

“Shall there be a convention to
revise the constitution and
amend the same?”

NYS Constitution -Article XIX.§2.

LEAGUE OF WOMEN VOTERS

MARCH 14, 2016

GERALD BENJAMIN



A Constitutionally Mandated Referendum Vote

- ▶ New York Must have a referendum asking citizens whether they wish to hold a constitutional convention every 20 years.
- ▶ No action by the governor or legislature is required.
- ▶ The next scheduled vote on this question will be on November 7, 2017

Why do we have this mandatory referendum question requirement?

- ▶ “ ...[A]ll power is preserved to the people...[We propose this so that] once every 20 years they might take the matter...[of how they are governed]...into their own hands... Ansel Bascom, Delegate from Seneca County, 1846 NYS Constitutional Convention
- ▶ “ ...[W]ithout the intervention of any other body... ...[I]f they were dissatisfied with the constitution, the people could say so and act accordingly, “ and if not, the existing constitution would be continued.” Richard Marvin, Delegate fro Chautauqua County, 1846 Constitutional Convention

The state government dashboard warning light



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- ▶ A reminder to pay attention
- ▶ Do you:
 - ▶ Ignore it?
 - ▶ Bring the car into the garage for a look, and then:
 - ▶ Decide to do nothing?
 - ▶ Get a tune up?
 - ▶ Authorize major service?
 - ▶ Replace the engine?
 - ▶ Or get a new car?

The state constitutional change referendum process, like your car's warning light

- ▶ Is not an add on
- ▶ Is built into the system
- ▶ But you only notice that it is there when it comes on, or stays on

The Mandatory Convention Question Vote is Unfamiliar

- ▶ Many people do not know there is a state constitution
- ▶ The statewide referendum process has only limited use in New York State
 - ▶ Approving amendments proposed by the legislature
 - ▶ Authorizing full faith and credit borrowing
- ▶ The opportunity to vote on this question occurs once every generation. Therefore, citizens get to make this choice only three or four times in a lifetime

ConCon Vote Remains Mystery for Vast Majority; Support for ConCon Weakens, Still Strong

Sienna Poll- October 26, 2015:

- ▶ “More than 70 percent say they have heard nothing at all about the 2017 vote on whether New York should hold a Constitutional Convention,
- ▶ “While support for a ConCon remains very strong, 60-25 percent, it is down from July when support was 69-15 percent.”

State Constitutional Conventions are not uncommon

- There Have Been 146 State Constitutions in force over the course of U.S. history
- Only two state constitutions currently in force (Massachusetts and New Hampshire) were adopted prior to the U.S. constitution
- New York has had 9 conventions and 4 constitutions. The current NY constitution, adopted in 1894, was given major revision in 1938

But lately states have displayed convention-phobia

- ▶ The last state constitutional convention was held by Rhode Island in 1986.
- ▶ New York's last convention was held in 1967
- ▶ In the mandatory referendum votes of 1977 and 1997 New Yorkers decline to call a convention
- ▶ The period between 1967 and today is the longest in state history without a constitutional convention

Gubernatorial leadership and preparation

- ▶ Comparative research by Professor John Dinan of Wake Forest University of all the states with mandatory convention question provisions in their constitutions shows that two key factors in making a positive referendum outcome more likely are:
 - ▶ Gubernatorial leadership
 - ▶ Advance research and preparation

“The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to their Passage,” *Montana Law Review* 71 (Summer 2010): 395-432 .

State of the State Message – January, 2016 A Constitutional Commission is proposed by Governor Cuomo to prepare New Yorkers for this referendum

- “From ethics enforcement to the basic rules governing day-to-day business in Albany, the process of government in New York State is broken.
- Governor Cuomo believes a constitutional convention offers voters the opportunity to achieve lasting reform in Albany.
- The Governor will invest \$1 million to create an expert, non-partisan commission to develop a blueprint for a convention.
- The commission will also be authorized to recommend fixes to the current convention delegate selection process, which experts believe is flawed.”

Why a phobia?

- ▶ The idea of changing a constitution is scary (association with the national constitution)
- ▶ The process is thought to be flawed, thus:
 - ▶ We don't know who will recommend changes
 - ▶ Bad things may happen
 - ▶ Nothing may be achieved, at high expense
- ▶ The things about how state government works that we don't like can't be fixed this way
- ▶ We have more focused ways to make constitutional change (through the legislature)

The risk benefit calculation

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- ▶ What is in the constitution now?
- ▶ Predicting from
 - ▶ experience
 - ▶ Constitutionally mandated processes
 - ▶ Statutory processes in place
- ▶ What should/will be removed or modified?
- ▶ What should/will be added?



“ ... [M]any state constitutions ... [are]...
baroque collections of essentially
statutory material”

Federal Judge J. Harvie Wilkinson III

▶ Words

- ▶ State “average” – 26,721 words (2009)
- ▶ NY – 51,700 words (11th longest)
- ▶ U.S. – 8,160 words (including amendments)

▶ Provisions

- ▶ State average number – 828
- ▶ NY – 1093



Constitutional Length – “Statutory” Material

New York is typical in that about a third of the provisions in its State constitution are devoted to “statutory type” matters.

Christopher Hammons. *Was James Madison Wrong? Rethinking the American Preference for Short, Framework Oriented Constitutions* 93 APSR 837, 840 (1999).

Process

- 19th Century solutions
- 21st Century problems

- ▶ Many processes are constitutionally specified
 - ▶ The question used to call a convention does not allow its agenda to be limited
 - ▶ Three delegates must be elected from each State Senate District and fifteen at large statewide
 - ▶ Partisan Bias
 - ▶ Voting rights Act concerns
 - ▶ Voting technology
 - ▶ Delegates must be compensated at the same rate as members of the Assembly
 - ▶ Double dipping
 - ▶ Use of the capitol

Processes Issues – Statutory

- ▶ Restricting eligibility to serve as delegate
 - ▶ Sitting legislators
 - ▶ Sitting judges
 - ▶ Others
- ▶ Do we use existing election law for:
 - ▶ Nomination of candidates for delegate?
 - ▶ Campaign finance for delegate elections?

Are the things New Yorker say they care about “constitutional issues?”

- ▶ Voter Priorities - Sienna poll – February, 2016
 - ▶ Education
 - ▶ Jobs
 - ▶ Taxes
 - ▶ State Government Ethics
 - ▶ Infrastructure
 - ▶ Health Care
 - ▶ Criminal Justice Reform

The lesson of constitutional change through the legislature

- ▶ Amendment or revision
- ▶ The legislature is a locus of self interest
 - ▶ The institution
 - ▶ The conferences
 - ▶ The members
- ▶ It has demonstrated unwillingness to alter the fundamentals of government through constitutional amendment, except to benefit itself (e.g. attempt to change the Budget process)
- ▶ Consider redistricting reform

The lessons of the 1967 convention

- ▶ Was it a failure?
 - ▶ Rejected at the polls
 - ▶ Results Offered in one question
 - ▶ But what was in it?
- ▶ Did it cost too much?
- ▶ Was it dominated by legislators? Judges? The political class? All of the above?

League of Women Voters Advocacy Areas - 2016

- ▶ EDUCATION
- ▶ ELECTION LAW
 - ▶ ELECTION LAW REFORM
 - ▶ CAMPAIGN FINANCE REFORM
- ▶ PUBLIC FINANCE OF CAMPAIGNS
- ▶ EQUALITY OF OPPORTUNITY
- ▶ MARRIAGE EQUALITY AND GENDA
- ▶ GOVERNMENTAL REFORM
 - ▶ ETHICS & LOBBY
 - ▶ REDISTRICTING
 - ▶ TRANPNARENCY IN GOVERNMENT
- ▶ HEALTH CARE
 - ▶ NATIONAL HEALTH CARE
 - ▶ OTHER HEALTH CARE
- ▶ JUDICIAL
 - ▶ COURT SYSTEM
 - ▶ LEGAL SERVICES FOR THE INDIGENT
- ▶ NATURAL RESOURCES
- ▶ ENVIRONMENTAL LAW
 - ▶ HYDRAULIC FRACTURING
- ▶ TRANSPORTATION
- ▶ WOMEN'S ISSUES
 - ▶ PAY EQUITY
 - ▶ WOMEN'S EQUALITY ACT

What would be different if the proposed 967 Constitution were adopted? - 1

- ▶ 1. There would be a five member commission redistricting the state legislature and Congress, chaired by an appointee of the Court of Appeals. Membership by legislators would be barred. "Gerrymandering for any purpose" would be prohibited.
- ▶ 2. There would be a constitutional requirement for fair districting in New York's local governments
- ▶ 3. There would be 60 members of the state Senate. The number would be fixed.
- ▶ 4. All public assistance and Medicaid costs not paid for by the national government would be borne by the state budget. There would be no mandated local share.
- ▶ 5. There would be explicit state constitutional protections against discrimination on the basis of age, sex or physical or mental handicap.
- ▶ 6. A constitution prohibition of aid to parochial schools (the Blaine Amendment), since rendered largely ineffectual, would no longer be in the state constitution, replaced by the language of the First Amendment to the United States Constitution
- ▶ 7. A citizen would be constitutionally protected in his or her right to sue the state if he or she thought it was spending money unconstitutionally. This provision was deemed to include the right of citizens to sue for violations of the forest preserve provisions.
- ▶ 8. State and local governments' community economic development responsibilities would not be in question, but would be constitutionally specified, supported and legitimized.

What would be different?

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- ▶ 9. The popular referendum requirement for the approval of state debt would not exist, though there would be a constitutional debt service limit, inked to general revenue receipts, on aggregate state and public authority debt.
- ▶ 10. Public higher education would have constitutional status. The State University of New York and City University of New York would be specifically recognized.
- ▶ 11. Electronic eavesdropping or surveillance for law enforcement purposes would be explicitly constitutionally limited.
- ▶ 12. There would be an explicit state constitutional guarantee of the right to counsel "at every stage of the proceeding" in all criminal matters.
- ▶ 13. There would be a constitutional guarantee of openness in state government.
- ▶ 14. "Unfair, inequitable or dishonest sales, marketing and financing practices" would be constitutionally specified as a matter of state concern.
- ▶ 15. The governor would have constitutional authority to reorganize state government, subject to legislative veto.
- ▶ 16. Vacancies in state elective offices would be filled by election as soon as practicable after they arose.

What would be different?

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- ▶ 17. The state court system would be better structured and organized, with judicial staffing more responsive to need and workload.
- ▶ 18. District courts would be a viable option for counties outside New York City.
- ▶ 19. There would be a constitutional basis for procedures for administrative rule making and adoption.
- ▶ 20. More equitable assessment of real property for taxation, with a viable option of moving the function to the county level, would be constitutionally based and encouraged.
- ▶ 21. While the Adirondack and Catskill Preserves would remain "forever wild," localities within the "blue lines" would enjoy the same capacity for home rule without amending the state constitution as do places elsewhere in New York.
- ▶ 22. It would be the constitutionally-based policy of the state to "to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products." The legislature, in implementing this policy, would be constitutionally directed to make "adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources."
- ▶ 23. Unless overcome by later litigation based upon the U.S. constitution, New Yorkers would vote where they were "domiciled," with "domicile" defined in the constitution.

What would be different?

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- ▶ 24. There would no longer be an affirmative constitutional obligation of the state to aid the needy. However, Article I, 10a states that "It shall be the policy of the state to foster and promote the general welfare and to establish a firm basis of economic security for the people of the state." Article XII, 12.a. notes that "economic and community development purposes shall include the renewal and rebuilding of communities, the development of new communities, and programs and facilities to enhance the physical environment, health and social well-being of, and to encourage the expansion of economic opportunity for, the people of the state."
- ▶ 25. Claims against the state would no longer be time bound. (Art. III, 5e)
- ▶ 26. Equality of educational opportunity would be guaranteed to all the people of the state.
- ▶ 27. State aid to school districts would be based on registration rather than attendance and would consider the "special educational needs, if any, of the students in each district and the total local tax burden of the taxpayers of each district."

What would be different?

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- ▶ 28. Defendants would have a right to a jury trial for offenses punishable by a term of imprisonment of more than six months.
- ▶ 29. Judges would be permitted to dispense with bail for non-capital offenses if the court is reasonably satisfied that a defendant will appear when directed.
- ▶ 30. The addition of "public campsites of the kind presently constructed and maintained, and in areas similar to those in which they are presently located, would be permitted in the forest preserve.
- ▶ 31. The "welfare of the child" would be the primary concern in determining adoption or guardianship decisions. Article V, sec. 27.
- ▶ 32. Discrimination in the admission to any school receiving public funds would be prohibited.
- ▶ 33. The Public Service Commission would have four members appointed by the governor and three members elected by the legislature sitting in joint session.

What to put in, what to remove, what to leave unchanged?

- ▶ There is no consensus on an agenda
- ▶ Think about
 - ▶ Election administration
 - ▶ Districting
 - ▶ Campaign finance
 - ▶ Separation of powers (Balance in budgeting)
 - ▶ Home rule
 - ▶ Removing dead letter law

A Final Referendum - Voter ratification of the convention's recommendations

- ▶ At least six weeks must pass before any vote on the convention's work
- ▶ The constitution gives the convention discretion in presenting its work
 - ▶ At a time of its choosing (A special election is possible)
 - ▶ In a single question
 - ▶ In a number of distinct questions

So there are **three votes** that must be “yes” to change the constitution by referendum:

- ▶ To call a convention
- ▶ To elect delegates
- ▶ To ratify the results of the convention

Process reform as a condition of holding a convention

- ▶ By statute – requires legislative action
- ▶ By constitutional amendment
 - ▶ Must be passed this year and again in 2017
 - ▶ Will be on the ballot at the same time as the convention call vote

The Convention “Catch 22”

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In a process designed to bypass it and the governor:

- ▶ The legislature can block process reform, and therefore support for a convention conditioned on it, by doing nothing
- ▶ Thus “passive aggression” by the legislature suborns a process designed to bypass it.

Process reform – A consequence of, not a condition for calling a convention

- ▶ If the voters call for a convention
 - ▶ Litigation will ensue on delegate selection
 - ▶ Process remedies adopted by the legislature will preempt their imposition by a Federal Judge

Questions?

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More Information?

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