

State Governments if they are to have any relevance must respond to the problems that beset the community. State Governments have the power but not the will to act. New York is a large wealthy state; one that has pioneered substantive legislative and governmental reorganization. And yet, it finds itself in the grips of a severe economic crisis with a political system that seems incapable of responding. New Yorkers are united on one thing: New York Government no longer functions as an effective working system. Historically, when that has happened one party or the other, riding the wave of new social forces and developments, mobilizes those forces and responds to the challenges. None of this is happening. The Legislature is not responding; and the Electorate is not cleaning house. When this happens the American tradition we have two recourses:

1. the revolutionary tradition out of which the country was born and which is still carried on for better or worse by a variety of groups;
2. the institutional way of responding to imperfections, that is, constitutional revision in the form of amendments or constitutional conventions that revise and or propose new constitutions. States have adopted variety of ways by which these change mechanisms are set in motion: the legislature passes amendments which are then sent to voters for ratification or Legislature votes to place a call for a convention on the Ballot or the legislature creates a commission to report constitutional reform to it for any action it may choose to take. Fourteen states provide for a constitutionally mandated question on whether to call a convention.

#### The "Magnificent Failure": The New York Constitutional Convention of 1967

- In 1957 the every twenty year provision was narrowly defeated 1,242, 568, to 1,368,068
- Democrats and NYC supported the Convention call; upstate Republicans opposed
- Between 1957 & 1967 organized group pressure grew & leading newspapers supported the call for a convention
- The rigid apportionment scheme placed in the 1894 Constitution made the legislature for all intents and purposes, "constitutionally republican."
- Between 1900 and 1964 Republicans controlled the legislature in every year but one 1934
- Every convention held between 1867 and 1967 was controlled by Republicans
- Then came the reapportionment revolution: state and federal cases invalidated provisions of the apportionment article in the state constitution. Under the gun

and having reached an impasse the legislature to passed a bill calling for a constitutional convention. A Reluctant Governor Rockefeller signed the bill

- Formation of a citizens commission for a constitutional convention headed by Howard Samuel with bi-partisan with prestigious membership
- In 1964 largely the result of the candidacy of Barry Goldwater, for the first time in the 20th Century, Democrats gained control of both the Senate and Assembly. New York Democrats in jest awarded him the title "Democratic man of the year"
- Major legislative leaders got on board; eventually so did Rockefeller and most labor organizations. Indeed it was hard to find any major groups that did not support a convention
- Issues: apportionment , modernizing state government, home rule/ fair treatment of NYC , & the Blaine Amendment
- Vote to call was 1,681, 483 to 1, 468, 431, with downstate and upstate city support
- The real "winner" and wild card in this process were those who ignored the ballot proposition altogether:

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	Yes	No	Blank
Ballots			
State wide Vote	1, 681,438	1,468, 431	2, 948, 332

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- For the first time since the inception of the modern party system the Democrats won control of the Convention. This outcome was secured by virtue of a deal with the Liberal Party and a division between the Republican and Conservative Parties

Are these circumstances, the fortuitous combination of conditions and events that led to the calling of a convention likely to be repeated? And if not what are the conditions needed for the calling of a constitutional convention. What conditions are within the control of those who want a convention? Machiavelli said that 50% of our lives are under the control of virtu and 50% are in the hands of Fortuna

What did it do?

- reduced the size from 46,000 to 23,000 words

- Executive reorganization
- Granted the suffrage to those 18 years or older...eliminated literacy & property qualifications... established a 30 day uniform residency requirement in voting district
- Legislative Redistricting Commission
- Eliminated the Blaine Amendment
- Added an anti-discrimination in employment based of race age color creed or disability
- Conservation Bill of Rights
- Consumer protection provision added to the Bill of Rights
- eliminate referendum requirement for assuming state debt in favor of tying debt to percentage of state revenue
- transfer of welfare financing and administration to the state
- free tuition for higher education
- state wide takeover of the operating cost of the statewide court system
- state formula for financing schools based on special educational needs and total local tax base providing more equitable school funding
- broad community development article

What Happened?

It was rejected almost three to one

- The margin of approval of conventions in New York has always been less than the margins approving the proposal changes so that a 213,000 margin for of calling a convention did not give reason for optimism.
- The coalition that had formed to back a convention was falling apart over a number of issues like the removal of the Blaine Amendment and high costs, but especially over the decision to submit all the changes in an all or nothing fashion. Every major newspaper in the state in response to an AP poll had urged its readers to reject the constitution for that reason. One by one they fell: League of Women Voters, NY Civil Liberties Union, and the NY chapter of NAACP.
- State Budget director issued a report saying that the costs would require an 80% rise in state taxes over the next ten years, requiring a doubling the state income tax or a 500% increase in the sales tax.
- Governor Rockefeller said he would vote for it; but urged voters to make up their own minds
- State Republican Party leaders in the Assembly and Senate urged rejection as did Senator Jacob Javits, & L-G, Malcolm Smith.

- The kindest thing that could be said about the Democratic campaign is that there was none.

Calling a constitutional Convention is a complex and daunting task. "The politics of constitutional revision is one of the least familiar forms of politics in which the voter is expected to participate." It is a call to begin again, the possibility for a new founding. One can understand the trepidations Madison exhibited in Federalist 37-38 over such a project.

It is an uphill battle because it rarely engages voter attention; requires changes in a document of which they are largely ignorant, a document that is obscure and difficult to comprehend; and Issue that are not immediately understandable or that enable voters to see a direct connection between state's problems and the proposed reforms

One of the consequences of length of constitutions, a trait both California and NY share, is that attempts to call a convention to revise the document galvanizes a relatively large number of groups into action. In a polity that survives on negotiation, compromise and coalition building getting change is more complex tangled and difficult.

I think the process of moving to constitutional reform requires that states like California and new York address some preliminary questions Here are my suggestions.

- 1 What are the major problems of California Government?
- 2 Which of those problems are amenable to constitutional reform, i.e., constitutional reforms that will "fix" or substantially alleviate the problems without unacceptable consequences? Lets call these category I problems
- 3 To what extent are those problems a function of a lack of consensus or deep fissures in the electorate as to what needs to be done? The prime example in New York and perhaps California is the question of constitutional restrictions on state debt. If the problem is that voters want the limits but simultaneously want the state to continue to provide services, then the problem is deeper than simply reforming the Constitution. To that extent the problems the legislature is not fixing reflect these fissures and not a dysfunctional legislature. Under these conditions a convention--barring divine intervention-- will not solve the problems,

or will have its solutions rejected at the polls. Lets call these category II problems

- 4 What's left? That is reforms do not fall into Category I or Category II. Anything?

What I am suggesting that we need to ask: can constitutional reform substitute for a dysfunctional or fractured community? Separating defective governmental structures, processes and policies that are considered such by a healthy majority of the community from those over which there are deep divides is an indispensable first step towards successful constitutional reform

- 5 When you arrive at that stage you will be in a position to decide what is the best way to proceed, constitutional reform commission constitutional initiative or constitutional convention

Let me say a few words about the stages in the process of constitutional reform

### Getting off the ground

In New York it is increasingly difficult to get the legislature to put the question on the ballot or even establish a constitutional Revision Commission like the one California used from the 1960's to the 1990s. The national data indicate that fewer conventions are being called and 93% of those calls have been rejected in the past thirty years. California has a different problem: you can end run the legislature with the constitutional initiative. Apparently the costs have begun to outweigh any possible gains. At least that's the view of your Chief Justice, Ronald George, and an Assembly sponsored guide to the legislature, **California's Legislature** which describes the results of this process as "haphazard and unbridled growth." [P.11]

The Campaign to get the question on the ballot needs a broad coalition backing reform. In New York it means convincing the legislative leadership of the Democratic Party to make the issue its own and not let it become a Republican campaign issue. With both parties committed to a convention we are more likely to get the process started. The question then becomes what direction do we want to move? What direction should constitutional reform take in addressing the state's condition? It would be ideal if the public unions got on board but that is unlikely.

Do we want—need-- a limited or unlimited convention? Is that options available in California? If the question is constitutionally mandated, then clearly a defined strategy to get the question approved is necessary.

One way to address this problem up front is to limit the issues conventions are authorized to address. We can do this in two ways: by prohibition as New Jersey did in 1947 when it put representation formulas off limits; and by prescription as Pennsylvania did when it specified the four Issues it authorized the convention to address. Of interest is Pennsylvania's claim that it did so because these issues were too complex and too difficult to be dealt with by legislative amendment.

The use of the limited convention raises questions: If it is not explicitly provided for can it be called by the legislature? And if it can, is it possible to limit a convention once it is appointed in the absence of an explicit authorization to call a limited convention? Its advantages are obvious: it negates the Pandora's Box argument, will allay fears of the various groups who think a convention might threaten their position or interests, and, most important, will allay fears that the legislature maybe letting the genie out of the bottle.

A central problem at this stage is translating or channeling public discontent into support for constitutional change and then enabling that sentiment to be expressed before the legislature or at a general election, when the question is constitutionally mandated. In New York that date is 2017. This problem can be illustrated by looking at the result for three polls taken in New York concerning the calling of a constitutional convention

## **Exhibit A**

### **Quinnipiac Poll June 17, 2004**

Some people say that State Government in New York is broken and needs to be fixed. Do you agree or disagree?

Agree 67%

Disagree 25%

DK/NA 8%

### **Exhibit B Siena Poll August 24, 2009**

"Do you support or oppose having a New York State Constitutional Convention in which delegates propose changes in the State Constitutions for voters to approve or disapprove?"

Support a convention 63%  
Oppose a convention 25%  
DK/NA 12%

### **Exhibit C Marist Poll August 24<sup>th</sup> 2009**

“Do you favor or oppose having a New York State Constitutional Convention which would give specially elected delegated broad powers to propose changes to the rules that control state government.”

Favor 42%  
Oppose 48%  
Unsure 10%

The results indicate the fragile nature of that support, and the problematic character of polls involving issues of constitutional reform. Poll responses are not rooted in specific knowledge about conventions. Positive responses to calls for constitutional reform seem to be a function of the general discontent that spills over into support for any alternatives to the present situation. But notice how quickly the support evaporates when we word the questions differently as did the Marist pollster.

Along with Robert Ward of the Rockefeller Institute in Albany, I suspect that the support figure in the Marist Poll is depressed by the “broad powers to delegates” phrase. The flag raised is the possibility for dramatic change and giving officials broad powers-- something that raises voter’s suspicions. By the same token the Siena Poll results were inflated by the inclusion of the “approve or reject” phrase. In 1997 when the question was mandated early polls had a majority in favor of the convention. Massive TV advertising campaign mostly by the public unions converted that yes into a strong no vote. A “parade of horrors” was trotted out: pensions lost, welfare benefits curtailed, forever wild in jeopardy, pro-life amendment added and right to bear arms included.

The trick is to connect the calling of a convention or the appointment of a constitutional commission with the cause of our discontent. Poll after Poll in New York indicates that voter dissatisfaction with state government is at the lowest level since these polls have been conducted. “New York needs major change; and that means changing the constitution. If the legislature won’t change the Constitution then the people must.”

In California, to some extent, that is exactly what has happened and, if the Chief Judge of your Supreme Court is correct, that is the problem. The message to the voters or the legislature need to be different than the one employed in New York: “Legislators of

California unite: you have nothing to lose but your power.” A constitutional convention will not be a Pandora’s Box, it will provide something more than the legislature would but it will be in the hands of the active citizenry and that means at least to some extent, legislators, judges, party officials and prominent citizens and reformers.

### **Selection of delegate**

In both states we need to address the charge that the process of selecting delegates is not an open one. Openness of the process will satisfy voters who do not want a convention to be just another forum for “politics as usual”, one dominated by members of the legislative and judicial branches. They want a citizen’s convention.

Here the dilemma is stark: how do we get the legislature to put the call for a convention on the ballot while satisfying demands for a citizen’s convention.

In New York we need to provide more diversity by using multiple member districts with single or double candidate voting, or present multi member districts with cumulative voting; preventing legislators and judge from double dipping for salary and pensions purposes by requiring them to choose; public financing of delegate elections; reducing the substantial barriers to ballot access; and non partisan selection are some ways this could be accomplished

### **Convention Decisions**

- In Illinois, Samuel Gove conducted a two day seminar for representatives of the press at which they were briefed on problems of conventions and constitutional making
- Pre convention briefing or "training conference to start delegates off on the same footing.
- Should there be a caucus or ongoing strategy session concerning the decisions of the convention
- Should the changes be submitted in an all or nothing fashion or submitted separately?
- Should there be decisions to limit the extent and number of reforms the convention adopts?
- Should the Convention limit itself only to major problems
- Leaders from both parties and independents must agree at the outset that whatever they do or don't do, they need to be ever sensitive to the picture they present to the voters in what they do and how they do it.
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### **Ratification of the results**

Above all maintain the unity of the parties and provide funds for the delegates themselves to campaign for the proposed changes. They will be the most effective spokespersons for the reforms.