

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

**THE ESTABLISHMENT OF A PREPARATORY
STATE COMMISSION ON A
CONSTITUTIONAL CONVENTION**

ADOPTED BY

**THE COMMITTEE ON THE NEW YORK STATE
CONSTITUTION**



Approved by the House of Delegates on November 7, 2015

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INTRODUCTION AND EXECUTIVE SUMMARY

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

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

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

¹ N.Y. CONST. art. XIX, § 2 (“At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question “Shall there be a convention to revise the constitution and amend the same?” shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . .”).

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

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

Thus, since 1914, the State has vested in temporary constitutional commissions the important — indeed indispensable — responsibility of doing the research, data-collection and other preparations necessary to conduct a Constitutional Convention. “Some [commissions] were appointed by the governor; others were established by the legislature. Some were created in anticipation of a vote on the mandatory Convention question;

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

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

others resulted from the need to prepare quickly after the question passed.”⁴ And some produced bodies of research and work product useful not only to Convention delegates, but also policymakers, courts and scholars decades after.⁵

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

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

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

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

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

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

⁵ *Id.*

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

I. BACKGROUND OF THE REPORT

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

At the Committee's first meeting on August 27, 2015, President Miranda requested that the members study and make recommendations on whether the State should establish a preparatory commission to plan and prepare for a Constitutional Convention. The Committee then heard from Professor Gerald Benjamin, Associate Vice President for Regional Engagement and Director of the Benjamin Center for Public Policy Initiatives at SUNY New Paltz, a nationally respected political scientist and commentator on state and local government. Professor Benjamin presented an overview of issues relating to the 2017 mandatory referendum and the conduct of a Constitutional Convention, and spoke about his service as Research Director of the Temporary Commission on Constitutional Revision from 1993 to 1995. Next, the Committee reviewed and discussed a research memorandum that surveyed the history of past preparatory commissions for

Constitutional Conventions, described the work product created by them, and identified key issues that must be considered in creating such a commission today.

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

II. HISTORICAL OVERVIEW OF PREPARATORY COMMISSIONS AND CONVENTIONS

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

A. Constitutional Convention Commission (1914-1915)

On April 7, 1914, the voters approved the call for a Constitutional Convention by a slim majority (153,322 to 151,969).⁶ Shortly thereafter, the Governor signed into law a bill establishing the “New York State Constitutional Convention Commission” with full power and authority to “collect, compile and print such information and data as it may deem useful for the delegates to the constitutional convention . . . in their deliberations at

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

such convention.”⁷ The Commission was specifically tasked to supply research materials to the Convention delegates before the Convention was to convene in April 1915.⁸

The Commission consisted of the Majority Leader of the Senate, the Speaker of the Assembly, and three citizens of the State appointed by the Governor.⁹ The Commission’s enabling legislation provided for no compensation to the members, but provided expenses, and also provided for the employment of paid “clerical, expert and other assistance.”¹⁰ For this purpose, the Legislature initially appropriated \$5,000.¹¹

The Commission’s Chair was Morgan J. O’Brien, a former Justice of the State Supreme Court. The Commission selected its staff and fixed their compensation.¹² The State agency responsible for providing assistance to the Commission, the Department of Efficiency and Economy, relied heavily on a newly formed private organization dedicated to producing research of government organizations, the New York Bureau of Municipal Research.¹³ The Bureau assigned 20 people to this project, including Charles A. Beard,

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

⁸ *Id.*

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

¹⁰ L. 1914, ch. 261, § 1.

¹¹ *Id.* § 2.

¹² *Id.* § 1.

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

later to become one of the most influential historians and political scientists in American history.¹⁴

The Commission produced a 768-page report for the 1915 Convention delegates that contained a comprehensive and detailed description of the organization and functions of the State government.¹⁵ The Commission also produced a 246-page appraisal of the State Constitution and government.¹⁶ The comprehensiveness and quality of these materials established New York as the first state in the nation to lay a solid research foundation for a Constitutional Convention.¹⁷ In fact, “[t]he report of the commission was the first comprehensive description of a state government ever prepared.”¹⁸ These materials ensured that the delegates to the Convention arrived well-prepared¹⁹ and established a precedent of detailed preparation for two future mandatory Convention referenda (1957 and 1997) and Constitutional Conventions (1938 and 1967).²⁰

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

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

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

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

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

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

²⁰ *Id.* at 1300.

B. Constitutional Convention Committee (1937-1938)

On November 3, 1936, the voters approved the call for a Constitutional Convention by a vote of 1,413,604 to 1,190,275.²¹ In response, Governor Herbert H. Lehman recommended in his annual message to the Legislature that past practice be followed by establishing a non-partisan committee to assemble and collate data for the use of the Convention.²² “It seems to be extremely short-sighted,” he observed, “for us to do nothing until the day the convention assembles.” The two Houses of the Legislature, however, did not adopt the Governor’s recommendation.²³

In the face of the Legislature’s inaction, on July 7, 1937, Governor Lehman announced the appointment of the “New York State Constitutional Committee.”²⁴ Consisting of 42 members, the Committee was “non-partisan and non-political in character and in motive,” and responsible for undertaking and directing “the preparation and publication of accurate, thorough, and above all, impartial studies on the important phases of government, certain to be considered at the Constitutional Convention.”²⁵ Governor Lehman made clear that the Committee’s purpose was not “to

²¹ *Id.* at 1304.

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

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

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

²⁵ *Id.*

determine an agenda for the Convention . . . Its functions will be confined to fact-finding studies and to the collection of data.”²⁶ Although all of the Committee’s members were appointed by the Governor, the Legislature appropriated money in support of its work.²⁷

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

The Committee produced 12 reports: five reference volumes, along with volumes devoted to problems related to the bill of rights, taxation and finance, and issues of home rule and local government. As constitutional historian Peter J. Galie has observed, “despite the haste in gathering this material, the Poletti Committee, as it became known, produced one of the most comprehensive and reliable source[s] of information on the New York Constitution.”²⁹

²⁶ *Id.*

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

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

²⁹ GALIE, ORDERED LIBERTY, *supra* note 6, at 233; Williams, *Constitutional Commissions*, *supra* note 4, at 50 (the “Committee produced a body of work extraordinary for its depth, breath, and quality”). The Poletti Committee’s reports are often cited by New York courts. *See, e.g., People v. Peque*, 22 N.Y.3d 168, 187 (2013) (“As noted in the Poletti Committee’s report in preparation for the State’s constitutional convention of 1938”); *Bordeleau v. State*, 18 N.Y.3d 305, 317 (2011) (“Such

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

In 1956, more than a year before the mandatory referendum on a Constitutional Convention, the Legislature established the “New York State Temporary Constitution Convention Commission.”³⁰ The Commission was given three responsibilities: (1) to study proposals for change and simplification of the Constitution; (2) to collect and present information and data useful for the delegates and electorate prior to and during the convention; and (3) to issue reports to the Governor and the Legislature. The interim reports were due not later than March 1, 1957, and from time to time thereafter until March 1, 1959, provided, however, that if the voters decided against the Convention the Commission would terminate on February 1, 1958.³¹

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

concerns were the subject of debate during the 1938 Constitutional Convention. But the Convention and subsequent ratification of the amendments by the electorate demonstrated the approval for the ability of public benefit corporations to receive and expend public monies, enable the development and performance of public projects and be independent of the State [see *Problems Relating to Executive Administration and Powers*, 1938 Rep. of N.Y. Constitutional Convention Comm., vol. 8, at 325–326] (citing the Poletti Report)].

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

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

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

The Commission had an outstanding staff, with nearly 70 expert consultants to conduct policy reviews.³⁴ On September 26, 1956, the Commission held its first organizational meeting,³⁵ and issued its First Interim Report on February 19, 1957.³⁶ The report provided a brief outline of the State's constitutional history, a description of methods of amending the Constitution, and staff studies that updated the compilation of state constitutions that had served the 1938 Convention and presented an outline of proposed background studies in local government. The Commission indicated that it would look for opportunities to simplify the existing Constitution in non-controversial ways.³⁷

³² L. 1956, ch. 814, § 2.

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

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

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

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

³⁷ *Id.*

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

In the spring of 1957, the Commission created an Inter-Law School Committee on Constitutional Simplification. The Committee examined 54 sections of the Constitution, recommending elimination of 23 of them as superfluous and outmoded. Other sections were deemed so cumbersome and “harmfully detailed” that they could “be rewritten and substantially shortened.”⁴⁰

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

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

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

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

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

On September 19, 1957, the Commission issued a Second Interim Report⁴² that summarized the proposals gathered by the Commission from individuals and 107 organizations during public hearings. The subjects receiving the greatest attention were local governments and home rule, legislative apportionments, organization and procedure.⁴³

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

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

As a result of legislative action calling for a referendum vote, in November 1965, the voters approved the call for a Convention by a vote of 1,681,438 to 1,468,431.⁴⁵ That same year, the Legislature established the “temporary state commission on the revision and simplification of the constitution and to prepare for a constitutional convention.”⁴⁶ The Commission was charged with making “a comprehensive study of the constitution with a view to proposing simplification of the constitution,” in addition to the traditional assignment of collecting and compiling useful

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

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

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

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

⁴⁶ L. 1965, Ch. 443, § 1.

information and data for the delegates and public before the convening of, and during the course of, the Constitutional Convention.⁴⁷

The Commission was comprised of 18 members, with the Governor, the Speaker of the Assembly, and the Senate Majority Leader each appointing six members.⁴⁸ However, the Commission's work was delayed because of policy conflicts, personality clashes, and disputes over the Commission's leadership and staff.⁴⁹ The Commission's membership roster was not announced until December 20, 1965, and its first planning meeting was not held until January 20, 1966.⁵⁰

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

The Commission had a 28-person staff, supported by numerous consultants on a wide range of subject areas.⁵³ The Legislature initially

⁴⁷ *Id.*

⁴⁸ *Id.*, at § 2.

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

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

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

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

⁵³ The Commission's staff and consultants are listed at the front of the Commission's 16 reports, which are accessible online from the New York State Library:

appropriated \$150,000 for the Commission, although the State eventually spent over a million dollars on it.⁵⁴

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

E. 1977 Referendum on a Constitutional Convention

No commission was established by the Governor or the Legislature during the run up to the mandatory Convention vote in 1977.⁵⁷ The City of New York was engulfed in a major fiscal crisis, and the legislative leaders were openly hostile to a Convention. “There are a substantial number of issues that require hefty analysis,” said a key staffer to the Speaker of the Assembly. “The Legislature for the past several years has been dealing with daily crises.”⁵⁸ On November 8, 1977, the electorate voted against a

http://128.121.13.244/awweb/main.jsp?flag=collection&smd=1&cl=library1_lib&field11=4116707&tm=1442777963096 (last visited on Sept 20, 2015).

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

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

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

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

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

Constitutional Convention by a substantial margin (1,668,137 to 1,126,902). The State’s failure to prepare for a Convention was used as an argument against calling it.⁵⁹

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

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

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

- consider the constitutional change process and the range of constitutional issues to be considered by the people;
- study the processes for convening, staffing, holding and acting on the recommendations of a Convention;
- determine the views of New Yorkers on constitutional matters;

⁵⁹ *Id.*

⁶⁰ Exec. Order No. 172 (May 1993).

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

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

- develop “a broad-based agenda” of constitutional issues and concerns;
- provide “an objective and non-partisan outline” of the range of constitutional issues; and
- engage in a range of activities designed to focus attention on constitutional change.⁶³

The Commission lacked the approval or financial support of the Legislature.⁶⁴ It did have a distinguished (albeit small) staff of seven persons who operated on a budget of approximately \$200,000 to \$250,000.⁶⁵ The Commission held hearings throughout the State and in March 1994 issued an interim report that explored and made recommendations regarding the delegate selection process.⁶⁶ It also issued a periodic newsletter entitled *Constitutional Matters* and a briefing book relating to the State Constitution.⁶⁷

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

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

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

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

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

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

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

III. RECOMMENDATIONS

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

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

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

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

⁶⁹ *Id.* at 12-21.

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

subjects it encompasses, but also a massive historical reclamation project to develop and provide information on the mechanics of a Convention itself.

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

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

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

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

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

⁷³ *Id.*

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

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

Recommendation 2: The commission should be tasked with (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

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

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

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

⁷⁶ *Id.*

questions to the delegates as opposed to providing substantive information was ineffective.⁷⁷

The State Constitution and its ramifications “are so complex and the structure of the Government that has been erected within the framework of the constitution has so many wide and varied implications that a broad frame of reference is essential.”⁷⁸ Therefore, among its other duties, the preparatory commission should:

Make a comprehensive study of the Constitution and compile recommended proposals for change and simplification;

Research the conduct of, and procedures used at, past Constitutional Conventions;

Study and make recommendations regarding the selection process for Convention delegates;

Undertake and direct the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held;

Brief the principal constitutional questions that were debated and considered at previous Conventions;

Collect data on the constitutional amendments proposed and adopted in other states on subjects of substantial interest to New Yorkers; and

⁷⁷ *Id.*

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

Collect and collate data on the important changes that have been made in the State's structure of government since the adoption of the present Constitution in 1894/1938.

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

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

The preparatory commission must have a dedicated, full-time, expert staff under the direction and assistance of an executive director, a research director and a counsel. Adequate support staff will be necessary, too. The commission will face the daunting task not only of examining the substantive areas of the Constitution and related issues, but also surveying and educating the public, and helping to plan and prepare for a Convention, if one is held. The preparatory commissions created for the 1915 and 1938 Conventions, and the one created in the 1957 Convention referendum — all hailed as successful — had the support of sizable research and support staffs, state agencies, good government groups, and leading academics. Nothing less is required today for a preparatory commission to successfully plan and prepare the State for the mandatory referendum in 2017 and a potential Convention in 2019.

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

A preparatory constitutional convention commission will require significant appropriations to accomplish its substantial task. As noted, the preparatory commission created for the 1967 Convention received an initial

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

\$150,000⁸⁰ that grew to approximately one million dollars by the time its work was completed in 1967.⁸¹

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

IV. CONCLUSION

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

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

⁸⁰ L. 1965, ch. 443 § 11.

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

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