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Unusual “Politics as Usual”: The 2017 Ballot Proposition Calling for a Constitutional Convention in New York

By Peter J Galie*

I. Achieving Constitutional Reform

“A Convention will be Politics as Usual”

- New York State AFL-CIO COPE Department

The first task of constitutional reformers is to make the people of the state aware that they live under a constitution that, for better or worse, affects their everyday lives whether they live on in remotes sections of the Adirondacks routes in villages or a teeming megalopolis. Until this is done, the people are not likely to demand or even accept the more thoroughgoing revision so badly needed in New York.

To do so is to engage in civic education of the highest order. Care of the constitution goes to the heart and soul of our polity. That task is made difficult for the following reasons:

- It rarely engages voter attention: the “winner” in most constitutional convention (commonly referred to as “con-con”) votes is the non-voter.¹

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1. See HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK’S 1967 CONSTITUTIONAL CONVENTION 31, 71 (1997); Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, 65 ALB. L. REV. 1017, 1047 (2002).

Vote on Calling a Constitutional Convention			
	1936	1965	1997
For	1,413,604	1,681,438	929,415
Against	1,190,275	1,468, 431	1,579,390
Blank	2,915,081	2,948,332	1,693,788

- ▶ It requires changes to a document that is obscure, difficult to comprehend, and about which voters are largely ignorant.²
- ▶ It requires knowledge of issues that are not immediately understandable or that enable voters to see a direct connection between the state’s problems and proposed reforms.³

II. Politics as Usual

When we move beyond problems related to information levels and participation rates, we come to an issue that has been a major stumbling block to successful calls for a constitutional convention. New Yorkers have a legitimate concern about politics as usual in the state, with the same three men sitting in a room making all major state decisions behind closed doors.⁴ Opponents of a constitutional convention make the argument that the process for selecting delegates, which in part resembles the process by which legislators are chosen,⁵ will enable “insiders” to dominate a convention, creating a duplicate forum for inaction when we already have one in our legislature.

2. For an analysis of the complexity, verbosity and arcane nature of much of the state’s constitution, see Peter J. Galie & Christopher Bopst, *Constitutional “Stuff”: House Cleaning the New York Constitution—Part I*, 7 ALB. L. REVIEW 1385 (2013).

3. *Id.* at 1387-90.

4. See Marc Santora, *U.S. Attorney Criticizes Albany’s ‘Three Men in a Room’ Culture*, NY TIMES (Jan. 23, 2015), https://www.nytimes.com/2015/01/24/nyregion/us-attorney-preet-bharara-criticizes-albanys-three-men-in-a-room-culture.html?mcubz=1&mtrref=www.google.com&assetType=nyt_now.

5. If the convention call is approved in November 2017, delegates will be elected in November 2018. See N.Y. CONST. art. XIX, § 2. Three delegates will be elected from each of the state’s sixty-three senate districts (for a total of 189) and fifteen delegates will be elected statewide (making a total of 204). See *id.* (delegate selection process); N.Y. STATE LAW § 124 (McKinney 2014) (establishing the sixty-three Senate districts).

Why, they ask, should we expect anything better from a convention run by the “same old politicians?” They say that today’s political climate would make any convention a waste of time and money that could be spent more productively. I want to explore the criticisms leveled against holding a constitutional convention in more detail.

The argument is as follows: a constitutional convention is so similar to a legislature in the way it operates as to make its efforts duplicative of the legislature.

- ▶ Structures and procedures are similar;
- ▶ Parties will organize the convention;
- ▶ Rules of procedure are similar to those employed by the legislature: committees, floor debates & proposals that will be voted on by a majority of the delegates;
- ▶ Membership overlaps with legislature;
- ▶ The convention will be dominated numerically by insiders, by virtue of the experience of the delegates elected: current or former legislators, judge and party officials. That has been the experience of past conventions; and
- ▶ Past conventions produced more of the same or so little that they were a waste of time and money.⁶

III. Why a Convention is Different Than a Legislature

The argument presented above is that a convention is similar to a legislature in the way it operates, making its efforts duplicative of the legislature. There are, however, important differences between the state legislature and a constitutional convention. A constitutional convention:

6. See, e.g., Ross Barkan, *New York is About to Vote on a Constitutional Convention: Here’s Why You Should Care*, THE VILLAGE VOICE (Aug. 31, 2017), <https://www.villagevoice.com/2017/08/31/new-york-is-about-to-vote-on-a-constitutional-convention-heres-why-you-should-care/> (discussing arguments for and against a constitutional convention); Michael Gormley, *New York Constitutional Convention Vote Raises Hopes, Fear*, NEWSDAY (Aug. 26, 2017), <http://www.newsday.com/news/region-state/new-york-constitutional-convention-vote-raises-hopes-fears-1.14091435> (same).

2017 *UNUSUAL "POLITICS AS USUAL"* 31

- ▶ Is a unicameral body, so there is no need for passage by multiple houses and the attendant reconciliation required between the two houses;⁷
- ▶ Is autonomous and transitory because it is called for a specific purpose and goes out of existence when that purpose is accomplished. This procedure frees delegates from the pressures of re-election campaigns;
- ▶ Does not use a seniority rule for the appointment of chairs and leadership;
- ▶ Allows judicial, executive, and local government officials to participate jointly in its deliberations.⁸ Officials are not separated into three branches as they are in state government;
- ▶ Limits the power of political leaders and parties. Convention officers do not have the political and legal influence that leaders of the state legislature wield. They cannot bury the proposals of maverick members in committees. Future committee assignments cannot be promised, and no local project can be initiated or delayed. As the leading scholar of the 1967 Convention writes about that event: "leadership was generally much more constrained than normally would have been the case in the legislature."⁹
- ▶ Has no institutional memory. Throughout New York's history there have only been a handful of delegates that have attended multiple conventions.¹⁰ Nearly all of the delegates to a 2019 convention will be new to the game. No delegates will exert special influence because of their experience in a prior convention (last held fifty years ago);¹¹
- ▶ Proposes only constitutional changes and focuses

7. N.Y. CONST. art. XIX, § 1.

8. There are no qualifications for who may serve as a delegate. *Id.* art. XIX, § 2.

9. DULLEA, *supra* note 1, at 9.

10. *Id.* at 8 (noting only two participants of the 1967 Constitutional Convention previously served as delegates).

11. *Id.*

exclusively on that task. A convention engages in none of the other activities and exercises none of the responsibilities that are a part of the state legislature's duties, such as adopting a budget and the day-to-day business of governing;

- ▶ Has less demanding procedures for constitutional revision than the ones imposed on the state legislature. Constitutional amendments in New York that are initiated by the legislature must pass two separately elected legislatures; a convention requires only single passage by that body.¹²
- ▶ Contains a mix of (senatorial) district and statewide delegates (there are fifteen delegates selected at large).¹³ As opposed to a legislature, in which all members are representing local interests, a convention combines both local and statewide interests.

These differences contradict claims about the similarities of the two deliberative bodies. On the question, as to whether past conventions have produced meaningful reform, I submit the following proposition.

IV. Past Conventions Have Been of Great Value in Creating Our Constitutional Tradition

Convention opponents assert that previous conventions have been boondoggles: do-nothing-events that have squandered taxpayer money on partying while fattening up pensions but producing little or nothing of value.

The best test of this claim is readily available: what did past conventions produce? The conventions of 1821, 1846, 1894, and 1938, all of whose work was approved in whole or in large part by the voters, had their share of sitting of former legislators and judges.¹⁴ Yet nearly every right and most of the important

12. *Compare* N.Y. CONST. art. XIX, § 1 (requiring a majority vote in both houses), *with* N.Y. CONST. art. XIX, § 2 (requiring a majority vote by the convention delegates).

13. N.Y. CONST. art. XIX, § 2.

14. *See* DULLEA, *supra* note 1, at 18-20.

2017 *UNUSUAL “POLITICS AS USUAL”* 33

constitutional reforms that we now look at with pride were the products of these conventions. Here is a partial list:

- The state bill of rights;¹⁵
- Environmental protections (the “forever wild” clause preventing state forest lands in the Adirondacks and the Catskills from being developed);¹⁶
- The education article, which has been interpreted to provide the right to a sound basic education;¹⁷
- The requirement that the state provide aid and care for its needy;¹⁸
- Provisions encouraging the state and municipalities to provide low-income housing for their most vulnerable residents;¹⁹
- A bill of rights for organized labor;²⁰
- The state’s equal protection clause;²¹
- Constitutional protection for public employee pension benefits;²² and
- Protections against illegal searches and seizures.²³

The very constitutional protections opponents use to scare people from approving a constitutional convention happened because we held conventions!²⁴ In the absence of conventions, would these cherished rights and policies be in the constitution? We wouldn’t bet on it. Since the state’s founding, conventions

15. N.Y. CONST. art. I, § 1.

16. N.Y. CONST. art. XIV, § 1.

17. N.Y. CONST. art. XI, §1-3.

18. N.Y. CONST. art. XVII, § 1.

19. N.Y. CONST. art XVIII, §1-2.

20. N.Y. CONST. art I, § 17.

21. N.Y. CONST. art. I, § 11.

22. N.Y. CONST. art. V, § 7.

23. N.Y. CONST. art I, § 12.

24. See generally Nathan Tempey, *Pandora’s Box or Reset Button? Unions, Activists Square Off Over Upcoming Constitutional Convention Vote*, GOTHAMIST (June 6, 2017, 10:42 AM), http://gothamist.com/2017/06/06/ny_constitutional_convention.php (discussing concern of repealing previously discussed constitutional protections).

have had a much stronger record of creating and enhancing rights than the state legislature.²⁵ Although we cannot predict what a convention will or won't do, we have no evidence whatsoever to believe that a convention in 2019 would undo this strong tradition.

Our last constitutional convention, held in 1967, continued the state's tradition of providing additional rights.²⁶ That convention proposed a new constitution (ultimately rejected by the voters)²⁷ that included, among others, the following reforms:

- ▶ An independent redistricting commission;²⁸
- ▶ Suffrage for those eighteen years or older;²⁹
- ▶ A more equitable school funding formula;³⁰
- ▶ Prohibition against discrimination based on sex, age, or handicap;³¹
- ▶ A constitutional provision protecting clean air and water;³² and
- ▶ Reducing the length of the document by fifty percent to twenty-six thousand words.³³

In the face of this evidence, we think it is difficult to contend that conventions have been do-nothing boondoggles.

25. See Gerald Benjamin, *"All of Nothing at All": Changing the Constitution – The Reform Dilemma*, in NEW YORK'S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS 285, 286 (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016).

26. See PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 309-317 (1996).

27. The constitution submitted by the 1967 convention, although forward looking in many respects, was rejected by voters. *Id.* 324-27. One of the main reasons for the proposed constitution's defeat was the controversial repeal of the existing prohibition against the use of state funds for parochial schools. *Id.* at 327 (referred to as the "Blaine" Amendment). By submitting its work as a single, "take it or leave it" constitution, the 1967 Convention eschewed the prudent decision of the 1938 Convention to submit its work in nine separate proposals. *Id.* at 325. This proved to be a fatal mistake.

28. See GALIE, *supra* note 26, at 314; DULLEA, *supra* note 1, at 204-206.

29. See GALIE, *supra* note 26, at 314; DULLEA, *supra* note 1, at 182-83.

30. See GALIE, *supra* note 26, at 317; DULLEA, *supra* note 1, at 288-89.

31. See GALIE, *supra* note 26, at 310; DULLEA, *supra* note 1, at 264.

32. See GALIE, *supra* note 26, at 317; DULLEA, *supra* note 1, at 249-251.

33. See GALIE, *supra* note 26, at 324.

2017 *UNUSUAL "POLITICS AS USUAL"* 35

Conventions have brought about remarkable transformations despite the inclusion of former politicians, legislators, and judges.

V. Conventions Have Not Been Dominated by Political "Insiders"

Contrary to popular misconceptions pushed by opponents of the constitutional convention, elected officials have not dominated past conventions. Of the 186 delegates to the 1967 convention, only 13 (seven percent) were sitting legislators, and 19 (thirteen percent) were sitting judges—hardly dominant and nowhere near a majority.³⁴ If we include former elected legislators and judges in our numbers, the total rises to sixty-six delegates, slightly more than one-third of the body.³⁵

There are good reasons, however, for not lumping together former and current elected officials. If the claim is that a convention will not do anything differently than the legislature because it will be dominated by legislators, we would have to assume that former legislators—even though no longer subject to the rules, norms, and sanctions of that body, and not under any pressure to be re-elected—will, nonetheless, behave as if they were still legislators. This argument strains credulity and common sense and does not comport with the actual behavior of legislators.

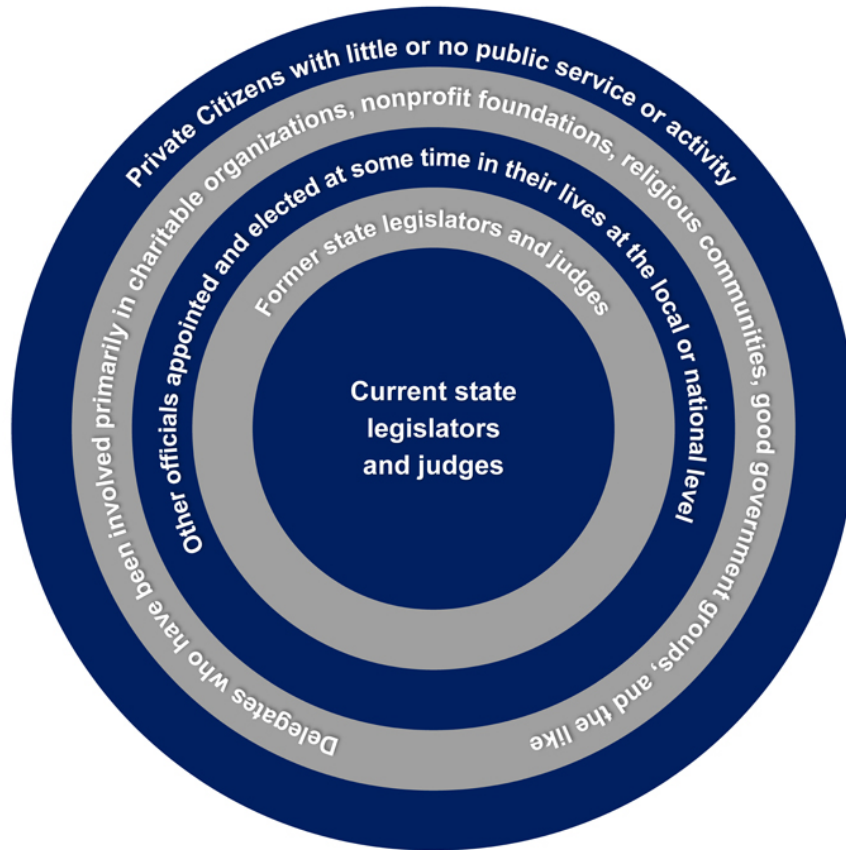
Who has not observed the willingness of former legislators to speak out or take positions on issues that, while legislators—subject to the constraints of party rules, legislative norms and the need to be re-elected—counseled silence? Branding former legislators and judges as “insiders” without closer analysis

34. See Gerald Benjamin, *Constitutional Change in New York State: Process and Issues*, in MAKING A MODERN CONSTITUTION: THE PROSPECTS FOR CONSTITUTIONAL REFORM IN NEW YORK 57, 66 (Rose Mary Bailly & Scott N. Fein eds., 2016) [hereinafter MAKING A MODERN CONSTITUTION]; see also Henrik N. Dullea, *We the People*, in MAKING A MODERN CONSTITUTION, *supra* note 34, at 23, 30-31.

35. See 1 PROCEEDINGS OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION 9-106 (1967). At the 1938 convention, seventy-three delegates (approximately forty-five percent) had either current or past state legislative or judicial experience. In 1967, the comparable figure was thirty-five percent, down ten percent.

papers over real differences, especially on the important issue of delegate independence.

To our argument that legislators and judges, former and current, did not constitute a majority of the delegates, opponents might reply: “The term ‘insiders’ includes not just former and current elected officials, but also local politicians like mayors, county attorneys, supervisors, local legislators, and non-office holding political party leaders.” Of course, broadening the categories of those termed “insiders” to include these additional categories, by definition, increases the number of “insiders” at a convention, but it also takes the sting out of the conclusion opponents have drawn from their presence. Let’s locate each category of delegates in one of a series of five concentric circles:



The first three circles contain the "insiders," broadly interpreted. However, lumping these individuals together ignores crucial differences between them—differences that suggest much more diversity of opinion and independence than the homogenizing pejorative "insider" implies. Should we label as insiders both a legislator who served one term and left because she thought she could promote legislative reform better from the outside and one who has been in the legislature for twenty-five years? How helpful is that? Would you put them in the same category?

Ask yourself: Should a former judge with a sterling record and the admiration of the community be tainted with the label "insider?" How about a former legislator who served with distinction? Consider a judge who sat on a city court having retired thirty years prior to serving as a delegate. Isn't it likely that that judge will have perspectives and experiences quite different from a currently serving court of appeals judge? Or consider a former governor or attorney general who, since retiring, has been an active member of a good government group like the League of Women Voters or Common Cause.

Should we dismiss as "insiders" past or present local officials who have earned the trust and respect of their constituents? Do we do them a disservice by labeling them with the presumptuous and denigrating label "insider?" Is that label at all helpful? Should we call such labeling by its proper name: propaganda?

If there are delegates at future conventions who have distinguished themselves in public life and earned the esteem of the voters who chose them as delegates, should we fault the process for producing such results? Would we want a convention filled with delegates who had no political experience or

Delegates' Backgrounds from the 1967 NYS Constitutional Convention	
1. Public service (excluding party or elected office)	46
2. Sitting state legislators or judges	37
3. Locally elected officials	33
4. Former state legislators or judges	29
5. Party leaders	22
6. Labor union officials	4
7. Academics	4
8. Other	11

familiarity with decision-making in democratically organized forums? Between the two ends of the spectrum—a convention dominated by current legislators, judges, and party leaders versus one dominated by political neophytes—there is a middle ground. That middle ground is revealed by examining the background of the delegates to the 1967 convention:

What is most striking about this list is that the largest number of delegates were in the public service category.³⁶ These delegates were most notable for their public service, and not by extensive party leadership positions or elected office.³⁷ They were individuals who had distinguished themselves as citizens.

Even among the minority of sitting and former legislators, profound and significant differences existed. These delegates were from:

- ▶ Different parties (Democratic, Republican, Labor, Liberal);
- ▶ Different parts of the state (upstate, downstate, etc.); and
- ▶ Different courts (ranging from justice courts to the Court of Appeals).³⁸

Some former legislators and judges had been off the bench or out of legislative office for over a generation. Most importantly, the individuals occupying each circle did not think alike on all or most of the issues at the conventions.

Social science research, not to mention our daily experiences, recognize that the loyalties of men and women in public life are diverse. Obtaining office under the label of a major party does not mean that person is in harmony with all those who likewise profess that label. To assume that these demographic characteristics (age, race, religion, ethnic background, and life experiences) would not create a diversity of opinions is naïve, if not willfully ignorant.

36. *See* 1 PROCEEDINGS OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION 9-106 (1967).

37. *See id.*

38. DULLEA, *supra* note 1, at 117-118, 124-126.

2017

UNUSUAL "POLITICS AS USUAL"

39

VI. What Insiders Will Share

What delegates with lengthy careers in public service and extensive political experience do share—and what we believe they would ensure—is that we will have a convention comprised of delegates who are:

- ▶ Familiar with our constitutional system of local, state, and national governments; and
- ▶ Committed to our constitutional values: the rule of law, an independent judiciary, a viable legislature, and the rights and policies New Yorkers cherish.

Such delegates are the best defense against the charge that a convention will open Pandora's Box and threaten our constitutional values. When we move beyond the breezy cynicism of "the insider's game" phrase, the argument falls of its own weight. Let's call this argument what it really is: an argument made by insiders!