Const. art. 3, § 10).
16. Governor Flower in his annual message noted, "Jurisdiction over the determination of such cases properly belongs to the courts, and I am satisfied that the proposed transfer of it will give general satisfaction when effected." Charles Z. Lincoln, Messages from the Governors IX 35 (1909).
17. The vote was 174,678 for the amendment and 180,030 opposed. Downstate New Yorkers supported the amendment, and it was opposed by upstate New York voters. 1893 N.Y. Legis. Manual 791 (1893).
18. *The Three Amendments*, New York Daily Tribune, Nov. 7, at 2. ("But did Mr. Hill make that suggestion having in mind the fact that the Court of Appeals which will have the final disposition of the contested legislative election cases has a majority of Democratic judges and is likely to have such a majority for many years to come?").
19. N.Y. Legis. Law § 3 (2009).
20. 1 Rev. Stat., pt. 1, ch. VII, title II, § 12, at 154 (1st ed., 1829). The Select Committee to Investigate Senator Monserrate reviews the origins of this statute in its report. *See supra* note 4, at 36–37.
21. *See generally* Thomas Cooley, Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 133 (1868) ("This power is sometimes conferred by the constitution, but it exists whether expressly conferred or not. It is 'a necessary and incidental power, to enable the house to perform its high functions and is necessary to the State. It is a power of protection.'" (*quoting* Hiss v. Bartlett, 69 Mass. 468, 473 (1855) (Shaw, C.J.))).
22. In 1987, the Assembly Committee on Ethics and Guidance concluded that the houses of the legislature lacked the authority to expel members. Assembly of the State of N.Y. Comm. on Ethics and Guidance, Findings After Investigation Concerning Charges Against Assemblywoman Gerdi E. Lipschutz (1987). Not only does this conclusion seem to against the force of legislative precedent, but it seems in clear contradiction of *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 481 (1885) (mentioning the issue of expelling members and concluding that "the necessity of the powers mentioned is apparent, and is conceded in all the authorities."). *See also* People ex rel. Hatzel v. Hall, 80 N.Y. 117, 126 (1880).
23. An action of Congress to remove Socialist Representative Henry Berger in 1920 passed by a vote of 311-1. *See* Zechariah Chafee, Free Speech in the United States 247 (1948); Thomas E. Vadney, *The Politics of Repression, A Case Study of the Red Scare in New York*, 49 N.Y. Hist. 56 (1968).
24. *Assembly Ousts Henry Jaeger, Socialist; Finds He Was a Jerseyman When Elected*, N.Y. Times, Mar. 31, 1921, at 1.
25. *Assembly Refuses to Oust Socialists*, N.Y. Times, Apr, 5, 1921 at 21.
26. 1 Assembly J. 105 (1918).
27. Senate J. 639 (1872).
28. 16 Senate Documents (1910). Similarly, misconduct before the beginning of his term was used as the basis for impeaching New York Governor William Sulzer in 1913. *See* Proceedings in the Court of Impeachments: The People of the State of New York by the Assembly Thereof against William Sulzer as Governor 1686 (1913).
29. The required oath is now in N.Y. Const. art. XIII, § 1.
30. Two were disqualified by votes of 116-28, one's vote was 115-28, and votes against two were 10-40. *See* 3 Proceedings of the Judiciary Committee of the Assembly in the Matter of the Investigation by the Assembly of the State of New York as to the Qualification of Louis Waldman, August Claessens, Samuel A. De Witt, Samuel Orr and Charles Solomon to Retain their Seats in Said Body 2805-2807 (1920).
31. Senator John Williams, Journal of the Senate of the State of New York 166 (1778).
32. Senator Ephraim Paine, Journal of the Senate of the State of New York 78 (1781).
33. Journal of the Assembly of the State of New York 793– 96 (1861).
34. N.Y. Pub. Officers Law § 30(1)(e) (McKinney 2006). *See also* Ruiz v. Regan, 143 Misc. 2d 773 (Sup. Ct. Albany Co. 1989).
35. U.S. Const., art. I, § 5.
36. H. W. Dodds, Procedures in State Legislatures 3 (1918) *citing* Legis. Drafting Research Fund of Columbia University Prepared for the N.Y. State Constitutional Convention Commission, Index Digest of State Constitutions 925–926 (1915).

37. Paul E. Salamanca & James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members*, 95 KY. L.J. 244, 254 -255 (2006-2007).

38. *Id.* at 254.

39. HRS CONST. art. III, § 12.

40. *See* HRS CONST. art. II, § 10. *See* Akizaki v. Fong, 461 P.2d 221 (Ha. 1969).

41. N.D. CONST. art. IV, § 12.

42. U.S. CONST. art. I, § 5.

43. *See*, *e.g.*, ALA. CONST. art. IV, § 53; CONN. CONST. art. III, § 13; IND. CONST. art. 4, § 14; OR. CONST. art. IV, § 15. Mississippi has the unique provision that each house can only expel a person once for the same offense, except in the cases of "theft, bribery, or corruption." MISS. CONST. art. IV, § 55.

44. VERMONT CONST. § 14—expulsion "not for causes known to their constituents antecedent to their election."

45. KAN. CONST. art. II, § 8.

46. ARK. CONST. art. V, § 12. WYO. CONST. art. III, § 12 and OKLA. CONST. art. V, § 19 bar a member expelled for corruption for serving in either house in the future.

47. *See*, *e.g.*, COLO. CONST. art. 12, § 4 making persons "convicted of embezzlement of public moneys, bribery, perjury, solicitation of bribery, or subornation of perjury" ineligible for service in the general assembly. *See similarly* ALA. CONST. art. IV, § 60; ARK. CONST. art. V, § 9; DELAWARE CONST. art. II, § 21; MISS. CONST. art. IV, § 44; N.D. CONST. art. IV, § 9; PENN. CONST. art. II, § 7, and S.D. CONST. art III, § 4.

48. *See supra* note 21. "In the states of Massachusetts, New Hampshire, New York and North Carolina, there being no constitutional provision on this subject, the power to expel exists, as a necessary incident to every deliberative body and may be exercised at the discretion of the assembly, and in the usual way of proceeding." Luther Stearns Cushing, *Lex Parliamentaria Americana: Elements of the Law and Practice of Legislative Assemblies in the United States*, § 685, 269 (1874).

49. *See* Hiss v. Bartlett, 69 Mass. 468, 473 (1855). *See also* State v. Gilmore, 20 Kan. 551 (1878).

50. French v. Senate of California, 80, 1031, 1032 (Cal. Sup. Ct., 1905).

51. *See Gilmore*, 20 Kan. at 554.

52. Wheatley v. Sec'y of the Commonwealth, 792 N.E.2d 645 (Mass. 2003); *see also* Heller v. Legislature of Nevada, 93 P.3d 746, 754 (Nev. 2004) (stating that "a legislative body's decision to admit or expel a member is almost unreviewable in the courts"); State v. Evans, 735 P.2d 29 (Utah 1997); Salamanca and Keller, *supra* note 38; Ronald A. Parsons, *Pierre Pressure: Legislative Elections, the State Constitution and the Supreme Court of South Dakota*, 50 S.D. L. REV. 218 (2005). "The courts have uniformly denied that they have any power to review either legislative expulsions or legislative decisions on the qualifications of members." ZECHARIAH CHAFEE, FREEDOM OF SPEECH 340 (1920).

53. Powell v. McCormack, 395 U.S. 486 (1969); Bond v. Floyd, 385 U.S. 116 (1966); Stephenson v. Woodward, 182 S.W.3d 162 (Ky. 2005).

54. PUB. OFFICERS LAW § 30.1(e).

55. 143 Misc. 2d 773 (Sup. Ct. Albany Co. 1989).

56. *Id.* at 775. *See also* 1989 N.Y. Op. Att'y. Gen 1 (1989). A more substantial defense of the power of a legislative act to declare a State legislative position to be vacant can be found in Erichetti v. Merlino, 457 A.2d 476, 486 (N.J. Super. 1982) finding that a vacancy was qualitatively different than an expulsion.

57. 3 Cow 686 (1824).

58. *Id.* at 708.

59. Thomas M. Cooley and Victor H. Lane, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* 189 n.1 (7th ed., 1903). *See also* 1977 Iowa AG: "You point out that mere statutes such as Chapter 57 and 59 of the Code, cannot limit the power of a house of the General Assembly. Of course, you are correct."

60. *See supra* note 54. Justice Douglas in a concurring opinion noted the views of Alexander Hamilton who wrote, "The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature." 395 U.S. at 552.

61. CONST. art. III, § 7. The local residential requirement is altered slightly after readjustments or alterations of legislative districts.

62. CONST. art. XIII, § 1.

63. *Smith Assails Assembly,* N.Y. TIMES, Jan. 11, 1920, at 1. *See generally* David Colburn, *Governor Alfred E. Smith and the Red Scare, 1919-20,* 88 POL. SCI. Q. 423 (1973).

64. *Socialists Seek Special Election*, N.Y. TIMES, Apr. 7, 1920, at 8.

65. *Powell*, 395 U.S. at 553.

66. *See supra* note 53.

67. *Id.*

68. Bond v. Floyd, 385 U.S. 116 (1966).

69. Under the Bond case, arguably the exclusion of the five Socialists in New York in 1920 could be viewed as a violation of their First Amendment rights. It would also make it unlikely that a house could expel a member who engaged in speech that could be considered biased against any gender, religion, race, or sexual orientation.

70. McCarley v. Sanders, 309 F. Supp. 8, 11 -12 (M.D. Ala. 1970); Gerald v. Louisiana State Senate, 408 So.2d 426 (La. App. 1 Cir. 1981); c.f. Gordon v. Leatherman, 325 F. Supp 494, 498 (S.D. Fla. 1971) *rev'd on other grounds* 450 U.S. 562 (5th Cir. 1971); Sweeney v. Tucker, 375 A.2d 698 (Pa. 1977).

71. *See supra* note 26.

72. Hughes' brief quoted in FREEDOM OF SPEECH, *supra* note 52, at 339.

Bennett Liebman is the Executive Director of the Government Law Center of Albany Law School. He teaches courses on Sports and the Law and Government and Gambling. His previous positions in New York State government included commissioner at the New York State Racing and Wagering Board, Assistant Commissioner for Legal Affairs at the New York State Department of Taxation and Finance, Special Deputy Counsel to the Governor, Counsel to the Lieutenant Governor, and Counsel to the New York State Board of Public Disclosure. Mr. Liebman is a *summa cum laude* graduate of Union College and a *cum laude* graduate of New York University School of Law.

Committee on Attorneys in Public Service

2010 Annual Meeting Program

Tuesday, January 26, 2010 • Hilton New York

The Committee on Attorneys in Public Service (CAPS) hosted its 2010 Annual Meeting program and awards reception on Tuesday, January 26th. The CAPS educational programs included the morning program, "The Supreme Court: Precedents and Principles," presented by Supreme Court scholars Jason Mazzone and William Araiza, professors at Brooklyn Law School. The program provided an overview of significant Supreme Court decisions of the October 2008 term, cases from the 2009 term and addressed the theme of doctrinal change.

The afternoon program, "The State Legislature and the State Constitution: The Path Forward," was moderated by Professor Michael Hutter of Albany Law School. The events of 2009 focused considerable attention on the role of the State Legislature and issues of succession to vacancies in State offices, as well as on the constitutional structure and function of State government as a whole. Professor Hutter led discussions in three panel discussions. Laurence Laufer of Genova Burns & Verona, Justin Levitt of the Brennan Center for Justice and Mark Glaser of Greenberg Traurig spoke on "Focus on the Legislature: Reform and Renewal." Professor Hutter joined with Professor Peter Galie from Canisius College on "Taking a Closer Look at State Constitutional Change." Justice James Yates, NYS Supreme Court, John Dunne of Whiteman, Osterman and Hanna, Robert Ward of the Rockefeller Institute of Government and Peter Kiernan, Counsel to Governor David Paterson, discussed "Process and Substance of Constitutional Change."

CAPS Chair, Hon. Peter Loomis, ALJ served as emcee for the CAPS Awards for Excellence in Public Service Awards Reception, which took place immediately following the educational programs. Diane F. Bosse (ret.), formerly of the New York State Board of Law Examiners, The Honorable Patricia Marks of Monroe County Court and Peter Schiff of the New York Department of Law were the honorees for the 2010 Awards.

Special thanks are extended to CAPS Chair, Hon. Peter Loomis, ALJ; Spencer Fisher, Natasha Phillip, CAPS Annual Meeting Co-Chairs; and Anthony Cartusciello, Donna Hintz, Awards Co-Chairs.

Professor Jason Mazzone

Professor Richard Araiza

Justin Levitt

Professor Peter Galie

Mark Glaser

Professor Michael Hutter

Laurence Laufer

John Dunne

Justice James Yates

Peter Loomis

Peter Kiernan

Robert Ward

Laufer, Levitt, Glaser

Kiernan, Hutter, Yates, Dunne, Ward

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Tuesday, January 26, 2010
5:30 p.m. – 7:00 p.m.
Hilton New York

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Diane Bosse

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Former Chief Judge Judith Kaye, Diane Bosse and Peter Loomis

Judge Judith Kaye; Chief Judge Jonathan Lippman, Hon. Peter Loomis, ALJ

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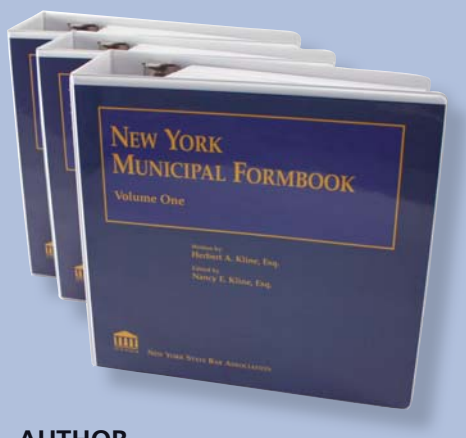

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