

The Philip Weinberg
Forum

**Amending the
New York State
Constitution —
Current Reform Issues**



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Richard P. Nathan:

My name is Dick Nathan and I am proud to be the director of the Rockefeller Institute. Today is part of a series of events that we've been holding, the Philip Weinberg Forum program, which is supported by the state government. This is number eight. We now have a website for the Weinberg Forums (<http://www.rockinst.org/weinberg/index.html>). Most of the Forums are on New York State subjects, and we have transcripts on the website for them, though some are still being worked on. This is the sixth one that we've done on New York State issues and there are four to come. They are all listed on the website.

If you have suggestions for other Weinberg Forums, particularly on the hot subject of state government and what's happening here now in this exciting moment check with David Wright, check with me, and check with Michael Cooper, who is our director of Publications and is working with David and Brian Stenson on these events.



With all of that said, I will say a word about the two speakers. They've developed their own idea about how this should go. I think it's going to be Jerry first and they're going to go back and forth a little bit and use their allotted time in a way that will work best for these two speakers, both of whom are very good

friends of the Rockefeller Institute and well known to all of you. Jerry Benjamin is going to start. He is the dean of Liberal Arts and Sciences at SUNY New Paltz. He's done that for nearly a decade. They should give gold platters to those who do that for a decade. Jerry has been very active at the Institute. He directed our New York Affairs, was research director of the Temporary Commission on the Constitutional Revision, which we sponsored, and also directed a major project we conducted for Rick Mills when Commissioner Mills became the Commissioner of Education. Jerry has been active as an academic, as a researcher, as a research leader, and as an active politician. He was a member of and for three years was chairman of the Ulster County Legislature. He's written thirteen books including one with me.

Jerry's a good friend of the Institute and so is Richard Briffault, who will be his co-panelist today. Richard is a graduate of Columbia and Harvard Law School. He served as clerk for federal Appeals Court Judge Shirley Hufstедler. He was assistant counsel to the governor. He's been on the faculty of Columbia University for a long time, over two decades. He's been very active on many state commissions, including with Jerry on the New York City Charter Commission. He's been a great help to me as a law professor and

a fine scholar and a man of immense good sense in thinking about the kinds of things that interest us and all of you. So I'm going to turn to Jerry to go first, you and Richard to go back and forth, and then we'll open it up for some discussion.

Gerald Benjamin:

Thank you, Dick. Good morning. I appreciate being invited and having a chance to see a lot of old friends here ... a few former bosses — Dick and Frank Mauro — and a lot of people I've worked with. David Shaffer did all the work on that Commission for the Department of Education and I helped, just to correct the record.

We are here today because we appear to be in a reform moment in New York. This may be a misperception, or an illusion, or the moment may have passed — it's not certain that we are still in that moment. But certainly there is a massive amount of interest in issues of structure and process in the political system and, frankly, it's difficult to find times at which there is interest in those topics.

It's instructive to me that in the current discourse over budget making — which we all hope will come to a timely conclusion this year — still the question of the tradeoff between structure and process on one hand and substance on the other is being elevated by the Speaker of the Assembly. Historically when we've gotten into conversations about tradeoffs between process and structural change on the one hand and substantive gain on the other from the budget process, there has been a predisposition among leaders to focus on the substantive and not the process or structure. That's why it's interesting to me that this point has once again surfaced during the last week.

It's very hard to create a constituency for reform in a settled political system. I've written at very great length about why we are in this bound-up situation, and won't seek to repeat the arguments here. (We may get to that today toward the end of Richard's and my presentation.) The reason we have a discussion of constitutional change in New York now, as we meet, is that one of the principal political institutions of the state wants fundamental alteration of the structure and operation of the government — that is the

state Legislature. I wrote an article with Melissa Cusa Staats, who used to work here with me, on structural change and when it occurs. The fundamental finding of that article was not surprising: The Legislature does not advance systemic changes of a structural nature when it itself is diminished by those changes. It only advances changes of a structural nature when it itself benefits. So we've come to a situation where the Legislature feels a need for constitutional change to empower itself or re-empower itself. That's why we are in this moment where we're seriously discussing the matter.



Having said this, I note that there are a lot of other points of constitutional change under discussion, but less visible and far less likely because they are in the category of diminishing the institutional power of the Legislature, or constraining it. I set out to make a list in preparation for today; it may not be inclusive. But certainly the question of

apportionment outside of the Legislature has in some of its formulations recently been introduced as a constitutional change. The question of election administration reform has not involved discussions of constitutional change, but it should because our structure for administering elections in New York is constitutionally embedded. It's been my view, and I've written on this, that we could do a lot better at election administration if we did it differently than is required in the New York State Constitution. We are having this massive discussion on the kind of machines we're using or might use without looking at the fundamentals of how we are administering elections. This is, in part, because the barrier to constitutional change is high and the vested interest of the major political parties is enormous.

Also, in addition to the article on budgeting, we have under discussion the question of state borrowing: the intent of constitutional constraints, the bypassing of limits, the failure of recently adopted statutory constraints, and the need for new

constitutional limits. In connection with borrowing, we are focused on public authorities; their use for bypassing constitutional borrowing limits is fundamental to the consideration of their role and operation. I commend to your attention the Comptroller's recent report on borrowing in New York and some of the frightening implications that he draws out of recent past practices.

There are constitutional dimensions to the whole question of local government reform, currently under study at the Rockefeller College and in discussion around the state as we see increasing concerns over the level of property taxation. The relationship of the state and localities, home rule and its implications, is fundamentally a constitutional question. Home rule as now defined in the New York State Constitution seriously constrains our capacity to rationalize our local government structures.

Some of these matters are linked in non-obvious ways. For example, in so far as massive portions of New York State public resources are now in the public authorities and in so far as our intent in creating an executive budget process was to assure comprehensive consideration of resources as against commitments, the growth by increments of the public authorities has undermined that intent. If we want to consider change with regard to public authority oversight accountability, we are actually addressing a question that bears upon what the budget process should be and should include. It's instructive that these matters are considered separately. In fact, they are linked matters.

The requirements that we place upon local government for financing social programs in New York is almost unique (if there is such a thing as "almost unique") and are, at bottom, state fiscal and budgetary considerations in some substantial dimension. Part of the problem in considering matters in separate categories is not realizing that they might be addressed in some comprehensive way. I'm not under the illusion that we can comprehensively reform New York's government in a stroke. But the discussions and policy approaches to some of these questions are inappropriately constrained. So this was a long way of saying that just like the environment is all around us (the first lesson in a

course on environmental policy), constitutional change is all around us. Important as it is, when we talk about constitutional change we're not just talking about the budget process.

A final observation: In 1997 when we issued the report, *Effective Government Now for A New Century* (that is the Constitution Commission that was preparing for the run up to the mandatory question, which we will talk about very shortly) we identified four areas of concern. They were fiscal integrity, state/local relations, education, and public safety. It's interesting to me that this report was issued just short of a decade ago and three of those are still compelling. One reality of New York is the persistence of these concerns and our relative incapacity to bring them to some reasonable resolution. That is a troubling aspect of all this. Are we Pollyannas who meet on occasion to discuss in a rarified and abstract way what might be done in a situation where nothing is possible? I don't think that's so or I wouldn't have spent 30 or 35 years working at it. Nevertheless, it is a question that nags at you when you look at the persistence of the agenda items.

I'm heading a charter commission for Ulster County. I was called by the County Administrator, who is preparing this week to make a presentation on the dark fiscal circumstances facing Ulster County. He said that the speech I made when I advanced the idea of raising the sales tax in Ulster County in 1992 was perfectly suitable to his presentation. All he had to do was change the dates and change the numbers. The causes of the problem are the same in his judgment. The implications of the problems are the same. And the potential remedies are the same. And yet here we are almost 15 years later. A sense of urgency needs to be aroused. That's one reason I'm here today, to do a little bit about that, and that's why I welcome this focus on the reform moment.

Now, Richard is going to talk about the budget article and the recent court decisions and their implications, and begin to talk a little about the constitutional change process. Then I will come back and talk more about constitutional change after Richard has made remarks.

Richard Briffault:

As Jerry points out, budget issues have been central to talk about constitutional change in New York for quite some time — at least a decade now. This year the nature of that concern shifted. Until recently the focus was on the difficulty in reaching a budget agreement, the extreme lateness of the budget, and what to do about it. A lot of the proposals had to do with changing the deadline, establishing a contingency budget, or providing for a neutral revenue estimator to help facilitate the process. The focus of the budget debate changed sharply, however, as a result of the Court of Appeals decision on December 16, 2004, in the aptly named *Pataki v. Silver* case. Just like *Bush versus Gore*, the caption on the case pretty much captures what the issues are about. This was the most important Court of Appeals decision interpreting the state’s constitutional budget provisions since their adoption more than 75 years ago. It’s not the first time the Court has interpreted the budget article of the Constitution but it is by far the most important.

The *Pataki v. Silver* litigation, as many people in this room know, grew out of disputed budgets from 1998 to 2001. The litigation presented two big questions: What can the Legislature take out of the budget and what can the governor put in? The case also considered the very meaning of the idea of the executive budget. Judge Robert Smith saw the adoption of the executive budget in the 1920s as a transformative event, creating something radically different from the legislative process as normally understood. In the normal process, the Legislature proposes, the governor reacts, can veto, and the Legislature can override the veto. The Legislature is at the center of lawmaking. Judge Smith, relying on some of the history of the executive budget proposal found in the records of the Constitutional Convention of 1915, came up with the concept that the executive budget was intended to make the governor the “constructor” of the budget with the Legislature reduced to a “critic” that can trim at the edges but not utterly transform the governor’s proposal. Chief Judge Kaye took a very different view that assimilated the executive budget process to the traditional background of separation of powers in which the Legislature is still the preeminent lawmaking body. She didn’t use any nifty words in the way that Judge Smith spoke of the “constructor” versus the “critic.” Judge Smith took

that language from Henry Stimson's committee in 1915. But I think you can see Chief Judge Kaye's view is that what the executive budget was designed to do was to give the governor the agenda-setting power in respect to the budget but not as much power over the ultimate product as the plurality concluded.

It is worth noting that the Court of Appeals' opinion came from a plurality, not a majority. The court split three ways. It was a 3-2-2 decision. Judge Smith writing for the plurality upheld the governor and declined to place any limits on the governor's budget-making power and was quite purposefully vague as to whether or not the courts should ever have a role in imposing limits on the governor's budget-making power. The concurring opinion of Judge Rosenblatt joined by the other Judge Smith, Judge George Bundy Smith, agreed with the plurality that in these particular cases there was nothing wrong with the language inserted by the governor, but found that there could be cases in which the governor would go too far and put in substantive policy or programmatic language insufficiently connected to the fiscal purposes of the budget, which would lead them to strike out that language from the governor's budget. Judge Robert Smith had written about possible gubernatorial actions, like linking aid to fire departments to changes in the firefighters' retirement age, and he had said he would not say if that could be treated as unconstitutional. The concurring judges were willing to say they thought that was unconstitutional, and would knock it out. But they concurred in the result in this case because they found the gubernatorial material was within the scope of his budgetary power. Chief Judge Kaye wrote a very strong dissent; basically saying this greatly increases the governor's power beyond what was intended by the executive budget and beyond a normal sense of separation of powers.

The case grew out of the fact that the Constitution greatly limits the Legislature's role. The governor has the power to submit the budget. All the Legislature can do under the Constitution is strike out or delete items of appropriation. They may not alter items of appropriation. A question arises when if they pass the governor's budget as submitted with modifications such as the simple strike out of an item but then shortly thereafter pass a bill changing the budgetary language such as by striking out some of the conditions the

governor had placed on an appropriation. In other words, if the Legislature passes the governor's budget with strikeouts, can it then adopt significant changes to the budget in subsequent legislation immediately after. Does that violate the constitutional ban on altering items of appropriation? In these cases the Court of Appeals said this was unconstitutional. At least where the Legislature was characterizing its own work as a substitution for what the governor had done and where the bills followed so closely on their agreeing to the governor's budget, this came too close to alteration to be constitutional.

Moreover, the court said the legislature cannot strike out the conditions while agreeing to the appropriation. The issues in the litigation had nothing to do with the amount of money being appropriated but with the conditions on the appropriation. The governor attached certain conditions to budgetary items directing that the money be used for certain purposes. The governor used the education budget to rewrite the school aid formula, and used the Medicaid appropriation to change the Medicaid reimbursement system. He used the budget to redirect how certain money is being paid to the State Library and Museum. The court said that the Legislature has the choice of either accepting or rejecting the appropriations with the conditions, but they can't accept the appropriation with the condition and then subsequently pass a new bill that deletes the conditions. Chief Judge Kaye dissented on this point and said the Legislature should be able to do this. The concurring judges agreed with the plurality.

The central issue for the court was whether there are any limits on the governor's ability to put policy or programmatic or substantive material in the budget. The Constitution says the governor shall submit a bill or bills laying out his budget proposals and necessary legislation. What can the governor put into that? How far can the governor go in adding things that are substantive or policy or programmatic? Judge Smith's plurality opinion acknowledges that this is subject to abuse. There is a constraint in the Constitution. Article VII, Section 6, says that that a gubernatorial condition has to specifically relate to an item of appropriation. But Judge Smith notes that could really pick up a lot of things. For example, this is not his example but mine, you could rewrite

the penal code and attach that to the prisons appropriation because if you increase or decrease sentences that will change the costs of running the prison system. One can imagine that rewriting the penal code would directly relate to the cost of running the prison system. That, I think, Judge Smith suggested might be an abuse. He declined to embrace the governor's view that the only limit on the governor's power to add substantive language is the anti-rider provision of Article VII, Section 6.

But Judge Smith also rejected Chief Judge Kaye's view that the governor can't put substantive or programmatic or policy language in the budget. As the judge put it, and I think everyone here would agree, all appropriations are substantive or programmatic or policy based. The budget is a substantive or programmatic or policy document and you can't draw that substantive versus appropriation line. He says it's not doable and he says it's not doable by a court. He specifically says that changing the school aid formula is no problem. That clearly relates to the "how, when and what" of the budget. Who's going to get how much and where and when and under what circumstances? And that's clearly budgetary and the fact that a 17-page description rather than a line item is used to make the appropriation and the fact that it is a change from past practice to use the budget to change the law is not a problem for him. All that seems fine. The school budget, even though it departs from the standing statutory formula, is not a problem. The governor can change policy in the budget if it's directly related to the making of appropriations. Judge Smith concludes by saying, "There may be some limit. Someday we might reach a limit or not because it's not clear that it's for judicial resolution and the real control is politics."



That is where the concurrence split from the majority. The concurrence says, "No, there are some things which do cross the line." Where the plurality was unclear as to

whether there are any judicially enforceable limits on what the governor can put in the budget, the concurrence stressed the need for such limits. There wasn't much disagreement between the plurality and the concurrence on the limits on the Legislature's power to take things out, but there was a major split concerning the limits on the governor's power to put things in. The concurrence, however, was pretty fuzzy as to what those limits are. The concurrence spoke of whether the impact on substantive laws is too great, if it lasts too long, and if it departs too much from history and custom. But it was far from clear how the plurality's test would work.

Finally, Chief Judge Kaye was more emphatic in saying that there are limits on how much the governor can use the budget to make policy a part of the fiscal process. In her view, to allow that too greatly distorts the traditional separation of powers. For her the purpose of the executive budget was to give the governor the power to set the agenda. Go back to the history of budget making in the 1910s and 1920s and individual agencies were communicating directly to the Legislature without the governor being able to centralize a submission of an initial proposal, without anybody linking appropriations and expenditures in a central way. The purpose of the executive budget was really to come up with a more focused agenda setting process, but not to eliminate the legislature's power to amend.

What exactly does this mean in terms of the governor's policymaking power in the budget? It depends. It may depend on just how far the governor is willing to go. You really do have a split in the majority. At least some members of the court are willing to say that some gubernatorial actions can go too far. But based on their test it's not clear what that would be. The case was a big victory for the governor both with respect to the particular budgets in question and with the idea that the governor has great power in both putting material in the budget and especially blocking the legislature from making alterations even in immediate post-enactment settings. But the scope of the governor's power is vague and is not unlimited.

Now, we're going to talk more about constitutional revision.

Richard P. Nathan:

Each speaker will now speak about the process of amending the Constitution.

Gerald Benjamin:

As most of us know, the Constitution of New York can be changed by two paths; one through the Legislature and the other around the Legislature, without its participation. It is common in state constitutions that there is a path to change the Constitution without participation of the major political branches on the assumption that they may be the beneficiaries of the pathology that you're trying to correct and consequently should not be allowed to have entire control over the process for change.

Analysts conventionally make distinctions between amendment of constitutions and their revision. Alan Tarr, I think the leading authority on state constitutions in the United States, defines amendment as the alteration of existing constitutions by the addition or subtraction of material, and revision as the replacement of one Constitution by another. Revision is specifically referenced in 23 state constitutions, including the New York Constitution.



The Legislature can either offer an amendment or call a constitutional convention. As I noted previously, there are limitations to what it has historically been willing to do when it comes to its own powers. That is, it is willing to enhance them but not diminish them. The reason we are at this moment is because of the

Legislature's feeling a need to enhance its powers. It has advanced quite concrete proposals about budgeting.

The language for proposing a constitutional convention in New York's Constitution dates to 1846. The process is that the Legislature advances the question; the people get to vote on whether or not to hold a convention. If a convention is called there is then an election held to elect delegates to that convention, and then there is a convention. It does its work and it presents the results of its work to the people. The convention chooses the form in which that presentation is made — one question or several questions. The people of New York then get to say whether they want to adopt those changes or not. Thus we have a constitutional convention process that has three discrete votes: 1) on whether to have a convention; 2) on the election of delegates; and 3) on acceptance or not of the work of the convention.

Note that the governor has no role in calling a convention if the Legislature chooses to put the convention question on the ballot.

The alternative route is the automatic convention question, used in 14 states including New York. There are differences in detail on the timing of the question in how frequently it's asked. New York is on a 20-year cycle. Using this process we may bypass those in power to consider our constitutional arrangements. Other states have other techniques. For example, the constitution commission with direct ballot access is used in Florida. The Florida Constitution actually provides for two commissions: one for fiscal matters and one for other matters. These commissions automatically come into existence. They advance constitutional changes to the ballot, which are then accepted or not by voters. An initiative to call a convention exists in some cases. An initiative to make constitutional change is also an available process.

In New York, we specify the constitutional convention question. The question is: "Shall there be a convention to revise the Constitution and amend the same?" It's interesting, amendment and revision are contemplated in the same question and the word "and" appears, not "or." It does not read, "Shall there be a convention to revise the Constitution or amend the same." There has been considerable discussion about whether we could have a limited convention in New York and Richard is going to talk more about that. I'm going to leave the point except to say that at least in my study most people have

been skeptical about whether we could do that, given that we have to ask this precise question on the ballot when we seek the authorization for a convention. The open-ended nature of the question is a source of considerable opposition to holding a convention.

Other states have specific language providing for limited conventions. Kansas is an example and North Carolina and Tennessee are other examples. New Jersey has currently under consideration a property tax convention; that may resonate with some of you. It resonates with me for reasons I won't detail here. I commend to your attention the report of the task force preparing for the New Jersey convention, which I think is a very good and smart report. You can find it on the Internet. Essentially since the New Jersey Constitution is silent on the question of a convention, the task force has concluded that a limited convention is within the discretion of the Legislature to call. We have the model of those states that provide for a limited convention and we also have the model of those states that are silent on holding a convention.

There is another intriguing point and that has to do with the use of the initiative to change the Constitution specifically with regard to the political branches. In Illinois there is no initiative for constitutional change generally but there is the initiative in this focused way. The Catch-22 is that in New York, if we don't have a convention we would have to adopt the constitutional changes that would allow us to focus through the only means available — the legislative amendment route, but this would be targeted at least in part on the legislature. That is, the people who are very likely to be against those changes (that is, the people in the Legislature) control the path to amendment.

Now, a few points on the issues. I'm very familiar with them, having worked on the preparation for the automatic call of the convention question in 1997. First, we specified how delegates are elected in the Constitution. They are to be elected 15 at-large and 3 from each Senate district. There are voting rights concerns about at-large elections. The use of multi-member districts and at-large elections raises a red flag. Richard knows a lot about this and I'll defer to him.

Additionally, since New York is famous for its bipartisan gerrymandering that has kept the Senate Republican for all this many years since 1965, some people fear perhaps that there would be a partisan bias in the use of these districts. I think that fear is misplaced. I think the use of Senate districts for multimember purposes could produce a different outcome because of the kind of gerrymandering the Senate must engage in as a minority party. I also think with the 2 million-person Democratic enrollment advantage in New York this fear is a little problematic. I also think it can be addressed by election system adjustments that can be done statutorily.

The at-large election, as Frank Mauro has pointed out, also raises a logistical question: How do we elect 15 members at-large without slating? Traditionally, we have done slating and we've allowed exceptions with paste-on devices to the ballot, which proved to be quite disastrous the last time they were used in connection with the 1967 convention. What technology would we use? How might it work? Do we have consideration of this requirement in choosing the new technology we're soon going to adopt for elections, at quite high cost?

What would the rules be for running the election for convention delegates? Would we use the usual rules in the New York Election Law? Would we use partisan election? Would we use nonpartisan election? How would we finance these elections? Would we use the same rules as for financing other elections? How would we establish ballot eligibility? Would we use the same rules? It was the view of the commission that I worked for that we could experiment with some reforms for the process without threatening those who benefit from a current process because it would be a distinct process. We could try some new things in electing delegates. We therefore proposed some things we tried that weren't usually tried or used in New York.

Other points. The convention must convene in the Capitol on the first Tuesday of April after the delegates are elected and continue until it's completed. Well, the Legislature would presumably want to be here too. But the Legislature might be displaced for a time. (This might be a salutary development.) The fact is that the article was written at a time when the Legislature stayed in session briefly and then left before

April 1st. So nobody was using the Capitol. This would clearly not be the case, so we have to figure that out.

A lot of objections to holding a convention date to the experience with the last one. Lots of legislative members got elected as delegates. The leadership of the convention was the legislative leadership. Many judges got elected. Members were compensated, as they must be under the Constitution, at the same level as a member of the Assembly. So we had the issue of dominance by the established order in the convention. (Our method used to bypass the legislature, it is argued, really did not do this.) We also had the issue of double dipping in the convention, double pay for those on state payrolls and double pension benefits. This offended some people. One of our commissioners — Malcolm Wilson, the former governor and former lieutenant governor and a great figure in New York — wanted to bar legislators, judges, and other people employed by the state government from serving at a convention. Some people reacted by saying that this was like barring doctors from the operating room. I think we need to address that question in a run up to any convention.

Finally, the form of presentation to the voters of the convention's results is up to the convention. That is a critical judgment, as evidenced in the successful presentation in several questions of the new New York City charter in 1989 and the failed presentation as one question of the Constitution of 1967 (the adoption of which in my judgment would have been a positive for the state). The uncertainties about how much would be addressed, who would be at a convention, how they would be picked, mitigating against support by some good government groups for a convention in 1997. I thought then, from a risk/benefit point of view, and said very widely and very frequently, that a convention was desirable. I thought then and think now that some of the worst-case fears could not occur in the practical political world.

I conclude that we should prepare as much as we can for a convention. Assemblyman Richard Brodsky and Senator Nick Spano calling for a convention isn't enough. Whatever we can address statutorily to take down the barriers that we've identified we should try to address. We should have legislation on who can serve. We

should have legislation on double dipping. We should have legislation on the election process. Because it is a long time until the next mandatory convention and it is improbable that we're going to get the Legislature to call one sooner, the least we can do is lay the groundwork and force, in so far as we can, consideration of some of these matters that would take away some of the concerns I've identified when we next must have a vote on the matter.

Richard Briffault:

I'm going to be very brief. Dick asked me to think about the question of the limited call. The usual assumption is that you can't have a limited convention because the Constitution doesn't provide for one. But I now want to propose an alternative point of view on that, which of course is "yes," we might be able to have a limited convention. This is important for a practical reason. As we saw the last time that the call for a convention was submitted to the voters in 1997, there was an enormous division amongst good government reform groups. On the one hand, people want the good things you could get from constitutional revision — fixing the budget process, controlling debt, campaign finance reform, nonpartisan independent redistricting. But people were afraid of losing the things that they like in the Constitution now. They were afraid of losing, depending on who they were, civil service protection, the education article, or the expansive protection of individual rights. Or they were afraid of bad things from their perspective being put in. Many people just decided they were too risk averse because you didn't know what could go in. I think there might be a better chance of getting a convention if it could be on a limited call.

Now as Jerry points out the Constitution right now gives two ways of amending the Constitution: legislative proposals, which the voters would then vote on, or the placing of the call for a convention on the ballot. That is the question "Shall there be a convention to revise the Constitution and amend the same?" The existence of those two options suggests they are the only two options. But there are reasons for thinking that is not the case.

First, we actually have had a limited call convention — in 1801. New York has had nine constitutional conventions. The first in 1777 produced our first post-colonial Constitution. But the 1777 Constitution didn't have procedures for amendment. Some time later, the Legislature had to deal with changing the size of the Legislature and with the role of the governor on something called the Council of Appointment. So, the Legislature submitted to the voters the question: Should we have a convention to address these two questions? The voters said yes, they elected delegates, and in 1801 they had a convention on those two questions. So we have had a limited call convention.



Second, the two constitutional routes — legislative submission of proposals and the placing of the call question on the ballot every 20 years — do not explain all our other conventions. We have had some conventions that were called off the 20-year cycle. So, this suggests the two means of amending the

Constitution that the Constitution provides for are not the only means.

Finally, there is the theory of the state Constitution. Whereas the federal Constitution is considered to be a grant of powers to a government which, without the Constitution, would have no powers, the state Constitution is a document of limitation which constrains and channels state power but does not create power. In other words, the legislature has the inherent power to call for a limited purpose constitutional convention unless the Constitution prohibits that — and it does not. The Constitution doesn't say that amendments proposed by the legislature and a convention called in response to the twenty-year question is the only ways of amending the Constitution. It just guarantees that there are these two. So conceivably there could be a third, which would be a limited call to amend. The Legislature would presumably put the question on the ballot or could even conceivably just call a convention. Presumably the delegates would have to be

elected and the convention would have stated purposes in its call. It could be a convention to deal with budgets or budget and debt reform. Presumably you could run the convention on that basis. There is one question that I haven't fully resolved and that is to what extent would this convention be subject to the 15 at-large and three per Senate district structure for the selection of delegates that is provided for in the Constitution or whether the Legislature could use another mechanism. I'm not sure about that.

The other thing, of course, and maybe it's more important is even if the legislature calls a limited purpose convention, if the convention got going and started to address other things, I don't think there would be any way to stop it other than the voters voting down their output. That is American history. The Philadelphia convention that wrote the U.S. Constitution was called on a limited call basis. Once it got going, it fully rewrote the Articles of Confederation and the result just went to the people. The states decided on the merits whether to say yes or no. They didn't dismiss it because the Convention went beyond the scope of the limited call.

I don't see anything in the state Constitution saying we can't have a limited call. We do have the history of having had one limited call. We do have the history of having calls off-cycle. So it seems to me there is nothing to preclude the Legislature from calling or asking the people whether they want one, and presumably the topics would be identified in the call itself. I think it's doable. I don't see anything unconstitutional about it. As I say, in the end the only real issue would be what if the convention then takes on other issues or there is debate as to what does it mean to address a certain topic. As we previously discussed, a budget has policy implications. If the focus is on the budget, can the convention also take on education? It might be a challenge to the legislators drafting the call to define the scope of the convention's limited focus. And, as I said, ultimately a limited call would be unenforceable. But I do think you could call one and see what happens. The way it would be enforced presumably would be what people campaign on to be elected and more importantly when the ultimate document is presented. Presumably if it went beyond the call, one of the reasons to vote against it would be that it went beyond the call.

These are thoughts inspired by looking out the window on the train on the way up here and certainly they haven't been fully researched.

Richard P. Nathan:

It's the world's prettiest train ride, so that's a distraction. But a nice contribution on a question I asked when we were planning for this. Let me ask the first question and then I'll open it up to questions. I want to ask you a question, Richard, on your saying that there could be a limited call. It has to be, I take it, by the Legislature?

Richard Briffault:

Yes, there's no other way to get the process started in New York. We don't have any provision for initiative or referendum in New York. I don't see that the governor has the ability to put something on the ballot. I presume we would need a law to put something on the ballot and the only people who can pass laws are the Legislature. It would have to come out of the Legislature one way or the other.

Gerald Benjamin:

It's interesting that we allow charter change for cities by other mechanisms, but we don't have such a mechanism for the state Constitution. So by analogy you would conclude that you are limited by the terms of the current constitutional provision.

Richard P. Nathan:

Charter change meaning?

Gerald Benjamin:

For cities there's legislation that provides three different ways to start the process.

Richard P. Nathan:

Counties?

Richard Briffault:

No.

Gerald Benjamin:

No.

Richard P. Nathan:

I'm going to make a comment and then open it up, so I won't detract from what I'm sure other people are going to want to say. This is a wonderfully good presentation by both of you and I can't thank you enough. One of the things I was thinking about when I talked to Jerry and Richard about today's meeting, is there wisdom in and could you have a blue-ribbon commission that says what it's going to do is address all of this? How would it get set up? Are there other ways besides formally using the constitutional modification provisions of the state Constitution to get some really smart attention on a basis that we will all have different views of in this, as Jerry said, reform moment, which may be over, as he said, but we're still here. It is now your turn to make comments or questions.

Robert Ward:

My name is Bob Ward of the New York State Business Council. Professor Briffault, that was an interesting question on the limited



call. Just wanting to run at this thing a little further. Any speculation on what the courts would do if before the convention actually happened somebody tried to derail a limited call by taking it to court?

Richard Briffault:

I never speak on what they might do. I can take the types of arguments that might be made and the kinds of responses. Obviously the argument would be that this is unauthorized. There are a couple of possibilities. One is that a court may react to this prudentially and say, we are not going to address this until the voters actually vote for this thing. I am assuming the Legislature would not call the convention directly, which is a possibility, but the Legislature would ask the voters whether they want a limited convention. One possibility would be for the courts to say, "Let's see what happens when it goes to the voters because right now it's premature. It's not ripe until the voters vote." If the voters vote "no" the question goes away. If the voters vote "yes" that might itself give some weight to the legitimacy of going forward. In short, it's likely the court would decide the issue isn't ripe for resolution until the voters approve the call. Then they might consult their constitutional history and see whether the convention of 1846, which adopted the current amendment procedures, intended them to be exclusive. They would also have to consider the canon in this area that a state constitution is not the source of a state government's power but only a limit so that they would have to think about whether the absence of a prohibition of a limited call is more significant than the absence of a specific authorization of a limited call.

I would be surprised if a court actually tries to choke the process off at the beginning. More likely they would let it play out. But you never know. Some court might say, "This is unauthorized and we're not going to let it happen. It's going to cost money to hold this election and we're simply not going to want to waste the money." Still, in other states in cases involving ballot propositions, courts have been reluctant to pass judgment on the constitutionality on something before it passes. They usually wait it out until after the voters vote.

Richard P. Nathan:

Jerry, you're skeptical.

Gerald Benjamin:

It's not my idea.

Richard P. Nathan:

What do you think about how you might devise other avenues?

Gerald Benjamin:

We tried what was called action panels in 1997. Peter Goldmark was head of the commission. He thought people were more worried about substantive stuff. He sought to get at the substantive stuff, with relatively narrowly defined constitutional changes. You were on the commission. You may recall this. His idea was that if we got the Legislature to appoint panels on these four points of focus and to commit to considering the proposals unchanged we might force a result. It was patterned after the Base-Closing Commission idea. But we got caught up in a change of partisan control in the executive. I talked to Governor Cuomo about this and he was very disappointed in that recommendation. He wanted a convention and thought we weren't courageous enough. We didn't really see the historic opportunity in that report. Of course, the Legislature is loath to commit to something in advance if it doesn't know what it is.

I would also say that what the experience showed me was that you cannot have a commission that goes forward without the advanced agreement of both political branches. We went forward with gubernatorial support. We didn't have legislative support. If you're going to create a process of some extraordinary nature, both political branches

have to sign off. And of course that is a high threshold in New York, given its partisan composition.

Richard P. Nathan:

A lot of what Jerry just referred to occurred in this room and I do remember it well. I'm thinking if there are other ways. Educating the public would take the very important substance that was expressed in both of your remarks and making sure that more people understand the profundity and character of these governance questions, which is something we care about a lot at the Rockefeller Institute.

Frank Thompson:

I'm Frank Thompson from Rockefeller College. I thought Jerry's opening line or two about whether this is a window of opportunity is good. I know you have concerns about many aspects of the Constitution and appropriately so. I am by no means an expert on this, but let me suggest that perhaps the number one window of opportunity to do something about is the budget process, especially in the wake of the court decision and in the wake of the terrible symbolism about chronically late budgets. It's a symbol of dysfunction in Albany government. It may be blown out of proportion but it's become the symbol. We think of reform as striking a somewhat better balance of power between the Legislature and the governor in response to this court decision, getting an on-time budget, and doing things in a somewhat better way. What's the best, most practical way to go about that? It seems to me, off the top of my head, that the convention would not be the route. If there were any hope for that, it would be in the non-convention route to budget amendment. Am I wrong about that? Enlighten me on how much reform do you think we have a chance at getting if we focus on that issue in particular and maybe how much is statutory and how much is constitutional?

Gerald Benjamin:

We had an agreement in the two houses on statutory and constitutional change in the last session. The statutory portion was vetoed by the governor. I thought that veto was a correct action. I was in a minority. I thought that the statutory provisions substantially undid executive budgeting and I wrote on this. I wasn't convinced that we had to undo executive budgeting. My view is that, in brief, we've reached beyond the intention with the current decision of the Court of Appeals. We may be functioning within the language of the constitutional budget process as was accepted or adopted in 1927, but we've reached beyond its intent. I think the Legislature has been diminished too much. We need a process that sustains executive budgeting, restores a proper legislative role, and provides incentives for all to adhere to its requirements and limits.

Frank Thompson:

That's also constitutional or just statutory?

Gerald Benjamin:

It's both, because we don't need the governor to move constitutionally. I want to say one other thing in reference to Dick's earlier point. There is a process in Utah where a commission comes into existence on a regular basis and proposes constitutional change. Very prestigious people serve on this commission in the state. It doesn't have ballot access, but it has very high political legitimacy. It hasn't taken on some of these flash points for the political branches but it has made substantial constitutional change possible in Utah. That's a much different political system than in New York, but there are models. But to get the models you have to make constitutional change or rely on statutory change through the legislature. Richard, you may want to comment?

Richard Briffault:

Just two quick things. A legislative amendment couldn't take effect until 2007 at the earliest because of the requirement that it has to be passed by two successive legislatures.

The Legislature could pass it this year. They would have to pass it again in 2007 (or 2008) and then it would go to the voters. So nothing can take effect until the beginning of 2008 at the earliest. Even with the constitutional convention, most likely there would be a call in year one, so that's this year, in 2005. An election of delegates would be in 2006. The convention meets in the spring of 2007. The convention goes to the voters at the end of 2007. Either way we're taking a while.

Gerald Benjamin:

The other thing is that any time you put a matter that looks like it's about money on the ballot in New York it is likely to fail. I wouldn't underestimate the challenge to getting New Yorkers to approve an amendment on budgeting.

E. J. McMahon:

I'm from the Manhattan Institute. There's a live constitutional amendment pending though, but that's the contingency budget.

Richard Briffault:

It doesn't get into the issues that the Court of Appeals addressed.

E. J. McMahon:

In effect it does.

Jo Brill:

I'm with the Citizens Budget Commission. I had the same question actually about the ideal balance of powers in the Constitution. Any other time talk about the budget process would be process but here it's substance. I wondered what is the ideal balance? Would you amend the Constitution, Jerry? You said you would. You didn't exactly say how.

Gerald Benjamin:

I haven't thought hard enough about that. It's on my agenda. I can identify principles that I wanted to effect a change that would assure that there was a substantial role for each player but I haven't written a specific provision. The key is that there are three players. The budget article really assumes two players but there are three — the governor and each house. That's a major complication. The conception of the interaction now in the Constitution is problematic.

The order of magnitude of the difficulty of getting three players to agree is much greater than getting two players to agree. It is three-way bargaining. There are all kinds of writings on triadic negotiations. The process would have to be conceived in that way to connect with the reality of our political life. I also think it would have to be conceived so that nobody got to do anything unilaterally. That's a fundamental point. Everybody must have substantial incentives to come to agreement. That is, doing nothing cannot be beneficial to anybody.

The Legislature has been reasserting itself now for a third of a century or more. Even though I have my difficulties with it in many ways, it is clear that it has become a more confident institution in policy making. Both houses have. Yet it believes itself to be irrelevant or substantially irrelevant. There's a debate on the degree to which this is a marketing point for the Legislature as opposed to an actual description. But I think its power has been diminished beyond from what it should be. We need to start with these first principles and move forward. But I haven't got concrete solutions.

Richard Briffault:

When the cases were pending but before they had been decided I did something for the City Bar Association in which I argued that the power of the Legislature to take something out of the budget to be coextensive with the power of the governor to put something in. That is consistent with the language used by the Court of Appeals in the Tremaine case back in 1929, which was the first case applying the executive budget provision. Under that approach, the process would probably look more like the federal

budget process. I agree with Judge Smith that it's very difficult to distinguish the fiscal from the substantive. The budget is often the setting in which we make policy since the budget is the one legislative measure that absolutely has to pass. I think it will be difficult to come up with a standard that a court could use to limit what the governor could put in. And I am not sure it would be wise even to try to separate the budget from policymaking. Instead, I think the best approach is that the Legislature has to be able to take out whatever the governor puts in. The governor is like the president as the agenda setter, has all of the resources of the executive, with all the agencies reporting to him, all the power and information to set the stage. But that ultimately should be subject to revision by the legislature. The legislature should be able to take out what the governor puts in. This would probably require an amendment to the "no alterations" clause.

Gerald Benjamin:

I might pull Frank Mauro into the conversation because I think he has personal experience with this. There was a period of serious tension between the executive and Legislature in the 1980s having to do with the accountability to the Legislature for spending that was budgeted but not done. There was a potential confrontation I believe between the Legislature and the governor in 1985. The institutions backed away from the confrontational mode because of uncertainty on both sides of the outcome in the courts, or perhaps because of greater comity in the interpersonal dynamics. The institutions accommodated each other or found a path. But we've pushed past the point where we can use those kinds of approaches to making things work. So we need a reconsideration of the structural arrangements. Frank, maybe you want to say something to that.

Frank Mauro:

I'm from the Fiscal Policy Institute. Not exactly to that, but related to that. It's one thing the Legislature could offer to the governor. The most recent case makes the governor very powerful but the governor still has no power of empowerment. So one of the things that the Legislature could do is establish some regularized empowerment process like the

Congressional Budget of 1974 in return for the governor giving up powers in the direction that Richard just said.

David Shaffer:

Well, it seems to me that we're thinking of this issue entirely within the context of the existing stasis in Albany. And that may suddenly change. Right now what we're thinking about is that we have this gridlock. We have partisan division. We have executive versus Legislature. We're trying to think if there is some



way to use the constitutional amendment process to get past that, to get in there and fix it. Even if that is conceivable constitutionally, is there any way of taking these gridlocked people and getting them to allow it to be done? There is another possibility, which is that Albany will suddenly overnight flip from gridlock to steamroller, where you have a Democratic majority in the Senate and a Democratic governor and they have a whole different set of reasons to want constitutional amendment. One of which would be to try prolonging the life of that situation, but they might also have substantive agenda items that they would like to achieve in the context of that too. I think people are looking ahead to this process and to think about that alternative possibility. That of course is what worries me more than the other. I think that's a distinct possibility. Gridlock could be a distant memory in three years.

Gerald Benjamin:

There are three points of division in the system in my formulation: 1) the partisan division, which you're referencing; 2) the institutional division, which we've been discussing; and 3) the personal. The dynamic now reflects a convergence between institutions confronting each other, people who don't like each other, and partisan

division. We have the worst case of all three cleavages aligned. Where you had people like Stanley Fink who had the capacity, will, and I think genius to overcome some of that, then you had a different situation. Notwithstanding, in other words, the partisan change that you anticipate, and that I agree is likely to happen soon, we're still going to have issues of institutional stakes. I don't think the structural arrangements are suited to the way the institutions want to behave in the current environment. The design of the institutions dates to the Progressive Era. The assumptions about the way politics worked and society worked in the Progressive Era are just not in accord with the way politics works and society works now. State constitutions are not enduring documents historically as the national Constitution is. They are regularly changed in reaction to changed circumstances. It's quite appropriate and well-precedented, even though they're constitutions, to give consideration to the changed context and its implications for the institutional design.

Richard P. Nathan:

Let me inject a commercial message here. On our website we have transcripts for these sessions (see <http://www.rockinst.org/weinberg/index.html>) and we had a session on the NYU Brennan report with Jeremy Creelan and Jeffrey Stonecash. It was a very interesting session, just like this one. You might go and look at that. We're trying to build up a body of knowledge to help the situation. That's what we're here for. I'm going to ask Richard if he wants to comment and I'm going to take one more question. Richard?

Richard Briffault:

That's obviously a very good point. Today's situation may soon cease to be relevant. On the other hand, the problem might recur in the future. Moreover, there may be reasons for making some changes apart from the conflict between the governor and the Legislature. I was struck by one of the earlier cases before the Court of Appeals in the early 1990s, the Bankers Association decision. That did not involve a conflict between the governor and the Legislature. The Legislature added a tax to the governor's budget, the governor signed it, and the governor was duly collecting the tax until a taxpayer sued and said the

Legislature couldn't add that tax because that was not consistent with the budget process provided for by the Constitution, and the Court of Appeals agreed. So there may still be reasons for a constitutional change even if there isn't an enormous conflict.

The current budget structure is the product of the thinking of 1915. It assumes a wasteful and incompetent Legislature. The Legislature today has a lot more professional capacity than it did in 1915. It may be that the budget process ultimately needs to look more like the federal budget process. To be sure, the federal government is not a model of anything in terms of either making deadlines or getting a balanced budget. But it does show that you can have a proper interplay of executive proposals, legislative reaction, legislative proposals, and executive reaction.

Robert Farley:



I'm a counsel with the New York State Senate. One of the issues that is very interesting, in respect to a limited call, is that both sides of the aisle in the Legislature are concerned that if you call a constitutional convention you're going to open up a Pandora's box with a number of things that shouldn't or they don't wish to have

discussed. Indeed, one reason the 1967 constitutional convention failed with the voters was because they felt it went beyond what they hoped it would be doing. If you can have a limited call, I think there would be a much greater likelihood that they would call a constitutional convention to not only reform some of these issues but also particularly the budget process. I guess the question that I have, though, is whether or not the Legislature can do a limited call. The Constitution does not provide for it, even though as you cite there may have been one in 1801 or the Constitution provision that sets up the process. Has there been any indication out there in other states or New York where they have had a declaratory judgment before they've done this?

Richard Briffault:

I can't answer that. This thing is entirely something that I was just thinking about today in terms of just looking at the text and the history alone. So I don't know. As Jerry pointed out, they're working on something like this in New Jersey right now, where there has been a preparatory commission being organized to organize a convention. They're operating under the assumption that they can do this in a more limited way. But they don't have the same text that we do. The answer is I have no idea and it would obviously require research.

Gerald Benjamin:

If you search the New Jersey Constitution with a word search and put the word "convention," you get nothing. It's silent except in the introductory materials as adopted or proposing the convention of 1947. That's the only place where the word "convention" appears if you search the document. I've looked at the amending article. I haven't looked at every article. I wrote a long article on this for a forthcoming book that Richard and others participated in. I encountered no decisions, nothing recent, where a limited call was established in states that didn't explicitly provide for it. This automatic call has not succeeded in any other versions since 1985. It's not just New York that faces this problem.

Richard P. Nathan:

Let me suggest that we keep the record open and ask both our speakers if they wish to add things that you might think.

Gerald Benjamin:

On a theoretical point, I have a problem with the idea of a super-ordinate body being constrained by a subordinate body. If the Legislature passes legislation but the body is authorized to change the Constitution and it chooses to go beyond the call, I have a

concern about the degree to which the subordinate body created by the Constitution can constrain a convention, which can change the Constitution.

Robert Ward:

That would be a call of the people, not the Legislature.

Richard Briffault:

And they can't change the convention in the Constitution either, only the people can. Remember when we call a constitutional convention they don't actually have to amend every article. Obviously, you could have a limited constitutional change. It may be in the end that this doesn't work because it's probably unenforceable. That is to say, I think you could set up the ground rules to have a limited call but if the group goes beyond their mandate, I'm not sure if there is any way to stop it. I think it can be set up this way. It can be called for specific purpose. People can campaign on those lines. The debate can be framed that way. But should the delegates decide they want to do something else, there I'm skeptical that they can ever be stopped.

Barbara Bartoletti:



I'm from the League of Women Voters. This actually is not enforceable. It comes back to the discussion of the delegate selection process. Jerry and I have had this discussion over many years. I guess I agree with Jerry, I think this is the nut that really has to be cracked and I wanted your comments. There are

some current pieces of legislation out there that would just call a convention. I think we get into all kinds of problems. We already have all kinds of problems with the delegate

selection process. We get into a whole new set of problems if we don't deal with and solve the problem of the 15 at-large delegates and how you deal with voting machines to provide that set up of delegate selection. Are we advancing or have you been able to advance any proposals? We have some but I know we've been carrying this on for some time.

Gerald Benjamin:

I still believe that the limited vote idea is a fine idea. You use the multimember district at the district level. You give each citizen one vote. There are two ways to gerrymander. One is packing, which the Republicans can't do because aren't enough Republicans. The other is distributing the Republican voters in a sufficient proportion so that they will win seats but not waste any votes. This requires going for about 55 percent majority within each district. Since they're creating these districts that are not overwhelmingly Republican, if you do a limited voting scheme within these districts you could probably get quite a fair outcome.

I would defer to Richard on the voting rights question. He wrote a wonderful essay for us in the mid-1990s on the voting rights implications of all this that may have to be updated, but I think it is still very sound. On the at-large delegates, I would argue that you have a very small proportion of the convention elected at-large and you can make that case and you have a reason for doing it — to get a perspective that's not limited to a particular geographic location. Richard and I were kicking around the technical question of the voting machines before we started this session and Frank of course has raised this point. Richard thinks it's less of a problem than I do. I think especially if you don't plan for this sort of election (at this change moment for the technology) we could get into a jam. I can imagine the use of computer screens where options would come up five at a time. I can imagine technological fixes for that kind of problem. I'm not sure how good they are yet.

Barbara Bartoletti:

An optical scan may be a step in the right direction. However, I guess you started out by saying the window has opened. Has the moment for reform passed or are we still in that moment? My fear is that the people of New York are frustrated enough that they want reform at all cost and perhaps what we get is not a good deal on the Constitution.

Richard Briffault:

In terms of the ballot, remember two years ago California voters went to a recall election with 265 candidates on the ballot and somehow they managed to get one person with a majority and a couple other people got a lot of votes and everybody else got a scattering. Everyone said that election was not going to work. It worked. We just had an election in Iraq. There were 275 people running in a nationwide election district about the same size as New York. They managed. They managed to actually come up with a handful of parties winning all the seats, which is what we would like in terms of having a coherent government. They did it. I think if Iraq can do it in the middle of a war, we could probably do it.

Frank Mauro:

Richard, did they have proportional representation?

Richard Briffault:

Again, we are using party lines.

Frank Mauro:

But it was winner take all.

Richard Briffault:

That's right. But you would still have large numbers of ballots. A long, long list of people.

Frank Mauro:

I think the question is: Is it acceptable in this day and age for America to elect 15 people at-large in a winner takes all election?

Richard Briffault:

I was hearing two different questions. One is the technology. Is it technically possible to do it? I think the answer to that is yes.

Frank Mauro:

Is it technically possible to have not winner take all? But if it is winner take all, is that acceptable? And the current election law calling for winner take all would have to be changed.

Richard Briffault:

The election law or the Constitution?

Frank Mauro:

The election law.

Richard Briffault:

That could be changed.

Frank Mauro:

Yes, it could be. But it has to be changed...

Gerald Benjamin:

You're talking about slating....

Richard Briffault:

Somebody asked about majority rule....

Frank Mauro:

...what we've always done in the past. I don't buy that what's happened through the slating in the past gave us delegates who were different than the delegates we got through the district election. I feel that the 15 at-large should be done away with.

Richard P. Nathan:

Thank you all for coming and thank both the speakers too. They were great.