THE NECESSITY FOR CONSTITUTIONAL CHANGE*

_Gerald Benjamin**_

Thank you for the opportunity to be here with you today. For us reformers, the fact of this conference is reassuring, as is the fact that there are still some of us—quite a few of us—here for the afternoon session.

My daughter Elizabeth Benjamin covers state politics for the _Albany Times Union_. We were talking during the Christmas holiday. The ill-conceived budget amendment to the state constitution had just been defeated.\(^1\) I asked, “what will be the focus of the coming session?” She responded, “reform is off the agenda; reform is dead.” I hastened to assure her that she was wrong.

It is an interesting question, the degree to which persistent attention can be maintained in the legislature on questions of structural change in government. Certainly, representative institutions in democratic systems, flawed or not, have limited capacity to attend to a large number of things at the same time. Every year in New York lots of bills get passed, but two or three major matters tend to occupy the legislature’s attention. The agenda is often defined by specific events of the moment or by action-forcing external circumstances.

One of my colleagues once called all the bills that are introduced, all the policy ideas that swirl around the capitol, “the primal stew of legislation.” Those of us who are interested in political and governmental reform first must think about how to assure that needed structural reforms in state government are in this year’s first serving of that stew, and each year’s until success is achieved.

There are a few things that we can count on. One is the regular

---

* This edited transcript was adapted from remarks delivered on February 10, 2006 at _Refinement or Reinvention, The State of Reform in New York_, a symposium of the Albany Law Review in conjunction with the Government Law Center of Albany Law School.

** The author is the Dean of the College of Liberal Arts and Sciences at the State University of New York at New Paltz, where he is also a Distinguished Professor of Political Science.

cycles of state politics. For example, redistricting and reapportionment has to happen every ten years, following the decennial census.\textsuperscript{2} The matter must be addressed. If the legislature does not do it, the courts will. The potential threat to their political survival focuses the attention of all legislators. When this happens the public gets to see entrenched self-interest operating: keeping incumbents and partisan majorities in place. The gross and palpable politics of self-interest evident in the way we do redistricting in New York fuels demands for reform. John Faso is notable for the energy he invested as the Republican Minority Leader in the legislature in making sure that we understood how unfair, how misplaced, and how pathological our redistricting practice was and is in New York.\textsuperscript{3}

Actors outside of the state’s peak political institutions may also be friends of reform. Two of these are the state and federal courts. We are now in a dynamic moment for New York’s separation of powers system because of the recent decision by the Court of Appeals about the distribution of powers in our state budgetary process.\textsuperscript{4} The legislature is unhappy and I do not think the legislature will leave the matter alone, nor should it.

I was very vigorously engaged in opposing the constitutional amendment that came forward from the legislature because I thought it destroyed our executive budget process, a process that I regard as the most important governmental reform in New York of the twentieth century. But I also said in that time, and continue to believe, that there is an undesirable imbalance in executive/legislative power in New York that has to be redressed through reassertion of a more substantial role for the legislature in governing.

Third, we reformers are served by the persistence of our system in highlighting structural problems by its dysfunction. We heard

\textsuperscript{2} N.Y. CONST. art. III, § 4; U.S. CONST. art. I, § 2.


earlier today about the Help America Vote Act of 2002 ("HAVA"). It happens that a book was recently sent to me for review that describes and analyzes the implementation of HAVA in nine different states, including New York. Our state was listed among those that had made modest progress, that is, was in the last category. I finished reading that book on the day that the threat of federal litigation arose because of New York's failure to meet the requirements of federal law. We were last again. It is interesting that a New Yorker gets to review this book.

We are in a moment where we are under less pressure, where there is some money around, where we have the capacity to be more distributive in budgeting, and when decisions are more easily reached than in a time of scarcity. Yet HAVA non-compliance reminds us that there are fundamental structural problems, that there is lack of performance, and that there needs to be persistent attentiveness to the reform agenda.

My special task today is to talk about why I think state constitutional reform is desirable. I have spent a lot of my life on this question and have mercilessly produced a very substantial written record. You can read what I think. I am therefore going to pass over, rather lightly, some of the substantive points in my outline so that I can get to some of the process issues that are barriers to constitutional change, and talk about how they might be

---

7 Sarah F. Liebschutz, New York: An Antiquated System Resistant to Change, in ELECTION REFORM: POLITICS AND POLICY 205–223 (Daniel J. Palazzolo & James W. Ceaser eds., 2005). There were three categories; the authors were judicious in naming them.
8 See generally Michael Cooper, U.S. Warns Albany of Suit Over Slow Vote Modernization, N.Y. TIMES, Jan. 12, 2006, at B1 (stating that the "Justice Department has threatened to sue New York State over its failure to modernize its voting system").
addressed.

But first let me acknowledge that we can do lots of good things by statute and by rule changes in the legislature. One of the strengths of the Brennan Report was that many of the important changes it proposed could be done by each house independently through rules changes.\textsuperscript{10} Neither two-house nor two-branch agreements were required.\textsuperscript{11} The challenge in that report to each house was something like: “You can really do these things; do them and demonstrate your commitment to these ideas.”

One of the problems with constitutional change is that it is hard to do. This is an understandable source of skepticism and resistance. We heard this morning that good things can be done by adhering to the blueprint that we have. But sometimes a blueprint made more than a century ago needs revision, an addition needs to be built on to the house, or wiring and plumbing need to be redesigned and modernized. It is costly to do and hard to live in the house while it is being upgraded but necessary if we still want to live in the house. The scope of what we need to achieve in New York cannot be done without serious attention to altering the blueprint and rebuilding parts of the house.

Some of the structural changes that we need are obvious and have been heavily discussed. Others are less obvious. For example, to resolve the relationship issue between the executive and legislative branches in New York, I do not think that we can attend only to the question of budgeting. I think we have to consider the separation of powers and how we define that balance more generally in our constitutional system. One point that I made in a recent opinion piece I published in the newspapers was that the two-term limit for governors does not seem to make state government less effective in those states that have it.\textsuperscript{12} In fact, if you examine the studies on the relative effectiveness of state government, many that rise to the top have the two-term limit and one, Virginia, has a one-term limit for Governor.\textsuperscript{13}

A two-term limit for statewide office is one way that gubernatorial


\textsuperscript{11} Id.


\textsuperscript{13} Va. Const. art. V, § 1.
power might be constrained and legislative power advanced in New York. Apart from the separation of powers question, what has become for all practical purposes a twelve-year term for our chief executive is a bad development in New York. It was bad when the prominent Democrat, Mario Cuomo, held the office, and it was bad too when a prominent Republican, George Pataki, held the office. The great power of incumbency is preemptive, and closes down the path to the top for many talented and accomplished people. They are driven out of public life because their ambition cannot be realized. The truncated opportunity structure of New York politics has consequences for the responsiveness of our political system. The third term of a governorship has not been a good time for New York; we ought to attend to that and learn from it.

There was recently an article in the Legislative Gazette, published and distributed in Albany by the State University of New York at New Paltz, on Assemblyman Richard Brodsky’s proposal that we put a right of privacy in the New York State Constitution.\(^\text{14}\) When we were discussing the prospect of a constitutional convention in the mid 1990s, Assemblyman Brodsky was one advocate whose agenda was not to constrain government further but to advance “positive rights”—rights to something from government rather than limitations upon government.\(^\text{15}\) Positive rights, and building upon and going beyond rights protections in the federal Constitution, would certainly be a matter for us to consider as part of a broader constitutional change process.

We heard today about the need for change in the way we do reapportionment to achieve more competitive elections. Entrenching a reapportionment commission in the state constitution would be far more desirable than achieving it by a statute (although achieving it by statute is far more desirable than not having it at all). Extraordinary, but true, we had such a commission included in the proposed 1967 constitution, which unfortunately was defeated at the polls by the voters for reasons


entirely not germane to this point. The structure of that commission was very close to the one Barbara Bartoletti described for us that is in now in use in Iowa.

The idea that we cannot do reapportionment in New York by commission because of the nature of our political culture is extremely problematic. New York City has a commission for redistricting its city council that achieved the task in the New York environment.

When we return to the concept of the executive budget and examine its history, it becomes apparent that the question of budgeting really is a question of accountability in government. What Al Smith really had in mind—and he got this from the progressive republicans so it was a bipartisan idea—was that we should know how much we have, we should know how much we want to spend, and we should bring these into accord. And if we do not have as much as we need, we have to get it and we have to say how we are getting it.

The consequence of the way we have developed our governmental structure over the last three-quarters of a century of history in New York, is that we have taken more and more of our financial activity off budget. Even if we achieved a reasonable budget process, which I think we can and will do in the near term, we will still not realize the underlying purpose of budgeting when we adopted the executive budget article. That is because too much is off budget.

So when we think about reforming New York government, we should go back to first principals. We need a constitutional approach to achieving in the present day the underlying values that drove the idea of executive budgeting. That is what should guide our approach to public authority reform.

Then there is local government. We do not have a local government system. We have the consequence of several hundred

---

17 Barbara Bartoletti, president of the League of Women Voters of New York State, also spoke at the symposium on Governmental Reform on February 10, 2006. The group’s positions on reform are available from their website, http://www.lwvny.org/advocacy.htm (last visited Apr. 25, 2006). For the relevant law currently in place in Iowa, see generally IOWA CODE ANN. § 42.5 (West 2006).
19 See Buckley, supra note 4, at 880–81 (noting that in 1915, reformers including Governor Al Smith had a plan to change revenue spending by integrating the various branches of government).
years of history. We have made change by addition, to accommodate the imperatives of contemporary life, but we have not done any subtraction. We must live with lines drawn at a time before there was an automobile, before we were illuminating our cities with electricity, not to mention computers, the fax machine, and the Internet.

I do not know why or how, but I turned my computer on in my hotel room today, and it was not plugged into any phone line, and it connected to the Internet. So, somebody has done something unimaginable. And yet, we still have all these jurisdictions; they are all overlapping. We have over seven hundred school districts; their lines are not coterminous with municipal boundaries. After we get all done figuring out the value of property, we have to do a million or so adjustments to try to be fair in property taxation, yet we are still not fair. We also employ lots and lots of people to do things we would not have to employ them to do if we had a simple system that made some reasonable sense.

One of the interesting things about this is that in the name of home rule we have entrenched our inability to change in our constitution. We have made it so hard to change that we throw up our hands. Very many very smart people are working very hard to make things better in New York. I do not want to diminish the importance of their efforts. But the fundamental fact is that we need to address this question of local government organization through constitutional change to bring order, rationality, and economy to the fundamentals of governance that affect people’s lives the most on a daily basis in this state.

How about election administration? We have entrenched bipartisan election administration in our constitution. This is the fox guarding the chicken coop. There is a convergence of interest between the two major political party organizations, which appoint the election administrators in New York, to exclude others outside those organizations from the process and from offering real

---

We should have neutral professional election administration. I would even accept Barbara Bartoletti’s technocrats, if I was not put off by that term.

There are constitutional changes that I am not for. For example, although I once was for term limitation for the legislature, I am not now. If we can get fair elections through proper process for reapportionment, accountability will follow.

As I stated earlier, I know that we can get some change through statutes. However, I am for doing some things through constitutional change that can also be done through statute because I am not trusting of the persistence of statutory change. I am mindful of and agree with George Washington Plunkitt’s view that reformers are only “mornin’ glories.” We get tired and our attention gets distracted. We go on to new battles. I personally want these things entrenched if we can get them entrenched.

In New York we can get constitutional change through the legislature or we can get it through a constitutional convention. In the mid 1990s, when I still worked in Albany at the Rockefeller Institute, Melissa Cusa (now Melissa Staats) and I did a study that showed what should be obvious to any person without research. We demonstrated that the legislature never passes constitutional amendments that diminish its power. In fact, making the point empirically took a lot of work. The legislature can also call a constitutional convention, but the mandatory question provision in New York is very broad. It is not likely that we can have a limited convention, and the legislature is very wary of putting at risk the rules and processes under which its members have succeeded.

Therefore—and this should also be obvious—if the disabilities

---

21 In response to this reality, more would-be candidates are challenging the laws governing election administration in federal court, and succeeding. See, e.g., Chou v. New York State Bd. of Elections, 332 F. Supp. 2d 510, 516 (E.D.N.Y. 2004) (holding that the witness residency requirements pertaining to ballot-access petitions are unconstitutional and enjoining the State Board of Elections from “implementing and enforcing that requirement”); Molinari v. Powers, 82 F. Supp. 2d 57, 69–71, 77–78 (E.D.N.Y. 2000) (finding that petitioning requirements for delegate candidates pledged to Republican presidential candidates unconstitutionally exclude candidates that lack the favor of the State Republican Party and placing delegate candidates for every national candidate on the primary ballot).


24 Id. at 49, 63, 64, 67, 68.

25 See id. at 47, 48, 52.

26 Id. at 48.
and problems are within the legislature, you must have a method around the legislature to undo or change those structures that are the source of the disabilities and problems. In fact, all fundamental documents in the United States offer a way around the people in power to deal with the times that the people in power are the problem or benefit from the problem.

Some states have the initiative and referendum process.\textsuperscript{27} We do not. Some would like us to, though based upon experience elsewhere the desirability of that sort of process is certainly a question. And of course there is the old catch twenty-two: we cannot get initiative and referendum without changing the constitution. And for sure we will not get this through the legislature.

Here in New York we have a periodic constitutional convention.\textsuperscript{28} One problem with automatically asking the people every twenty years whether we should call a convention\textsuperscript{29} is that when you get around to doing it, you may not want to have it. The timing may not be right for the convention, and then you have to wait another twenty years. And yet, the difficulties notwithstanding, I think we need to have a constitutional convention. The reason I think this is because the agenda, as I have tried to demonstrate, is a large one. It is not limited to the concerns of the moment.

What are our other problems? Delegate election for a convention under the New York Constitution is within state senate districts.\textsuperscript{30} Since those districts are designed to sustain the republican majority in the senate, that becomes a problem for some partisans.\textsuperscript{31} Also, the use of senate districts as multimember districts as the constitution requires\textsuperscript{32} raises some potential Voting Rights Act\textsuperscript{33} concerns.

There has been domination in past conventions by those I call the people in the government industry, people already in office, or people working in government. For all my love and respect for the

\textsuperscript{27} \textit{Id.} at 49–50, 50 tbl.3.1.
\textsuperscript{28} \textit{Id.} at 47, 52.
\textsuperscript{29} See \textit{id.} at 47, 52.
\textsuperscript{30} N.Y. CONST. art. XIX, § 2.
\textsuperscript{31} If Eric Lane is right, as I think he is, and partisan change in control of the senate is inevitable, Democrats will have less objection to the use of senate districts in this way going forward than they do currently.
\textsuperscript{32} N.Y. CONST. art. III, § 4.
judges of New York, this includes judges who have an interest in protecting the constitutional articles defining the judicial system, and have gotten to conventions to make sure that they would have a very strong voice in their definition and re-definition.

Generally, there has been a political calculation by many that the risks of having a convention are higher than the benefits that might accrue. That is because there are particular benefits in the constitution for lots of sub-groups: environmentalists, state employees, labor union members. Members of each of these sub-groups do not want the particular benefits to be at risk, even though from any reasonable political calculation, in my judgment, the risks are not substantial for the people who are worrying about them.

When I was advocating calling a convention in 1997, one of my co-religionists stopped me in front of the synagogue on the high holidays and said, “you are trying to take my pension away.” He was a teacher’s union activist, and his comment illustrates what was defeating the idea—unrealistic fears of the political consequences of having a convention.

Some years ago I met a very prominent federal judge who was a delegate at the 1967 Convention. I was desperately trying to get him to give me the record of that convention as a gift. He had all these books I wanted and that he never used. The funny thing was that he actually gave me the books. Then, when I arranged to pick them up, he said, “I regret to tell you Professor that my wife sold them at a garage sale.” So, I still do not have the record of the 1967 Convention.

This wonderfully smart judge was dead set against calling a convention in 1997 because he thought all his effort in 1967 was wasted. I think people learn the wrong lessons from history. The reason that we did not adopt much of the good work of the 1967 Convention was because we made political miscalculations about how to offer the result to the people. That was a mistake that the New York City Charter Commission did not make when Eric Lane was the staff director there. That commission thought very hard

---


35 If anybody has it and is not using it, I would love to talk to them.

about how to offer those questions to the people.\textsuperscript{37} It decided to ask the public about several of the most controversial matters separately.\textsuperscript{38} All the questions put to the people by that City Charter Commission were adopted in the end.\textsuperscript{39}

There is also a concern about double dipping: elected officials, judges, and other state employees getting two salaries if they become convention delegates because of a provision in the constitution about how they must be compensated.\textsuperscript{40} We can deal with this concern by passing a statute now saying that one cannot get double pension credits or salaries if he or she is both a delegate and on a state payroll. We ought to address it now to take the issue off the table before the next mandatory convention question vote. We can also adopt an election process statutorily that would anticipate and address some of the voting rights issues. The commission I worked on in 1994 to 1996 proposed some statutory alternatives to remove some of the concerns about using senate districts as multi-member districts for the election of convention delegates.\textsuperscript{41}

The best lesson is that of the 1938 Convention—we can have a better governmental system in New York.\textsuperscript{42} We can advance some of the fundamental values that Republicans and Democrats in New York have always shared about the good things state and local government can do to help people live better, more productive lives. We can create a governmental system that is properly managed, properly run, and democratically responsive.

Let us not take the wrong lessons from history. Let us try to avoid some of the disabilities of the past and seize this special opportunity for constitutional change that the possibility of a convention offers us. Let us prepare. Let us understand that there are multiple check-points in deciding to have a convention: one vote

\textsuperscript{37} Id. at 756–59.

\textsuperscript{38} See id. (discussing the exchange between the public and the commission during the debate of numerous issues).

\textsuperscript{39} Id. at 729.


\textsuperscript{41} From 1993–1995, the author was the Research Director of New York’s Temporary State Commission on Constitutional Revision.

to call one, a second vote to elect the delegates, and a third vote on deciding to accept the outcome. Then let us take the opportunity that our constitution gives us to create a responsive, intelligent, and effective government for the twenty-first century in New York.

Thank you.