



Public Policy Forum

Constitutions and Effective Government: The Case Of New York

**Presented by
Peter J. Galie**

April 20, 2007

Richard P. Nathan:

Welcome. I am proud to be the co-director of the Rockefeller Institute of Government. Under Michael Cooper, our director of publications, we hold periodic public policy forums. Today's subject is an appropriate one, and our speaker is just the right person. The subject is the New York State Constitution, and our speaker is Professor Peter Galie of Canisius College, who has worked with us closely on this topic. He is a learned and wonderful expert on the New York State Constitution.

Peter Galie:

Thank you. I thought what I would do is raise questions of the kind that one might ask before deciding whether this reform is what we want or not what we want and why. So, that's the way I have decided to approach the question of constitutional reform in New York.

I have bluntly put the question that I want to bounce around: "Are the key issues facing New York related in any direct way to the state's constitution? And would the adoption of the reforms advocated by a bevy of reform organizations solve those problems?"

As I was reading through some of works on constitutionals reform and in the book *Decision 1997* published by the Rockefeller Institute, which is by far the best up-to-date collection

of thoughtful essays on reforming the constitution. The Poletti Reports, a series of reports on all aspects of the state constitution prepared for the Convention of 1938, are probably the best set of reports ever produced for a constitutional convention in New York, but they are almost sixty years old. Nonetheless those reports are the place to start when you think about constitutional reform in New York.

When I was looking at some of the issues that are facing the state today, I thought, “Does the constitution have anything to say about the pension bond? Is there anything about how much we’re going to have to spend on education? Does it have anything to say about the Medicaid issue?” In short, the incredibly difficult issues involving finances. What could we do to reform the constitution that would in any way address those issues?

Where have we been as a state? How we get our designation as the “Empire State”? We did become a headquarters for continental expansion and it was probably then that people began calling us the Empire State. One author suggests that it arose from George Washington’s reference to New York City as the “seat of the empire” is the origin of the phrase (see Daniel Hulsebosch, *Constituting Empire New York and the Transformation of Constitutionalism in the Atlantic World 1664-1830*, Chapel Hill, 2005, p. 3).

The seat of the empire was geographically central, commercially vibrant, and internationally formidable. Rome was the classical model, London its contemporary successor. In 1785, it was not clear that New York was destined to be that model, or a modern example of it (Hulsebosch, op. cit.). It was too early to tell whether the confederation would succeed as one. Alexander Hamilton, in the *Federalist Papers* writes of “The fate of an empire, in many respects, the most interesting in the world.” Turns out, he was right.

We know the outcome. I purchased a used copy of *Actual Government in New York*, a textbook published around 1910, which was used in widely in the public schools of New York. It’s fascinating and informative to read the description of New York. The author makes reference to New York in terms of this notion of a great republic whose contemporary model was London. The text is a milestone marking the achievements and status of New York at the opening of the 20th century

In 1938, some 35 years later, New York held a constitutional convention. In the 1930s democracy was under siege, as you all know. Fascism and communism claimed to have better economic answers and, as hard as it is to imagine how people could believe that, there

were genuine and legitimate reasons why people believed that the answers these systems had were simply better than the ones we were providing in America, in the United States, in the '30s. And they proclaimed themselves to be the wave of the future.

So, it's interesting in that context to reflect on the remarks of Judge Frederick Crane, who was elected president of the convention: "We are here to do one thing if nothing else, to prove to the world that our form of government does work, that it will work efficiently, and can meet the problems of the day and the necessities of the times, as well as intelligently as any other form of government, that we are capable of providing a proper rule for those whose representative we are."

Well, the convention did make significant changes in the 1894 constitution. And New York continued to grow in stature, wealth, and size. Between 1938 and 1950, the state's congressional delegation rose to 45, and the state solidified its status as the financial, commercial, literary, and artistic capital of the country, if not the world.

In 2006, then candidate Eliot Spitzer, in a speech before this Institute, made the following statement:

New York is at the crossroads. It must adapt to the new realities of the 21st Century. We don't need fake reform. We must streamline our government, make it more responsive and accountable in order to compete, create new jobs, maintain and enhance our quality of life. If we don't do this, the State will continue on its steady decline.

Now, besides paralleling remarks made by others at different points in New York's history, there are a number of interesting aspects to his remarks. Like Frederick Crane, he saw New York as a testing grounds, whether we can demonstrate to the state's citizens that the government is capable of responding to the challenge.

His call for streamlining the government and accountability harkens to the turn-of-the-century government modernizers who dominated the 1915 New York State Constitutional Convention with its focus on efficiency and accountability — rejected, by the way, by the voters.

Finally he compared himself to two reformers, Susan B. Anthony and Theodore Roosevelt. Most important for me is the silent assumption in his remark about the relationship between reform and desired results.

Within the last week, Governor Spitzer indicated that campaign reform and legislative redistricting would be at the top of his agenda for the rest of the legislative session. But what assurances do we have that governmental reform and, more specifically, constitutional reform will correct the problems to which they are addressed? More pointedly, are the problems at which constitutional reform is directed the most important problems facing the state?

I've come to the question I wish to make the focus of my talk: "What is the relationship between our state constitution and the state of the state, or to the problems we face and the solutions we need?"

I'm not going to spend much time describing the processes and practices that have led to the disturbing description of the New York State government by numerous reform groups: The Brennan Center, New York Public Interest Research Group (NYPIRG), Citizen's Budget Commission, Manhattan Institute for Public Policy Research, Citizen's Action of New York, The Center for Public Integrity, the Citizen's Union, the Common Cause, League of Women Voters, and a number of temporary state commissions. I'm sure I don't have them all by any means, but it is a remarkable and extensive list. On top of these are the newspapers, which have published a number of special reports on the state of the state, including *The New York Times*, the *Albany Times Union*, the *Syracuse Post Standard*, the *Buffalo News* — and more.

It's not that the specific indictments are not important; they are, and they raise questions that just as important. Here's one of them: Given the fact that so many groups in an almost uniform chorus have indicted the state's political process, why has this state of affairs been allowed to continue, and even thrive?

The simple answer is, "Well, you know, the system is clogged." But there may be other reasons as to why, in the face a fairly persuasive case of dysfunction, things don't change very much. The press has an easy answer, and the easy answer may be the right one, but I'm not so sure.

It is interesting to note that, by far, the legislature has received the brunt of this attack, although the judiciary has come in for some as well. There is the issue of merit selection versus election. If you look at the political science literature on this question you come away wondering: “Does it make a difference?” Political scientists who have studied this question have not been able to say definitively that one system achieves better results than the other. So, it’s difficult to say that even if we adopted merit selection, we would obtain better results. We might get more diversity; but independence and competence? I don’t how know how much of those we would achieve.

Other questions have also been raised about judicial reform, including a fully unified court system, nonpartisan elections, partisan elections from smaller districts, and, recently, the partisan nominations of judges. The Court of Appeals has pretty much put an end to partisan nomination of judges, at least legally speaking. These developments have put the judiciary on the pages of the newspapers, along with the Legislature. But let me back up to the questions that I believe must be raised prior to addressing any specific reforms.

What do we expect a state constitution to do? And what specifically do we want it to accomplish? What I’m suggesting is that these reform groups don’t start with the basic questions that must be addressed before responding to specific problems. And those questions are: “What is it that we want our state constitution to do?” I’ll give you one example. We have a Bill of Rights in the constitution. It’s curious motley of the profound — substantive rights and protection of the fundamental criminal process rights — along with other items like gambling and ditch removal, provisions that don’t belong in a Bill of Rights.

But the question is: Given the fact that we have this national Bill of Rights, what function should a Bill of Rights play in a state constitution? We have never asked that question because the state bill of rights was added largely because the national constitution had one. I don’t think anybody in New York ever sat down and asked, “How exactly do we want this Bill of Rights to function?” Is it simply a copycat of the Bill of Rights in the national constitution? If we want a Bill of Rights, what should it do? That question has never been asked in any constitutional convention, and I don’t know whether it has been asked by commentators. But that’s the kind of thing I’m talking about.

Here’s our Government 101 start: We want to organize the government to provide conflict management structures. We want it to articulate the basic values and concerns of the people, the fundamental principles and policy goals.



Before we insert provisions in the document, we should ask: Why are they so important that we want them in a constitution? If you go through our state constitution, I guarantee everybody in this room will find something that doesn't belong. And I think that you will find things that aren't in there that you think really ought to be there. But those are the kinds of preliminary questions, if you like, that I'm talking about.

We want a constitution to limit these powers such as they are not abused in the process, and finally, of course, we want to protect rights and liberties. That raises the question, "What are we protecting, given the fact that we have this national Bill of Rights and plenty of federal laws?"

So, the first set of questions we would need to address is: Are the structures and procedures adequate? Are the limits effective? I mean, are they too constraining or are they not constraining enough? Are the fundamental principles and policy goals and rights in accord with the contemporary consensus or do they need revisiting?

Having answered these, we would then have to ask to what extent the formal constitution is embodied in the practices and behavior of those entrusted with its operation? This distinction is one between the "black letter constitution" and the operational constitution, the constitution "on the ground," so to speak. And that leads us to ask more of questions about our constitution. So, we need a careful delineation of those parts of the document where provision and practice diverge. And there are lots of those.

Then we have to ask the more difficult question: What are the reasons for the divergence? Why is there a difference between the constitution on paper and the constitution on the ground? If we don't know the real reason for it, attempting to eliminate the divergence could be, at the worst, a disaster and, at the very least, won't get you where you want to go potentially. Surely having an answer to that question is the *sine qua non* for effective reform. Constitutionalism is a struggle to render government immune, as far as possible from human frailties and their political consequence, what the Republican tradition called, "

corruption,” in its larger sense, while simultaneously establishing institutions that will be effective and powerful enough to do the job we have asked them to do.

So, my specific question is: To what extent are the gaps we discover a function of conflicting values embodied in the constitution itself? Here are four examples. The constitution limits the executive branch to 20 departments. That provision, to a large extent, has been circumvented by the location of many units, not called departments, in an omnibus executive department.

Now, do we want to say, “My God, there’s serious gap here and we ought to do exactly what the constitution says”? Or do we want to say, “Wait a minute. What are we trying to accomplish with that limitation? Does that limitation make any sense?” So it may not be an argument for bringing the two together; maybe just reconceptualizing what kinds of things we want to put in the constitution on this issue.

Example Two: The constitution requires a three-day waiting period between the time bills are presented to the legislature, and their passage. I’m not sure that’s technically correct, but it’s close. Governors, however, can issue a message of necessity to circumvent that requirement. On March 31st of this year, the governor issued “Messages of Necessity” to allow thousands of pages of bills to be passed without the wait.

In 2005, in a case involving the Seneca Indian nation (*Scott Maybee d/b/a/ Smoke Signals v. State of New York, George E. Pataki, &c., Et Al.* 4 NY3d 415, 2005), the Court of Appeals upheld a message of necessity on a law banning internet cigarette sales. Maybee asserted that the governor stated no reason to immediately pass the legislation. The Court held that as long as there is some factual statement, the governor’s conclusion may not be challenged. What factual statement did they have in this bill? Well, the facts were no more than the content of the bill; that’s what he had in this message of necessity.

Judith Kaye said that the constitution had been violated, but voted to uphold the court’s decision. There are all sorts of reason why courts may say it’s a clear violation of the constitution, but conclude, “We cannot,” or “we are not going to do anything about it.” And that’s what the court did here.

How did we get to that point? It was a long time in coming, this misuse of the Message of Necessity. It didn’t happen overnight. Finally you get to the last straw, the *reductio ad*

absurdum: “It doesn’t matter what the governor puts in there, we’re going buy it.” So our question is: Does that provision belong in the document? Or do we need to get rid of it?

Here’s the most famous or infamous example and it’s on state debt. In Article VII, section 2, the provisions are explicit in their restrictions and reflect an unwillingness to allow debt limits to be set by the legislature or the governor. If such debt is to be incurred it must be approved by the voters of the state; yet the state has managed to incur significant direct or indirect debt outside the requirements of these limitations by a series of devices — you all know them. In 1961, 98.4 percent of the state’s capital program was funded from current revenues and pay-as-you-go capital financing. By 1967, the Temporary State Commission on the Constitutional Convention could report that much of the capital construction in recent years had been financed outside the constitutional debt system. Now, we all know who is responsible for that and who got things done in this state.

The Blaine Amendment is a statement about separation of church and state that appears to be far more restrictive, at least on its face, than the First Amendment. So, you would think just reading the language that we would not allow much of the state aid to religious schools that would pass muster under the less-demanding requirements of the First Amendment. But that has not happened. Why is it that, since 1938, the Blaine Amendment had played little or no role in the decisions of this state concerning aid to religious institutions? This state has decided, that is, a consensus had formed around the proposition that we are going to play a major role in educating the students in this state, whether they are in public Catholic, Jewish, or Lutheran schools.

Finally, my last example. You have the “Forever Wild” provision protecting the great Adirondack Park system provision, which says one thing, and then you have another section, added in 1969, which says it’s the policy of this state to “be concerned about the natural beauty, the wilderness character, geological and ecological historical significance shall be preserved and administered for the use for the enjoyment of the people.” It goes on about this, but as far as I can tell, that provision has had almost no impact on New York State policy. I know that this one, the Forever Wild, has had an impact, and that’s for sure.

So, what we need to do before we think about constitutional reform is ask ourselves, “Are some kinds of constitutional provisions more likely to produce the intended effect

than others? And if so, can we specify them?” Here is a series of questions and no answers:

- Are self-executing provisions more effective than those authorizing the legislature to implement the provision? The Forever Wild, for example, versus a general mandate to protect the environment.
- Are proscriptive provisions more effective than prescriptive ones allowing discretion? The case of debt limits, for example.
- Are provisions that lay out in detail what is to be done and how more effective than those giving the legislature discretion to fill in the details? The judiciary article is a perfect example of the former. Unlike the national constitution, it goes for page after page. If you put Article VIII and Article VI together, you account for half the length of the constitution.
- And we do the same thing pretty much in Article VII and Article III, but you all know the consequence of doing that. It’s guaranteed that they will be the parts of the constitution that will be amended regularly.

The judiciary has been a perennial focus for constitutional reform in New York State from 1846 to the present, and it continues to be. Why is that? Is it simply because we have it in the constitution? Or are there other reasons?

Are provisions addressing structures and allocating powers more effective than those addressing policy matters? The canal article is apposite. Read the canal article as it was adopted in 1821 and follow its evolution. What you see is that it gets smaller and smaller until the present, where it has been reduced to one or two sentences.

What matters are more suitable, and what matters are less suitable, for inclusion? Is that question wrongheaded? Should we rather ask what are the things we feel strongly about and believe are fundamental? Independent of these questions, do we want to sit down and say, “Look, this is what we want in there, period, and we’re going to put it in.” Forget the National Municipal League and their ideas for a moment. These are the things we want, and we’re going to put them in there in some organized fashion.

Questioning this line of reasoning further, I would ask to what extent is constitutional failure a function of a gap or a disjunction between the document and the political culture and partisan divisions, that is, the social and economic characteristics of the state. This is a distinction that goes back to Montesquieu, who didn't want to talk about the laws in an 800-page work called *The Spirit of the Laws*. By the "Spirit of the Laws" he meant the climate, the geography, the culture, the history, and all those things that, in effect, are the important prepolitical conditions for whatever happens at the political or constitutional level.

And so, what's important about a community is not its constitution, but these prepolitical conditions, what you must factor in when creating the laws. It is reflected in Plato's remark: "I don't care much about who makes the laws, just let me control what songs our people sing."

So to what extent is the gap between debt provisions, for example, and the constitution on the ground a reflection of the decision maker's attempts to reflect or respond to ambiguous or conflicting demands from the public at different times? Citizens do not wish to have taxes raised, but they do want decent social services and efficient infrastructures.

The constitution contains articles mandating that the needy be cared for. It contains provisions about addressing housing needs, protecting the environment, and guaranteeing a sound education. All of these constitutional mandates to spend exist alongside the limitations on how much debt the state can incur. So, maybe we're not looking at a conflict between the parchment constitution and the constitution on the ground; rather we are looking at conflicts within the constitution itself. Cross-pressured politicians look for ways to duck such issues and postponing or hiding them are two well-worn techniques.

There's another reason that helps explain this situation: the need to get things done. Two of our great governors, Nelson Rockefeller and Al Smith, exemplified this "get-things-done approach." By the way, reading the 1938 Constitutional Conventions Debates is not the most exciting prospect, but it is a joy because you get to read the comments Al Smith makes — just reading them will have you laughing. At the 1938 Constitutional Convention, Al Smith opposed all attempts to restrict public authorities, calling them, "The one method we have discovered for getting work done expeditiously and without overtaxing our people." For him, the constitutional issues raised by the public authorities were not the point; they got things done.

And then there is Rockefeller's remark "Great men are not drawn to small office," which reflected his desire to get things done one way or another. Between 1961 and 1967, he got a lot of things done.



On several occasions in the 1960s, voters turned down propositions for financing low-income housing and slum clearance, only to see the newly formed Urban Development Corporation (UDC) engaged in just such activities. In the 1980s, voters rejected a prison construction bond, only to have the UDC float bonds and build prisons. Now, what's wrong with this picture?

I'm not suggesting that one side is right and the other side is wrong. But surely we have a conflict here in terms of what we want to do.

There are a couple of ways to approach this problem. The debt policies were adopted by and large in the 19th and early 20th centuries. They now have, in my view, tenuous or ambivalent support among decision makers. They are treated by the courts, by governors, and by most legislatures as obstacles to be overcome, not provisions to be obeyed. When you get to the point where provisions in the constitution are seen simply as obstacles — pain in the ass provisions — that we have got to somehow get around, we've lost any notion of what constitutional provisions are about.

We don't think that way about the Bill of Rights. The legislature does not think that way about provision in the Bill of Rights or the environment; yet, they do think about the finance provision in that way. It's in the constitution and has the same force. It may have just as much importance, but they think about it in a completely different way. Why is that? They are not seen as legitimate safeguards to the fiscal integrity and solvency of the state. They fail to command the necessary consensus that might have sustained them. Judicial complicity in this process has been manifest in numerous opinions. Here's my favorite: Robert Schultz, who I know, is a zealot, maybe even fanatical, but when he focused on the New York State Constitution and economic issues, I thought he was on to something. He brought a number of these cases himself and I don't think he's a lawyer, he's an engineer. So, in *Schultz v. State of New York*, the court made a startling admission of its willingness to

wink at constitutional chicanery. Here's the statement: "If modern ingenuity, even gimmickry have, in fact, stretched the words of the constitution beyond the point of prudence" — I marvel at that language — "that plea for reform in state borrowing practices is appropriately directed to the public arena." We never say that about the Bill of Rights, but somehow this is not as important, or it is as important, but it's not our bailiwick.

The state's defense of the New York City Transitional Finance Authority Act against the charge of unconstitutionality — this is the topper — was to concede the charge, claiming that the constitutional provision concerning the city's debt year is "outdated." You rarely find the state forced to make such a blatant admission. But that is what happens when we fail to address the need for modernization and legitimization.

Of course, we could address these issues constitutionally, ironically, by deconstitutionalizing them: eliminating the requirement to submit propositions to voters; reducing, if not eliminating, the need to resort to moral obligation debt and eliminating the need for some of these authorities; and giving the legislature free reign constitutionally, if not politically, to accumulate as much debt as it deemed necessary.

Alternatively, we could revise and strengthen them in ways that would make them more effective. Which way should we turn? How do we decide that? That is the issue that ought to be fully and thoroughly aired. Will it get aired in the legislature? I don't believe so. Should it be aired? Absolutely! Where would you air it?

The alternative to a constitutional convention would be a constitutional commission. I think New York State was one of the founders of the constitutional commission. It's a close call between New Jersey and New York for that honor. There are lots of advantages and disadvantages to these commissions, but they are able to look at these questions carefully, reflect on them, work through them, and provide the alternatives.

Another way to approach this is to say there is support for some kinds of constitutionally mandated fiscal restraints, but the legislature is out of step with public attitudes. You might respond: "How can you say that, given the re-election rates of legislature?" Half of the people clearly said that they are in favor of what the legislature, with the connivance of the courts, is doing, and not what the constitution says we ought to do.

That brings us to the state of the state legislature, which I am not going to get into. But it raises the question of the extent to which the legislature, in fact, is out of step? And it allows me to make another reference to political philosophy. Since I have referenced Montesquieu and Plato, now I'll do Lenin.

I thought that the best way to describe the decision-making process in the legislature would be to use a phrase of Lenin's, "democratic centralism." It does seem to fit if I understand the process.

The democratic aspect of this phrase involves the freedom of members of a political party to discuss and debate matters concerning policy direction. However, once the decision of a party is made, and it may be made by the majority vote, all members get in line and there is no dissent. That's the centralism aspect.

In New York, the freedom of members to choose policies is severely limited by a number of factors, which I shall leave for another talk

This is a government where secrecy is not just expected, but relied upon to make the government run. It is a system where the key players defend this secrecy as the most efficient and effective way to do business. Governor Pataki once said, rather dismissively in my view, "The process is the process."

For the players, quite simply, secret ways work. The system works and things get done. That was the argument of Al Smith, Nelson Rockefeller, and George Pataki. It is the argument of Bruno, Silver, and their supporters. They go further. Given the political diversity and divisions in the state, that's the only way the system can be made to work. For the most part, these arguments are made by people inside the capitol; but one scholar who defends the system along these lines is Jeffrey Stonecash, who I know and respect. He has made the strongest case for this connection between the fact that the political system has to reflect the prepolitical conditions of the state, and deal with them. These conditions are not something you can ignore. The way the Legislature works is, in fact, a reflection of a political system adapting to the realities of the demographic, political, economic, and geographical divisions of the state. Montesquieu would nod.

So, we really have no choice if we want things to get done. I don't know whether he's correct about that, but that's the assumption on which the arguments are based. Here's

Jeffrey's defense. "The key to understanding legislative leadership lies in the membership, not the leaders. If a party has sufficient consensus on issues, it may create strong leaders to act as agents in pursuing the party's legislative agenda. The members sacrifice a limited amount of their independence to the leaders, because the commonality of preferences ensures that most members will only rarely be pressured to take an action they don't prefer. Instead of party leadership being the cause of high party cohesion, cohesive parties are the main preconditions for strong leadership."

So, Stonecash turns everything around. The press starts with, "Three Men in a Room," top down with the bosses deciding and everybody getting in line. Jeffrey says it's a very different dynamic. Strong leaders are still possible in an area of individualist members, but the collective membership becomes, "the boss."

To most members, strong leadership is a necessary evil to achieve agreement. That is, we don't have any choice. We're a victim of social and political determinism. We are an epiphenomenon. That is my one nod to Marx

The reality on the ground must be obeyed. I'm pushing Jeffrey here, but as long as leadership is responsive to members' needs, the members are likely to continue to support a strong leadership system.

Turning negotiations over to leaders allows leadership freedom, but it also frees members to spend more time focusing on constituent concerns that will enhance their re-election chances. With this arrangement, legislators do not need to be in the state capitol on a full-time basis because leadership assumes responsibility for negotiations and management of day-to-day legislative business. Oh, how nice not to have to face the reality of being a legislator. That's what he seems to be saying.

Building support and gaining legitimacy for necessary compromises within a democracy is difficult. Who would disagree with that? The process in New York reflects how protracted that can become in a legislature filled with veterans from diverse districts who take issues seriously. Stonecash makes a strong defense, one that is in direct disagreement with the way in which the press and reform groups have defined the situation, the "Three Men in a Room."

New York City is the financial capital of the world, but it has more social and economic problems, and more poverty, than any other part of the state. The income inequalities in that city are greater than anywhere in this state. What a curious combination. Sixty percent of all the houses in the state that are on public assistance are in New York City. Seventy percent of Medicaid personal care cases are in New York City. And two-thirds of all state funds allocated for these two programs are spent in the city. You wonder why they have a different view about things.

Transportation money is spent in one way upstate and downstaters in New York City want it spent in another way.

Now, let me turn to legislative redistricting, since it is one of the two major items on Governor Spitzer's agenda. It makes sense, and I'm in favor of it. We can't expect the legislature to act in a disinterested way when it comes to their lifeblood. But what is it that reform groups think it will achieve? More party competition? Not likely, given the distribution of Democrats and Republicans in the state. It may affect some marginal districts. It could cost the Republicans the Senate, but would it result in a significant increase in party competition in New York? I don't think so. This is not an argument for not doing it. The question is, has anybody worked out the numbers to see what the political implications would be? How different would we be with a particular legislative redistricting scheme? So, if we are we in favor of doing it, what is it going to mean?

And here's the final point about whether all the focus and fuss about constitutional reform really matters. Are the big issues facing the state money questions that have little or nothing to do with the constitution?

Over the last fifteen years, the state government has presided over an economy in meltdown. It didn't see the job growth the rest of the nation saw, at least according to the commentaries that I've read. New York's major disaster can be summed up in one word: Medicaid. It is the most expensive Medicaid program in the country. In New York, it is swallowing up the entire economy. According to the Manhattan Institute, New York spent \$42 billion in 2004. Compare that to California at \$25 billion and Texas at \$15 billion. We spent more than those two states combined. And for good reason. We are much more generous in our benefits and there may be more social problems. It's not a question of saying, "This is all being thrown down some hole." There are legitimate issues and we have made certain choices. That doesn't change the fact that we spend as much as we do. In the 2007

budget, I think the figure is \$47 billion. It's the largest single item in the \$121 billion budget.

The state will spend \$20 billion on education and that may not be enough. There is no reason to believe that this figure will not increase, and increase dramatically.

Pensions have risen even faster than Medicaid expenditures, jumping from \$1 billion in 2000 to \$6.7 billion in 2005, reaching — I think as I haven't been able to check this — close to or over \$7 billion in 2006. Are they going to slow down? Maybe. Are they going to stop? No. One group has referred to these escalating costs as “New York's public pension bomb.”

That's a lot of money. There are significant financial problems. Is anything in the constitution we might change going to affect any of these financial issues? If we alter the debt limitations we might get a better bond rating out of the bond services. And that could save us, over time, billions of dollars by getting better interest rates in the market. That is one way in which constitutional reform might affect these financial questions.

I really would like to have you tell me what ways you think constitutional reform has anything to do with these very difficult, pressing constitutional questions. Thank you.

Richard P. Nathan:

Wonderful thought. I like your technique, and while I'm talking about one of our authors, I'll just make a comment and open up to questions. I also want to mention Bob Ward, who is the author of our two books on *New York State government* and, in a space of about 10 days, will become the new deputy director of Rockefeller Institute.

Peter, that was really very insightful. I could listen for longer. You covered the waterfront and you give us a lot to think about. Let me ask a question, then I'll open up the questions. This is something of a personal comment, as well as a question. The government is dynamic, that's what the founders talked about. They couldn't write the constitution they wanted, because of the people outdoors, that's what they thought.

So, government is always changing as our values and our ideas change. Maybe the secret to the success of the American political system is that nobody can really do a lot of damage. There's everybody from anywhere, separation of powers, American Federalism, and

they jump in and raise lots problems and prevent us from easily going off the deep end. A protection that is cultural, maybe more than constitutional.

But there are, Peter, some things that you couldn't do. You mentioned one without constitutional change. And maybe it's a good idea, and maybe it's not, but you couldn't change the apportionment of the legislature and a system for apportioning legislative seats without changing the constitution.

You could not select judges, as the governor has suggested, on a merit basis rather than an election basis, I think, without constitutional change. Whether those changes meet anything, I don't know. You raised new questions about that.

But there are some things we couldn't do without doing them in the constitution, and that's just a comment on that, and then I'll open it up to others for question.

Peter Galie:

Well, that's right. And on the question of judicial selection, is it worth all the effort to get a constitutional amendment on the ballot with regard to merit for the return we're going to get? I don't know.

There are three things we want from the judiciary: We want it be independent, we want it to be competent, and, in New York especially, we want it to be diverse.

The only possible advantage to the merit selection of Supreme Court judges would be that you might get more diversity. We get less diversity, it's clear, from the electoral system than we might from a system that is selected, rather than election. But the question is: Should that be our major concern of the constitutional reform?

John J. McEneny:

I'm the assemblyman for the 104th Assembly district. I have several observations on this. In the question of selection or election of judges, sometimes I find that the good government people often get involved in some peripheral issues of personalities and so on when, in fact, the simple structural change can solve a lot of problems.

On the question of Supreme Court judges, one of the problems if you want diversity is that the best way to be a Supreme Court Justice is to have the backing of a large group and a lot of money, because you're going to have to run in a district that's larger than a congressional district.

And because of the prohibitions that we put on the political activity of our judges from a town court all the way through, a judge will be relatively obscure outside his local district. He or she won't be running around to picnics, they won't be giving after-dinner speeches. Once they put on the black robes, they disappear from political life, or they should. And the irony is they then have to go to a political party to get them elected.

The chances of being the Supreme Court Judge from Schoharie County in this judicial district are very, very slim unless somebody decides every 30 years to throw a crumb off the table.

So, to the domination of the majority, the rule of thumb. In my first election, I knocked off an 18-year incumbent who was the majority leader in the county legislature. It was a tied Democratic primary that then turned into a lightning election. And it made *The New York Times* and everything else. That's because I ran in a district that had 7,600 residents and 4,500 voters.

If I had to run at-large, as I would have for town government in the town of Colonie, that would have been hopeless. The larger the district, the more dependent the election is on big money or big organizations, be they political, unions, business associations, or so on. The smaller the district, which a lot of people look on as very inefficient and very parochial, the more susceptible it is to grass roots action and reaction.

When we get to the issue of the judges, I don't hear any good government groups talking about these sprawling judicial districts that no one relates to who is not a member of the bar and are larger than congressional districts. We have forced ourselves in a position where only big money or high influence will get you into a judgeship.

So, whether we go into election or not, and for a while the League of Women Voters and some of the courts people were talking about a system of appointing and then running after a period of time. I say raise the bar, but somehow, I think people have more trust in themselves than some of the elitist groups that they can't ever be a part of.

Peter Galie:

That's right. About six years ago, I had a group of students with whom I did a three-year project on rewriting the New York State Constitution. I gave them information and let them go at it. What they did for the judiciary article was adopt that solution. They recognized the problems and suggested that they be appointed initially. But they have what we call, "retention elections" every so many years, in which the voters simply get the choice to say, "Do you want this person to remain on the bench or not" and, if so, they get another 10 or so years. Whether that is a compromise that gets the worse of both worlds or not, it was an intriguing idea. It's another way to do it.

John J. McEneny:

Regarding Seymour Lachman, I bought his book, and I stopped reading after the first chapter when he said that he and the average senator spent two hours at work when he came to Albany in a day. He should return his salary. I work year-round, full-time. I'm never bored. There are always constituent requests. Doesn't this man even read what's sent to him? Doesn't he do any research? I think he indicted himself.

Peter Galie:

You're paid as part-time though, right? The New York State Legislature is legally part-time? I know you work full-time, but is it considered a part-time job?

John J. McEneny:

No. Not in New York. In 1974, the State Legislature was paid for six months at a time, and if you came back, you were out of luck. And there were special sessions, they often came back in fall and August and so on. But they were paid over six months.

I have an option of going part-time. So does the mayor of Albany. Jerry Jennings technically has a part-time job, the same as I am if I choose it to be so. The fact of the matter is we have a \$120 billion budget. Dick Connors is full-time, I'm full-time, Canestrari pays his Bar dues, but he hasn't practiced law in years. Paul Tonko is an engineer, but he doesn't do any engineering.

We have a long tradition of full-time legislators in the State Capitol and in upstate in general. What's happened is you get \$79,500, unless you're a Republican, in which case you get an immediate \$9,000 raise. Because there's so few of them they happen to be put into leadership.

The person elected back in 1998 at \$79,500, a Democrat, could expect at least 10 years and could easily go to 14 years the way we were going at that frozen salary. And if they get the frozen salary and they live in Manhattan, they better get something on the side or they are not going to be able to do it.

I don't hear the judges pointing this part out, and they are always comparing themselves to the federal judges, who are already the 11th highest paid judges in the nation. But they don't compare themselves to state judges. But the real disparity is the upstate/down-state cost of living. My house fuel bills were triple to an identical house down in Westchester County, New York City, or Long Island. And we can live very well on the salaries we're given in the Capital District. In the Adirondacks, we can be the richest person in town. Even richer in the Buffalo area. The disparity is the problem there. But Lachman saying he worked two hours a day. That's a disgrace, but it's his disgrace, and he owns it.

The "Three Men in a Room" is a newspaper term and they love it. They also love to say it's part-time. That means that any editor who I see writes a column once a week, I guess he only works one day a week. You know, they count us by the time we're in session. The least productive time for a legislature is sitting waiting for something to happen that you can't control. The most productive time is being in your district office, meeting with your people, deciding how long you want to talk to them, and going out into the field. Those days of legislative meeting, that's your least productive time in the office that you hold.

The "Three Men in a Room" is a newspaper term primarily pushed by people who would love to be in the room, and also would love to be in the conference. I remember going into conference as a freshman and watching people calling each other names, telling me that they are naïve, they are stupid, and they are ill-formed, etc. And I said to myself as they opened up the conference, "If they will clean up the language totally, people won't be as candid as they are now."

Or if we didn't have this conference function in that way, there would be a backroom somewhere, and no backroom was big enough to take the 100 freshmen in there. And I

walked in with no experience in the legislature as an equal to people who had been there 25 years and ran major committees.

We have four conferences. One conference changes leadership, the Republican minority, all the time, so they never have a coup. They are not there long enough. We had two successful coups in the both the majority and the minority government since I've been there in the State Senate. And we had a very serious badly timed attempt, because it leaked out in May instead of in November, when Brodsky really did some damage, or it looked like he was going to do some real damage against Shelly Silver.

Richard Nathan:

Let me ask you a quick question, Jack. How could you be part-time? What could you do that would make you part-time? You said there's a choice you have.

John J. McEneny:

I'd get a full-time professorship, that's been done. There are many more part-time in the Senate, and in minorities of both Houses, than there are in the majorities, and particularly in the Senate.

Richard Nathan:

And you can practice law before the judges, who now say they are not going to sit before a legislator. One of the big issues that we've got to get on the table here is the one you raised about compensation. In Singapore, they have a wonderful solution: They pay all their leading public officials \$1 million-plus, and say they are incorruptible and they have to and will work hard.

Howard Shapiro:

Im now a private citizen. I originally had a very good short question, and after hearing the Assembly member, I'm going to go back to my experience with judicial appointees, and so forth. My suggestion would be that it would be great to have him make a presentation here and go through some of these issues.

One of the best cadre of Court of Appeals judges ever produced in this state, which I was involved with, came when Hugh Jones, Sol Wachtler, and Dominick Gabrielli were elected. And regardless of what people think about Sol Wachtler, I think everybody agreed that those judges were outstanding judges. I'm not convinced that the appointed process is better than the election process.

Other provocative issues that he sort of gets near are constitutional amendments, for example. I'm not saying I support a limit on the term of legislators. I'm not convinced, for example, that saying that the legislative session must end at the end of May, or whatever date you pick, wouldn't produce as good as result as the one that you have now.

My question is the issue of constitutional change, and the difference here between constitutional convention and constitutional amendment.

I used to be big fan of the constitutional convention, until I thought about it and had some experience with it. I realized that when the people are presented with an all-or-nothing package of change to the constitution, I'm wondering whether or not constitutional convention makes as much sense as a constitutional amendment. For two successive sessions of the Legislature, focus in on one or two issues that you present to the public, which is ripe for change. Just have those issues on the ballot as opposed to a laundry list of changes, some of which would be viewed as esoteric.

Peter Galie:

I do want to respond to that. The legislative amendment process is quite good. As you mentioned, if you have a specific issue, a particular problem that needs to be addressed in a particular way, you go through the legislative process, you debate, you argue it, you put it on the ballot, and the voters say "yes," or "no."

It is ill-suited for some of the larger issues I've raised here. You may want to say, "Well, we can't approach it that way. We need to do it incrementally. There's only one way to do it." I don't think that some of the issues are amenable to being handled incrementally. In fact, approaching them piecemeal is likely to create more problems because of the relationship of the changes to other provisions in the constitution.

But now let me address the other road to reform — a constitutional convention. A convention is problematic because it's an all-or-nothing thing. It is clear to me that the constitutional convention, at least in this state, is probably moving in the direction of the political dinosaur. The number of them that take place nationwide is declining. There are lots of reasons for that, some of them good, some of them not so good.

In 1967, for example, the convention president decided to put the changes in a “take it all or leave it all” package before the voters. He was warned: “You ought to present the hot button issues separately, so everything doesn't go down in defeat.” It was a big mistake. In 1938, they didn't do that. What they did was to take all those amendments, which were relatively uncontroversial, and put that before the people as an omnibus amendment. Then they took the 10 or so most controversial, the issues that would be difficult, and let the people decide on each one of those separately. It was a shrewd move and allowed the people to make thoughtful choices. The three most partisan measures the convention proposed were rejected; the other seven or so were passed. So it can happen

Look, there are advantages to all three methods of changing the constitution. It depends on what you're looking to do. If you are looking for specific, narrow reform, an amendment by the legislators as soon as you can get them to act on a particular problem may be better.

But when you're dealing with debt, you may get an amendment, but you will not have addressed the issue of the whole debt structure of the constitution — whether it makes any sense any longer. I know that's a big apple to chew, but I believe all or most of our problems stem from the fact that we have not ever sat down and said, “Look, what do we want to do with this?”

Howard Shapiro:

I just want to respond to that. Peter, I'd agree with you in what you say about debt, for example, so expand the question to the people. But if you put in the death penalty at the same time as you're talking about debt before the people, you have created, in my opinion, mass confusion and lack of focus. That's all I'm saying.

Peter Galie:

I'm just saying there's at least some counterfactual evidence of that. But it's a consideration.

Bob Ward:

Peter, thank you for a great presentation. I think if there is one element of the constitution that a lot of people would say is an area where the constitution can be brought more closely to the practices of government, it would be in the districting of the legislature. And I just wanted to make the observation that you raise the question as to whether it would really make much of a difference if they were to redistrict things. Would it make much of a difference as to how many districts there would be where the parties in control of the district might change? It's been suggested that it probably wouldn't be that many.

I just wanted to observe, it's not only the issue of whether a district is Republican or a Democrat, it's an issue of people within a given party if a seat is reliably Democratic or reliably Republican. It still matters that the incumbent be susceptible to challenge from within their own party.

I think at least some would say that it's too easy for people to assume that they are not going to be subjected to a primary and whether it's a good or a bad thing to have people doubt legislators, feel more pressure in that way, is open to argument. But I think that's an important consideration.

Peter Galie:

I agree; I did neglect that. That would be another possible change that would be affected by a legislator independent of the party competition.

Thomas Gais:

Thank you very much, Peter, it was a wonderful talk. I'm co-director here at the Rockefeller Institute. You reminded me of this old political science literature that actually tried to correlate the characteristics of state constitutions, and all kinds of policy outcomes, especially welfare and Medicaid and transportation, and they never found much of

anything. So, it's a good point that you bring, although there is one thing that I was reminded of in the discussion. You may want to take a look at it. I don't know what the literature has been since then, but some years ago, Morris Fiorina wrote a little book and he claimed, or he seemed to find evidence for, some sort of relationship between professionalism, actually measured by the pay or the compensation to state legislators and the activism and size of government in states.

The argument, though, wasn't that somehow we get legislators who are paid more than the ones who spend more on government. He actually seemed to find that the Democratic Party generally supporting more active government, and you were able to get better recruitment of Democrats and more competitive races.

Peter Galie:

I do think that I disagree with the people, taxpayers, who are opposed, "My God, look at all the money." I just don't think, even if that's true, I just don't think that's really an issue we ought to focus on. And it may be, as you say, there may be good reasons why, if we do that, we get some positive benefits, even though it seems to be costing more than we want to pay.

Again there are two models for how we want constitutional government to function. You can talk about a constitution that is activist, aimed at opening things up to let public officials make decisions pretty much unencumbered, except by the political process and specific structural or rights limitations. This is a progressive model if you will; it's activist and works to deal with problems. The government has all the power to deal with problems if it has the political will.

Or you can have a constitution that's much more like some in the west, more populist, where you have the people involved in different ways with the initiative, referendum, or other mechanisms that involve a larger group in the constitutional process. Now you may not have to choose. Maybe there is a possibility of having both of those, but there are two models and that's what a community, a state has to decide.

New Jersey's experimenting with something along these lines, though it has not yet been adopted. I don't like the "amenda-mania" of the initiative as it operates in California, but there is something to this process that might be salvaged, and this notion of an indirect initiative is an interesting one. The proposal working its way through the New Jersey

legislature eliminates some of the problems created by the raw majoritarian constitutionalism of the initiatives.

Richard Nathan:

What is an indirect initiative?

Peter Galie:

Maybe somebody else can describe it. What happens here is the initiative is limited to certain kinds of issues. Certain issues are off the table. And I think its policy issues, I'm not sure now. Rather than simply dumping proposed legislation because there are problem, it allows the legislature, if the sponsors will agree, to accept the amendment that would correct or deal with a problem, and then go on to vote on it as corrected.

These were two features of that indirect initiative that seems to be working. It puts pressure on the legislature without taking the job of the legislature away.

John J. McEneny:

Two quick comments, one: In 1994, *Governing* magazine had an article, "Where Have All the Lawyers Gone?" I dealt with the reporter, and he went and talked to all of the lawyers we had then and there were probably 40 with law degrees, and he said that if there were 13 people who had an active law practice that brought in \$10,000 a year, that would be the maximum.

And the reason you're losing lawyers is, one, because it's very time consuming; but the other reason is conflicts of interest or the appearance thereof. And since the Watergate era, conflict of interest, the people holding very visible jobs, whether it's in the private sector, in business, or in the law professions, is forcing a lot of people out of jobs that they traditionally would hold when they were legislators.

The McEneny solution to redistricting is a simple one, nobody's mentioning it. One of the reasons we have a problem is because there is a built-in constitutional incompatibility between Senate districts and Assembly districts. This creates a situation where the majority of each house draws up a plan, which has obvious disadvantages from the good government

point of view, and then holds their nose while they vote for the opposite house, selling out their own political party who are a minority there, in order to get what they want.

I noticed over the years there are 165 assemblymen and the equivalent in Maryland in 55 senators, and the same thing in Massachusetts. I always wondered why, and then I realized that what they do is they draw a Senate district and then they divide by three. And within that Senate district, they have three delegates or representatives, or what we call “Assemblymen.”

We currently establish the Assembly as at inflexible, 150; but we allow the Senate to pick a number between 55 and 65 to have as many senators as they want. And when they get a crisis, the last time, they added a 62nd senator.

If we changed the constitution so that the Senate could pick either number 50 or number 75, I don’t care which one it is, then the two houses would have to talk to each other, because we would also say that within each Senate district there would be two or three Assembly members, depending on which number they took.

Right now we have a system where, essentially, neither house has to talk to the other. And so what the good government groups have been concentrating on is who gets to draw the lines? And none of them mention any justices, like “block on border,” which destroys city neighborhoods and “town on border,” which causes a massive amount of mathematical differences that violate one-man/one-vote. They don’t understand that. They don’t understand community patterns, natural barriers between people, preserving neighborhoods. They also haven’t got what personality is going to be there to get to draw the lines.

Two structural changes that could be made, one would be to get rid of those discriminatory, antiurban qualifications from the 1894 constitution that makes towns sacrosanct. You couldn’t even get the village of Menands to make the maps come out, because it’s part of the town of Colonie, when you were creating an urban district along the river, just to give a specific example.

Peter Galie:

But all your changes would still keep the decision in the legislature, and it would just be the legislature.

John J. McEneny:

Well, you might have the final. Most people have the final vote in the legislature, but they like to see somebody else draw lines first, get it out to public input. If it's a popular thing, there will be so much public pressure that people will say, "Please approve it."

But what we really do is we draw two legislative redistrictings: one is the Senate, one is the Republican, and then we combine these two incompatible things, which might be great in one house and horrible in another.

If we would change the number so that your Senate district, in the case of Albany (the least gerrymandered is Albany because it's the Albany County line), then you'd say you'd have a north county and a south county member of the Assembly and just draw the line wherever the map comes out, and try and respect the municipal boundaries and that type of thing in the process. But then both houses would have to talk to each other.

That basic incompatibility of the two houses causes a lot of the structural problem. Nobody's mentioned that, and nobody's mentioned town-on-border and block-on-border. Ron Canestrari and I, and Tim Gordon, are one person apart, if not identical, in the number of people. That's in a census that's already outdated the day it comes out; whereas, Bob Riley, who has three suburban towns, he can have thousands more or less people than his adjoining suburban and rural-based district. Nobody mentions that either.

Frank Mauro:

Yes, we could go even further than that, but it might hook in to your small business plan. In New Jersey, senators and assemblymen are elected from the same districts, it's just that you elect one senator and two assemblymen. You don't think, you can divide the Senate district into two parts. Everybody wants on runs on the same line, it's interesting.

Richard Nathan:

We'll give Peter the last word.

Peter Galie:

I don't really need it.

Richard Nathan:

He doesn't really need it, but this is great. Thanks for coming.