

# Presidential Summit: Lawyers can be leaders in discussions on benefits of Constitutional convention



**Conventional talk**—Solicitor General Barbara D. Underwood discusses how the state Constitution differs from the U.S. Constitution as panelists Henry M. Greenberg, Dr. Gerald Benjamin, Richard Ravitch and Richard Briffault listen. [Photos by Steve Hart/Happening Photos]

By Patricia Sears Doherty

Although the State Bar to date has not taken a position on whether voters should convene a constitutional convention in 2019, speakers at the second discussion of the Annual Meeting's Presidential Summit, made some strong arguments as to its benefits.

Early in his term, President David P. Miranda appointed a State Bar Committee on the New York State Constitution, to study the state government blueprint and suggest areas of concern to the delegates of a potential convention.

In November, the House of Delegates approved the committee's first report, which called for state funding for a preparatory commission to educate the public on the state Constitution, prior to the constitutionally dictated referendum on the 2017 general election ballot.

The referendum's language is mandated in the Constitution: 'Shall there be a convention to revise the constitution and amend the same?'

"This can have a potentially tremendous impact on lawyers and the citizens of New York," said Miranda in introducing the Summit panel.

Governor Andrew Cuomo apparently agreed, and has requested \$1 million for a preparatory commission in his proposed budget which requires action by the state Legislature by March 31.

The next step for the State Bar committee is to study the current constitution and suggest areas that could be on the agenda of a preparatory commission. During the Presidential Summit, and at the January 29 House of Delegates meeting, Committee Chair Henry M. Greenberg of Albany (Greenberg Traurig) revealed that the committee's first examination will be of the concept of home rule, and promised that the next report sent to the House

would be on that topic.

"We think it is vitally important that the public be thoroughly educated before this vote, because it presents a once-in-a-generation opportunity for New Yorkers to reinvent their state government," said Greenberg, calling it "a unique opportunity."

Lawyers will play an important role in helping convention delegates with their work, because of their particular set of skills.

"It's no accident," said Greenberg that the three people who drafted New York's state Constitution in 1777, John Jay, Governor Morris, Robert Livingston, were lawyers; 33 of the 55 delegates who created America's first Constitution were lawyers; and that all the current justices of the U.S. Supreme Court, and all seven judges of the state Court of Appeals are lawyers.

"That's because lawyers, by training, disposition, temperament, and yes, sworn obligation, each and every one of us take an oath to support the state and federal Constitutions," he said.

## New York values

Barbara D. Underwood, state Solicitor General, spoke about struggles within the courts to determine when it should depart from the opinions of the U.S. Supreme Court, which interprets the meaning of the federal constitution.

"The U.S. Supreme Court has the last word on the meaning of the federal Constitution, but it has no authority at all to interpret a state Constitution," said Underwood.

Therefore, examining the state Constitution is appropriate. "Constitutions are formed not only by their drafters, but also by judicial interpretation. And where improvement is needed, there may sometimes be more than one way to get it," she said.

Panelist Dr. Gerald Benjamin, a political scientist and director of the Benjamin Center for Public Policy Initiatives at SUNY New Paltz, reminded the audience that Governor Cuomo "has linked the need for the commission to some of the fundamental challenges that we face in New York governments and have been facing for some time. He particularly noted ethics enforcements and the rule of day-to-day business" said Benjamin.

However, Benjamin said that some of the issues Cuomo hopes the convention would address, require quick remedies. Those remedies, said Benjamin, could sink the call for a convention.

Benjamin named some of those issues: the supposed "unlimited nature" of the convention, because of the Constitution's 20-year mandate for a voter referendum on whether to hold a convention; partisan bias in districting; Voting Rights Act concerns about selection of convention delegates; how candidates for delegate finance their election campaigns; cost of the convention; and concerns about legislative dominance of delegate election.

But, Benjamin said, the mandated referendum is not an alternative to the way New Yorkers are governed.

"It's part of the way we govern ourselves. It's an aspect of our governance that gives the sovereign people a say, a moment to consider whether they want to keep the system they have operating as it's operating, or they want to consider alternatives by getting a group of people to pay attention to designing and recommending alternatives for the consideration of the people at referendum," he said.

One benefit of holding a convention is that delegates will debate the issue of citizens' lack of trust in New York government and the "the dynamic of presumption about government that's negative and in a negative spiral," he said.

"So thoughtful consideration with some institutional change might be a compelling way of rekindling support for government, and the good things that government does in society," concluded Benjamin.

## What to talk about

Richard Briffault, a professor at Columbia Law School and an expert in local law and local government ethics, wondered what would be on a convention agenda.

"The ultimate issue is what would it be about? What are the kinds of things that we think require constitutional revision, or at least we think ought to be talked about when we talk about consti-

tutional revision?" said Briffault.

He said that lawyers will be asked to be opinion and thought leaders in communities throughout the state in the months leading up to the referendum.

"As this process unfolds in New York over the next 22 months, you're going to be looked to in your communities to figure out, and people are going to ask you, 'what is this constitutional thing, and what's it about?'" said Briffault. "And you're actually going to play an important role in educate them on what the issues are."

Lawyers will be leaders in the discussion because of their ability to define the central issues and to analyze the benefits, good and bad, of holding a constitutional convention, said Briffault. Lawyers also can help shape the questions on what should or should not be topics of convention discussion.

A convention could take up the debate on the way elections are administered and the structure of boards of elections, which the constitution man-



**Define 'politician'**—Former Lieutenant Governor Richard Ravitch speaks about finances at the Summit.

dates as bipartisan.

Answering that question could help address the low voter turnout for elections of recent years, said Briffault.

"New York State is well behind other states in pioneering methods of making it easier to vote. We're one of the few states that doesn't have early in-person voting, which might make it easier for people to vote," he said, suggesting that perhaps the makeup of election boards should not be mandated bipartisan.

Another important convention topic could be about home rule and good government, he said.

"Where are constitutional mandates

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## Presidential Summit: Benefits of a constitutional convention—and what to talk about

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or restrictions on the government appropriate?" he asked. "Because that's what a constitution would do. It would either try and make the government do something that it doesn't want to do, or stop them from doing something they do want to do, and what are some things which are desirable, but that probably are not fit for the constitution?"

### Rebuilding politics

Former Lieutenant Governor Richard Ravitch said he sees "no downside" to convening a constitutional convention. He sees advantages to the

public conversation that would ensue.

"I think there is a very significant disquiet in the public today, expressed unfortunately by diminished participation in politics, and above all, by a diminishing appetite on the part of young people to go into politics, to take the risk of exposing their lives to the vicissitudes of public life, and I think that's a serious problem," said Ravitch.

The issues discussed at a convention would be foremost in the public's concern and "should be discussed in the most open and public form that's possible.

"It could well come to deciding that we don't need to change any constitutional provision. That in and of itself would be a serious and perhaps proper decision" Ravitch said.

Drawing upon his background in finance, Ravitch presented examples of fiscal practices on the state and local levels.

"The issues that the public is going to be facing in the next 20 years have to do with the state's ability to manage its fiscal affairs in a way that will not drive people out of the state, but will ensure that the necessary services and a safe and sound infrastructure is available," he said.

A constitutional convention could go a long way to restoring the integrity of becoming a politician, he said.

"I desperately hope that my grandchildren will not continue to think of 'politician' as a pejorative characterization, and the only way they can do that is by having the kind discussion about the real issues that New Yorkers face in the context of a constitutional convention."

To view the entire Presidential Summit discussion, go to [www.nysba.org/webcastarchive](http://www.nysba.org/webcastarchive). ♦

*Sears Doherty is State Bar News editor.*

## Solar energy push driving innovative legal accommodations

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and also help lower the cost of solar."

Sandbank said that Con Edison used the program to install solar energy in Queens and Brooklyn rather than build sub stations and raise rates.

The state government plan also scales up solar usage through community-distributed generation, which enables the 25 percent of individuals who cannot install systems at home to share ownership and benefits of solar projects. Members contract with a sponsor who develops a system at a single site.

### More demand, more questions

Shaw said he believes community-distributed generation will skyrocket—and raise various legal questions.

For example, while community-distributed generation is largely geared toward residential customers, the rules say that up to 40 percent of the membership may be a single entity – such as a commercial, industrial or government customer. If a government entity were to become a customer, there is speculation on whether prevailing wage laws would apply. Shaw said this is among the many issues that require more clarity.

Another concern is what happens when solar projects create more energy than needed at a particular site. Because customers potentially could sell the extra electricity, they risk falling under federal securities provisions. Some opinions have held that they would not trigger those regulations because the customers clearly buy energy for their own use, not to profit. To make this clear, however, lawyers should draw contracts carefully.

"If a contract is found to be a security, time-consuming and expensive

compliance requirements may apply," said Devin McDougall of New York City (Sive, Paget & Riesel P.C.).

Lawyers also can expect community solar contract negotiations to involve multiple parties—regulators, utilities and investors— with their own priorities. And, McDougall said, consumer protection laws apply, requiring contracts that are clear, include cancellation policies and prohibit selling personal data.

He advised lawyers to pay close attention.

"The community-distributed solar program is experimental, so it is going to change, and will eventually become subject to standards of the REV program," said McDougall.

### Acting locally

Leo Wiegman, executive director of Sustainable Westchester, a non-profit made up of local governments in the county, described how small municipalities can help develop substantial clean energy projects that lower costs for thousands of ratepayers.

Last year, the organization got PSC approval for New York's first community choice aggregation program. Under REV, the initiative lets municipalities bid out the natural gas and electricity supply for homeowners and small business owners as a group. Once the appropriate bid is received, Wiegman said the system will serve more than 10,000 customers in 20 municipalities.

Sustainable Westchester also is helping convert a closed landfill in White Plains into a solar project that will power city government operations. Other endeavors include organizing communities into buying groups that navigate highly technical state and fed-

eral tax incentives and utility regulations, and draw private investors.

"The 40 cities, towns and villages that make up Sustainable Westchester have over 800,000 residents," said Wiegman, a former mayor of Croton-on-Hudson.

"We are developing innovative partnerships that allow municipalities to develop needed services, while sharing the learning curve and organizing the marketplace. We keep track of the opportunities as policies and regulations change, so our member municipalities can focus on what they do best—delivering local services."

As New York takes on its big energy agenda, local governments are responding by updating plans and amending zoning.

"We are seeing more and more comprehensive plans include renewable and solar in their documents, which is very helpful when we get to the strategy side," said Jessica Bacher, executive

director of the Land Use Center at Pace Law School, which is working with municipalities through NY-Sun.

To streamline the process, she said the state has developed a model solar permit that 110 communities have adopted. A model solar energy law for localities will soon follow.

Bacher emphasized using the right definitions and devising processes that match a project's scale so smaller ones aren't delayed. She sees communities address standards for rooftop and ground-mounted solar systems, and requirements for setback, clearance and environmental impact.

"The state wants to encourage solar and we'll see more applications at the local level that include a number of different priorities," she said. "How do we balance those priorities? We are talking about that." ♦

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**Eyes on New York**—Noah Shaw of NYSERDA talks about the legal implications of solar power.



**Normal energy**—Leo Wiegman of Sustainable Westchester discusses its solar projects. [Photos by Brad Hamilton]