

WHEN DOES A GAMBLING PROHIBITION NOT PROHIBIT
GAMBLING? OR AN ALTERNATIVE MAD HATTER'S RIDDLE
AND HOW IT HELPS US TO UNDERSTAND CONSTITUTIONAL
CHANGE IN NEW YORK

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I. INTRODUCTION

“When does a gambling prohibition not prohibit gambling?”

This—not “[W]hy is a raven like a writing desk?”—might have been the Mad Hatter’s riddle for Alice, in Wonderland.¹ Of course, it was not—maybe because Lewis Carroll was not a New Yorker, or maybe because, when Carroll wrote, the facts of the matter did not present such a paradox. Whatever the reason, if Carroll were writing today, he certainly would not choose this modern alternative. The reason? The Mad Hatter’s riddle was designed to be unanswerable,² whereas the answer to this one is just too easy:

“A gambling prohibition does not prohibit gambling when it is in the New York Constitution.”

As the second decade of the twenty-first century began, pari-mutuel betting on horse races was occurring routinely not only at New York’s ten race tracks, but also through five regional off-track-betting agencies that offer live streaming of races within and outside of the state, and telephone and internet betting accounts.³ The New York State lottery was the largest such system in North

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¹ See LEWIS CARROLL, *ALICE IN WONDERLAND* 58 (Everyman’s Library 1983) (1865). Lewis Carroll said that the riddle was made to be unanswerable. *Why is a Raven Like a Writing Desk?*, WISEGEEK, <http://www.wisegeek.com/why-is-a-raven-like-a-writing-desk.htm> (last visited Feb. 9, 2012). A fine answer was later suggested: “Poe wrote on both.” *Id.*

² *Why is a Raven Like a Writing Desk?*, *supra* note 1.

³ See *Sports Gambling—Pari-mutuel Gambling*, LIBRARY INDEX, <http://www.libraryindex.com/pages/1611/Sports-Gambling-PARI-MUTUEL-GAMBLING.html> (last visited Feb. 9, 2012).

America;⁴ the state also offered New Yorkers access to multi-state mega-jackpot games.⁵ Winners were picked for a Quick Draw game every four minutes.⁶ The sale of instant scratch-off tickets offered the opportunity to gamble twenty-four hours a day, seven days a week, three hundred and sixty-five days a year. One national web-based directory indicated twenty-one different active casinos or racinos in New York and one gambling cruise operator based in the state.⁷ Access to other gambling opportunities was available to New Yorkers electronically. And, of course, illegal gambling persisted. Bennett Liebman, a leading authority in the field, has written that “[s]wiss cheese has fewer holes than the state’s ban on gambling.”⁸

All this opportunity to gamble, and yet, removing or amending the constitutional gambling limitation still emerged as an issue. During the summer of 2011, Governor Andrew Cuomo said that “his administration was ‘actively’” considering an initiative to permit what the *New York Times* described as “full-scale commercial gambling.”⁹ Meanwhile, Assembly Speaker Sheldon Silver endorsed the idea: “We have it all over, in New Jersey, Connecticut, Pennsylvania, in Native American casinos in New York,” Silver said in September 2011, “so we might as well take part in the revenues that come from casino gaming.”¹⁰ Meanwhile, Senate Majority Leader Dean Skelos, through a spokesman, indicated support for “let[ting] the people of New York decide.”¹¹ Both Silver and Skelos, however, also favored retaining some limits on casino location,

⁴ Douglas McIntyre, *The 10 States That Pay Out the Biggest Lottery Jackpots*, DAILY FINANCE (May 3, 2011), <http://www.dailyfinance.com/2011/05/03/lottery-states-biggest-jackpots/>.

⁵ *History of the Game*, MEGA MILLIONS, <http://www.megamillions.com/about/history.asp> (last visited Feb. 9, 2012).

⁶ *How to Play: Quick Draw*, N.Y. LOTTERY, http://nylottery.ny.gov/wps/portal?PC_7_SPTF_TV14188AC0IKIA9Q6K0QS0_WCM_CONTEXT=/wps/wcm/connect/NYSL+Content+Library/NYSL+Internet+Site/Home/Daily+Games/QUICK+DRAW/ (last visited Feb. 9, 2012).

⁷ *New York Casinos*, AM. CASINO GUIDE (Apr. 24, 2008), <http://www.americancasinoguide.com/casinos-by-state/new-york-casinos.html>. Of these, five were Class III Indian casinos and nine were racinos. *Id.* Numerous off track betting facilities are not included in this count. *See id.*

⁸ Bennett Liebman, *Gambling and the New York State Constitution*, N.Y.S.B.A., GOV'T L. & POL'Y J., Spring 2010, at 48.

⁹ Thomas Kaplan, *Cuomo Weighs Ending State Limits on Casino Gambling*, N.Y. TIMES, Aug. 10, 2011, at A17, available at <http://www.nytimes.com/2011/08/10/nyregion/cuomo-considering-end-to-constitutional-ban-on-casino-gambling.html>.

¹⁰ Fredric U. Dicker, *JACKPOT: Pols' Bet on NYC casinos—Top Pols' OK Boosts Odds for NY Casinos*, N.Y. POST, Sept. 19, 2011, at 2, available at http://www.nypost.com/p/news/local/top_pols_ok_boosts_odds_for_ny_casinos_pM7a8ZucfHoW710HFnlqBN.

¹¹ *Id.*

Silver to avoid exploitation of the poor, Skelos to assure consideration of “community impact and support.”¹²

As the New York State government once again begins to seriously consider altering or removing its gambling prohibition by constitutional amendment—an action that must be taken by the legislature alone, without formal gubernatorial involvement—the real puzzle is not *what* the riddle’s answer is, but *why* it is what it is. The answers to this *why* question—derived from taking a centuries-long view of state constitutional history and a constantly shifting political landscape—offers insights into the source of state constitutional limits on the state legislature and the capacity of these to be effectively limiting. These answers also reveal the manner in which intended limits are altered: by amendment, through statutory action, court interpretation, and preemptive national government action. And in the end, understanding these answers may help New York State take a small step away from a puzzling constitutional wonderland, and closer to a world in which law and practice reach a healthful and legitimate convergence.

II. WHEN IT COMES TO THE LEGISLATURE WHAT IS A STATE CONSTITUTION SUPPOSED TO DO ANYWAY?

Classically, reformers have been critical of state constitutions for being insufficiently limited to the fundamental structures and processes of government, that is, for not being truly constitutional.¹³ The length of state constitutions has been widely used as an indicator of their lack of appropriate focus.¹⁴ The average state constitution was 26,271 words long in 2009, about three times the length of the U.S. Constitution (the New York Constitution contained 51,700 words in that year).¹⁵

Approaching the matter differently near the close of the twentieth century, political scientist Christopher Hammons considered the number of provisions in each of the state constitutions in force and the character of those provisions. “On average,” he wrote, “state constitutions contain 828 provisions, and 324 are devoted to . . . statutory-type issues. This means that 39% of the typical state

¹² *Id.*

¹³ Christopher W. Hammons, *State Constitutional Reform: Is it Necessary?*, 64 ALB. L. REV. 1327, 1328, 1335 (2001).

¹⁴ *Id.* at 1328.

¹⁵ *Id.* at 1328–29; see also Table 1.1: *General Information on State Constitutions*, COUNCIL OF STATE GOV'TS, http://knowledgecenter.csg.org/drupal/system/files/Table_1.1_1.pdf (last visited Feb. 9, 2012).

constitution is devoted to matters that most scholars consider extraneous at best.”¹⁶ New York’s 1894 Constitution, the one most recently adopted, Hammons found, had about one-third more provisions than the mean (1,093), but was at the mean in its proportion to statutory material.¹⁷

Articulately advancing the traditional reform sentiment, an essay by federal judge J. Harvie Wilkinson III, written in 2006 in reaction to the constitutionalization of same-sex marriage in an increased number of jurisdictions, bemoaned “the evolution of many state constitutions into baroque collections of essentially statutory material.”¹⁸ Judge Wilkinson continued, “We should [not] surrender our commitment to constitutions as articulations of fundamental rather than positive law. When states burden their constitutions with essentially statutory provisions, they risk trivializing them.”¹⁹

An alternative view argues in defense of the greater length of state constitutions; they are more detailed because they perform a fundamentally different role than does the national constitution in the federal system.²⁰ Congress, created *de novo* at a convention with state representation and ratified in the states, may do only what it is affirmatively given by the U.S. Constitution to do. In contrast state legislatures, antecedent inheritors of sovereign authority as a result of successful revolution, may do all but what they are prohibited from doing by the state constitutions.²¹ Columbia Law Professor Richard Briffault recently quoted the classic summary of this point from Thomas Cooley’s benchmark nineteenth century book, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*:

We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the State to ascertain if any *limitations* have been imposed upon the

¹⁶ Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions*, 93 AM. POL. SCI. REV. 837, 840 (1999).

¹⁷ *Id.* at 848.

¹⁸ J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What’s a Constitution for?*, 56 DUKE L.J. 545, 574 (2006).

¹⁹ *Id.*

²⁰ See Richard Briffault, *State Constitutions in the Federal System*, in DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 11 (Gerald Benjamin & Henrik N. Dullea eds., 1997). Briffault cites Elazar, who in turn attributes the length of state constitutions to the need for states’ constitutions to be explicit about the scope of governmental powers, and Kincaid, who attributes the length of state constitutions to the states’ protectionist responsibilities. *Id.*

²¹ See *id.* at 9–10 (comparing the United States Constitution and state constitutions).

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complete power with which the legislative department of the State was vested in its creation. . . . [T]he State legislature has jurisdiction of all subjects on which its legislation is not prohibited.²²

Documents that grant power may be brief. Documents that place limits on power that is otherwise plenary must anticipate all that requires limiting; they are necessarily longer and more detailed. So, for example, the gambling prohibitions in the New York State Constitution may be too “statutory” and unnecessarily contributory to its length by one standard. But by another they may be the only means of limiting plenary legislative power in this area of policy, if limitation is indeed judged desirable.

III. THE LEGISLATURE IS RARELY DISPOSED TO LIMIT ITS OWN POWER BY STATE CONSTITUTIONAL PROVISION

Provisions enter into state constitutions by two paths; through the legislature and/or without (or around) the legislature.²³ Almost always, popular ratification at referendum is required.²⁴

It is common in American state constitutions for state legislatures to be given a means for initiating constitutional amendment or revision.²⁵ In New York, the legislature may propose a constitutional amendment by passing it in two successive sessions,

²² Richard Briffault, *Skelos v. Paterson: The Surprisingly Strong Case for the Governor’s Surprising Power to Appoint a Lieutenant Governor*, 73 ALB. L. REV. 675, 696–97 (2010) (emphasis in original) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 173 (1868)).

²³ See Gerald Benjamin & Melissa Cusa, *Constitutional Amendment through the Legislature in New York*, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 47, 49 (G. Alan Tarr ed., 1996) (stating that most states have legislative constitutional amendment processes, and also methods that bypass the legislature to revise or amend their constitutions). The most common method to bypass the legislature is the Constitutional Initiative, which allows voters to petition to put amendments on the ballot to a vote of the citizenry. *Id.* The Constitutional Commission with Ballot Access approach, only used in Florida, allows for the “periodic automatic creation of a commission that may propose constitutional amendments directly to the voters.” *Id.* Under the Automatic Convention Question approach, used in New York and thirteen other states, the question of whether to hold a constitutional convention is periodically placed on the ballot and held if voters vote in favor of convention. *Id.* at 52. at 50. See below for further detail.

²⁴ See *id.* at 53 (stating that because the source of a constitution is in democratic theory the sovereign people, the people must vote to agree to proposed constitutional changes in all states except Delaware).

²⁵ See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 25 (1998). Tarr notes that most state constitutional amendments have been proposed by state legislatures and in fact forty-one state constitutions expressly authorize the legislature to convene constitutional conventions. *Id.*

with a general election intervening.²⁶ Amendments are adopted if they receive approval of a majority of those voting on the question at a statewide election thereafter.²⁷

Previous analyses established that though these are often introduced by individual members (e.g., term limitation or session length), the legislature in New York does not propose for a vote amendments that limit itself.²⁸ An analysis performed for this essay indicated that of eleven amendments placed on the ballot by the legislature in the fifteen years between 1995 and 2010, none were limiting of the legislature.²⁹ In fact only two were of statewide institutional reach and consequence.³⁰ The first, passed in 2001, made the language of the constitution itself gender neutral.³¹ The second, a proposal to re-empower the legislature in budgeting after an adverse decision for it in the Court of Appeals, failed at the polls.³²

The legislature may also propose the calling of a constitutional convention, by placing on the ballot this question, prescribed in the constitution: “Shall there be a convention to revise the constitution

²⁶ N.Y. CONST. art. XIX, § 1.

²⁷ *Id.*

²⁸ See Benjamin & Cusa, *supra* note 23, at 63–66 (noting that in the last decade studied (1983–1993) proposals sought to limit the length of legislative sessions and there were also efforts to institute term limitations for legislators). Of the Article III constitutional amendments acted on between 1967–1993, five were passed by the legislature and two were passed by the voters. *Id.* at 66 tbl.3.5.

²⁹ Amendments to the constitution placed on the ballot that were not Article III amendments include the following: Assemb. B. 5598, 232nd Reg. Sess. (N.Y. 2009) (proposing amendment to art. 3, § 24); S. 2802, 232nd Reg. Sess. (N.Y. 2009) (proposing amendment to art. 14, § 1); S. 1568, 231st Reg. Sess. (N.Y. 2008) (proposing amendment to art. 5, § 6); S. 1128, 230th Reg. Sess. (N.Y. 2007) (proposing amendment to art. 14, § 1); Assemb. B. 11231, 228th Reg. Sess. (N.Y. 2005) (proposing amendment to art. 4, §§ 7, 17, art. 7, §§ 1–6); S. 2295, 226th Reg. Sess. (N.Y. 2003) (proposing amendment to art. 8, § 4); S. 3383, 226th Reg. Sess. (N.Y. 2003) (proposing amendment to art. 8, § 5); Assemb. B. 3960, 224th Reg. Sess. (N.Y. 2001) (proposing amendment to art. 1–20); S. 3392, 222nd Reg. Sess. (N.Y. 1999) (proposing amendment to art. 6, § 26); S. 4110A, 220th Reg. Sess. (N.Y. 1997) (proposing amendment to art. 5, § 6); S. 3001, 220th Leg. Sess. (N.Y. 1997) (proposing amendment to art. 6, §§ 15–16).

³⁰ See Assemb. B. 11231, 228th Reg. Sess. (N.Y. 2005) (proposing amendment to art. 4, §§ 7, 17 and art. 7 §§ 1–6, relating to a submission of the budget to the legislature); see *generally* Assemb. B. 3960, 224th Reg. Sess. (N.Y. 2001) (proposing amendment to art. 1–20, generally making references in the constitution gender neutral).

³¹ See Assemb. B. 3960, 224th Reg. Sess. (N.Y. 2001) (changing the constitution to include both male and female references, or neutral references where appropriate).

³² See Assemb. B. 11231, 228th Reg. Sess. (N.Y. 2005) (requiring that copies of the release of agency budget requests furnished to the executive be made available to the legislature and the public). This proposal authorized contingency budget to make effect in certain circumstances, reduces the amount of time during which the governor may amend the executive budget without consent of the legislature from thirty to twenty-one days, and creates a fiscal stabilization reserve fund. See, e.g., Pataki v. N.Y. State Assembly, 4 N.Y.3d 75, 824 N.E.2d 898, 791 N.Y.S.2d 458 (2004).

or amend the same?”³³ If the voters answer “yes,” delegates are elected and a convention meets at the capitol in Albany, at a time and in accord with a process specified in the constitution.³⁴ But recent legislatures have not been inclined to do this. The 1801, 1821, and, with reluctance, 1846 conventions were called at legislative initiative.³⁵ In 1914 the legislature placed the convention question on the ballot at a special election, in anticipation of it otherwise being put to a vote in 1916, a presidential year.³⁶ Since then, the legislature successfully proposed the calling of a convention only once, in 1967.³⁷

As noted, the state constitution is an actual or potential locus of limitations on the legislature. Conventions have a single purpose: to revise or amend the constitution.³⁸ Unlike legislatures, they are not continuing institutions; they go out of existence once their work is done.³⁹ Also, conventions have no institutional stake in the outcome of their handiwork (though, of course, delegates may have careers and continuing relationships in the state and its government).⁴⁰ Moreover, because of the broad wording of the convention question specified in the New York Constitution, most authorities in the state believe that, once called, a convention may not be limited in its agenda.⁴¹ All this adds up to produce a very large dose of skepticism among legislators and their leaders—winners under the existing system and fully empowered except as limited in the state constitution—about the desirability of constitutional conventions.

³³ Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 145, 148 (G. Alan Tarr & Robert F. Williams eds. 2006) (citing N.Y. CONST. art. XIX, §2).

³⁴ See N.Y. CONST. art. XIX, § 2.

³⁵ Richard I. Nunez, *New York State Constitutional Reform—Past Political Battles in Constitutional Language*, 10 WM. & MARY L. REV. 366, 367 (1968).

³⁶ *Id.* at 369. There was an automatic convention call vote on the ballot in 1916, but in light of the recency of the work of the 1915 commission, and its rejection at the polls, the outcome was negative. See generally *id.* at 370 (describing the convention question’s appearance on the ballot in 1916 and the electoral outcome).

³⁷ See *id.* at 373.

³⁸ See generally N.Y. CONST. art. XIX, § 2 (describing the purpose of the convention in New York State).

³⁹ See generally *id.* (“The delegates . . . shall continue their session until the business of such convention shall have been completed.”).

⁴⁰ See *id.*

⁴¹ See Benjamin, *supra* note 33, at 148 (“Because the New York State Constitution prescribes the precise question to be asked of the voters—‘Shall there be a convention to revise the constitution or amend the same?’—the agenda of a constitutional convention in New York may not be limited.”).

Constitution writers expected this. So, they included means for bypassing the legislature to change state constitutions—and impose limits, when needed, on the otherwise “complete power” of state legislatures that Cooley identifies.⁴² These include the constitutional initiative⁴³ and the constitutional commission with direct ballot access (in Florida).⁴⁴ The constitutional provisions passed in the American states in recent years that have been most limiting on legislatures—e.g., term limitation, tax limitation—have almost always been added through the constitutional initiative.⁴⁵

A third method for bypassing the state legislature to amend or revise the state constitution is the automatic convention call.⁴⁶ New York has neither the constitutional initiative nor the constitutional commission process but it has, since 1848, had the automatic convention call.⁴⁷ Based on the 1848 provision, the current state constitution provides that:

At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question “Shall there be a convention to revise the constitution and amend the same?” shall be submitted to and decided by the electors of the state.⁴⁸

The New York State constitutional conventions of 1867, 1894, and 1938 were convened as a result of this provision (voters rejected opportunities offered under this provision to call a state constitutional convention in 1916, 1957, 1977, and 1997).⁴⁹ Many

⁴² See THOMAS M. COOLEY, *CONSTITUTIONAL LIMITATIONS* 87 (1987). There was a “Judiciary Convention” convened by the legislature in 1921 with limited jurisdiction, but this is commonly regarded as a “commission,” not a convention, because it reported to the legislature and lacked independent authority to place the results of its work directly on the ballot. Nunez, *supra* note 35, at 370–71.

⁴³ See *What are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INSTITUTE, <http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm#Initiatives> (last visited Feb. 9, 2012) (defining “initiative”).

⁴⁴ Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL’Y SYMP. 53, 74 (1996).

⁴⁵ See *id.* at 66 (“The constitutional initiative has brought tax limits to state governments and terms limits [sic] to state legislatures.”).

⁴⁶ Benjamin, *supra* note 33, at 146.

⁴⁷ Burton C. Agata, *Amending and Revising the New York State Constitution*, in *THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK* 39, 44 (Gerald Benjamin ed., 1994); see Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMP. L. REV. 1291, 1292 n.3, 1303 (1995).

⁴⁸ N.Y. CONST. art. XIX, § 2.

⁴⁹ Benjamin, *supra* note 33, at 145, 147, 162; Agata, *supra* note 47, at 46; N.Y. STATE CONSTITUTIONAL CONVENTION COMM., *PROBLEMS RELATING TO LEGISLATIVE ORGANIZATION AND POWERS* 366 (1938) [hereinafter 1938 CONSTITUTIONAL CONVENTION COMM.]; CHARLES Z.

“statutory-type” limitations on the reach of the legislature’s power were included in the state constitution as a result of these conventions. Among these was the state’s constitutional limitation on lotteries, first adopted in 1821, and strengthened in 1846.⁵⁰ The 1867 convention, the first called automatically, made no change in this provision (its work failed of adoption at referendum).⁵¹ The gambling prohibition was made “absolute” in 1894.⁵² Of these three, the first two conventions were called by the legislature, at a time when this was the sole means of convening one.⁵³ The 1894 convention, resulting from the automatic call provision, made the gambling prohibition (seemingly) absolute.⁵⁴ Since that time the state legislature has systematically struggled to modify, mitigate, or remove this limitation both by statute and by amending the constitution through the state legislative route.

IV. ORIGINS OF GAMBLING PROHIBITIONS AND CONSTITUTIONAL EXCEPTIONS

The New York State Constitution’s general prohibition against gambling currently provides that there be “no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling” in the state.⁵⁵ The constitution also includes a series of exceptions to this ban for:⁵⁶

LINCOLN, 2 THE CONSTITUTIONAL HISTORY OF NEW YORK 241 (1906); see Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1294 (2001) (citing SAMUEL T. MCSEVENEY, *THE POLITICS OF DEPRESSION: POLITICAL BEHAVIOR IN THE NORTHEAST, 1893–1896*, at 63 (1972)).

⁵⁰ See N.Y. STATE TASK FORCE ON CASINO GAMBLING, REPORT TO THE GOVERNOR 4, 5 (1996) [hereinafter REPORT TO THE GOVERNOR]; CHARLES Z. LINCOLN, 3 THE CONSTITUTIONAL HISTORY OF NEW YORK 33, 46 (1906).

⁵¹ See LINCOLN, *supra* note 49, at 241; LINCOLN, *supra* note 50, at 46.

⁵² See REPORT TO THE GOVERNOR, *supra* note 50, at 5; LINCOLN, *supra* note 50, at 33, 47–48, 51.

⁵³ See Jerald A. Sharum, *A Brief History of the Mechanisms of Constitutional Change in New York and the Future Prospects for the Adoption of the Initiative Power*, 70 ALB. L. REV. 1055, 1059, 1061–62 (2007).

⁵⁴ See REPORT TO THE GOVERNOR, *supra* note 50, at 5; LINCOLN, *supra* note 51, at 47–48, 51.

⁵⁵ N.Y. CONST. art. I, § 9, para. 1.

⁵⁶ *Id.* § 9.

[E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except parimutual betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass

lotteries operated by the state to “aid or support” education,⁵⁷ pari-mutuel betting on horse races that produce “a reasonable revenue for the support of government,”⁵⁸ and bingo, lotto, or numbers games with prizes given on the basis of chance authorized by local referendum to benefit “bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations,” under legislative oversight, with maximum prizes of limited value and safeguards against professional management or the involvement of criminal elements.⁵⁹

Constitutional gambling prohibitions in New York were established and strengthened over the course of the nineteenth century, and then attenuated during the twentieth century.⁶⁰ Lotteries were commonly used in early New York to finance public

appropriate laws to prevent offenses against any of the provisions of this section.

2. Notwithstanding the foregoing provisions of this section, any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature: (1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; (2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; (3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and (4) no person shall receive any remuneration for participating in the management or operation of any such game. Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars. The legislature shall pass appropriate laws to effectuate the purposes of this subdivision, ensure that such games are rigidly regulated to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and the diversion of funds from the purposes authorized hereunder and establish a method by which a municipality which has authorized such games may rescind or revoke such authorization. Unless permitted by the legislature, no municipality shall have the power to pass local laws or ordinances relating to such games. Nothing in this section shall prevent the legislature from passing laws more restrictive than any of the provisions of this section. (Amendment approved by vote of the people November 7, 1939; further amended by vote of the people November 5, 1957; November 8, 1966; November 4, 1975; November 6, 1984; November 6, 2001.)

Id.

⁵⁷ N.Y. CONST. art. I, § 9, para. 1.

⁵⁸ *Id.*

⁵⁹ *Id.* § 9, para. 2.

⁶⁰ See *supra* notes 50–59 and accompanying text.

works, private business initiatives, and even church construction and repair.⁶¹ Statutory prohibitions were at first enacted for private lotteries, not those run by the government.⁶² Regulation of lotteries by state government resulted in vigorous competition for their authorization by the legislature for fund raising.⁶³

As earlier noted, a prohibition against lotteries first entered the New York Constitution at the 1821 convention.⁶⁴ The arguments made were familiar. Opponents said that gambling was immoral and socially “pernicious.”⁶⁵ They sought a constitutional provision because they did not trust the legislature to resist the future influence of gambling proponents.⁶⁶ Advocates stressed the value of lotteries as a relatively “painless” revenue source.⁶⁷ They argued further that a prohibition, though denying the state resources, would be ineffective in advancing its social objectives because gambling opportunities offered by other states would still be available to New Yorkers.⁶⁸ And there was a view expressed, too, that the regulation of gambling was a legislative matter, not a constitutional one.⁶⁹

Interestingly, the legislature did not resist this first lottery ban as it did later constitutional gambling limitations.⁷⁰ Statutory action to phase lotteries out, initiated in 1822, resulted in the ending of all lottery activity in New York by the onset of 1834.⁷¹ The ban continued, but the constitutional exception included in the 1821 prohibition for “lotteries already provided for by law” was therefore removed in 1846.⁷²

As also previously noted, the 1867 convention continued the lottery ban.⁷³ The gambling prohibition was extended in the constitution adopted in 1894 to include “pool selling [and] bookmaking” and, most significantly, generalized to “any other kind of gambling.”⁷⁴ This was explicitly targeted to ban betting on horse

⁶¹ 1938 CONSTITUTIONAL CONVENTION COMM., *supra* note 49, at 417.

⁶² *Id.*

⁶³ *See* Liebman, *supra* note 8, at 46.

⁶⁴ 1938 CONSTITUTIONAL CONVENTION COMM., *supra* note 49, at 417.

⁶⁵ *Id.* at 418.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.* at 419–20.

⁷¹ Liebman, *supra* note 8, at 46.

⁷² 1938 CONSTITUTIONAL CONVENTION COMM., *supra* note 49, at 419 (quoting N.Y. CONST. art. VII, § 11 (1821)).

⁷³ 1938 CONSTITUTIONAL CONVENTION COMM., *supra* note 49, at 419.

⁷⁴ *Id.* at 421.

aces.⁷⁵ An accompanying directive required that the legislature “pass appropriate laws to prevent offenses against any of the provisions of this section.”⁷⁶

Both before and after the adoption of the 1894 constitutional prohibition on gambling, horseracing interests battled in the legislature and the courts—where they proved to be mostly successful—to carve out an exception for themselves.⁷⁷ The constitutional directive to the legislature to effect the constitutional anti-gambling provision—which made the provision non-self-executing—was employed by horseracing proponents and their legislative allies to undermine the intent behind the constitutional prohibition itself.⁷⁸ A summary of the history of gambling prohibitions, written in preparation for the 1938 constitutional convention, observed, “[a]lthough the Legislature was ostensibly passing a law to enforce the provisions of the Constitution against gambling, it ha[s] practically nullified those provisions.”⁷⁹ This legislative predisposition, to resist and bypass the constitution gambling prohibition so angered Governor Charles Evans Hughes that he even once proposed to make the passage of unconstitutional legislation a felony crime.⁸⁰

In reaction, there were attempts at the 1915 constitutional convention by those in the state who opposed all gambling to strengthen the restriction by altering the language of the constitution.⁸¹ Though the 1915 constitution failed of ratification, the fact that advocates for strengthening the gambling restriction had little influence at the convention was a demonstration that the power of anti-gambling forces in the state was greatly diminished.⁸²

Even with the presence of the lingering effects of the Great Depression, attempts to establish a state lottery to provide funds for social welfare or low income housing failed at the 1938 state

⁷⁵ Liebman, *supra* note 8, at 46.

⁷⁶ 1938 CONSTITUTIONAL CONVENTION COMM., *supra* note 49, at 421.

⁷⁷ See, for example, the Ives Pool Law, 1887 N.Y. Laws 604, which authorized bookmaking and poolselling exclusively inside racetracks. See Bennett Liebman, *Horseracing in New York in the Progressive Era*, 12 GAMING L. REV. & ECON. 550 *passim* (2008) (discussing the dispute over betting on horse races); see also ROBERT F. WESSER, CHARLES EVANS HUGHES: POLITICS AND REFORM IN NEW YORK, 1905–1910, AT 189–208 (1967) (discussing Hughes’ battle for race track gambling reform).

⁷⁸ 1938 CONSTITUTIONAL CONVENTION COMM., *supra* note 49, at 423; see PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 162 (1996).

⁷⁹ 1938 CONSTITUTIONAL CONVENTION COMM., *supra* note 49, at 423.

⁸⁰ WESSER, *supra* note 77, at 190.

⁸¹ See 1938 CONSTITUTIONAL CONVENTION COMM., *supra* note 49, at 425–26.

⁸² See discussion *supra* notes 77–80 and accompanying text.

constitutional convention.⁸³ Conservative upstate elements of the Republican majority that controlled that convention allowed debate, but successfully resisted passage, of a more general repeal of the constitution's anti-gambling provisions favored by Democrats and some organized interests.⁸⁴

However, the capacity of anti-gambling interests to defend the general prohibition continued to diminish over the course of the twentieth century, giving way on four occasions to explicit constitutional recognition of arguments that gambling was a way to generate needed revenue for state government or for other organizations regarded as worthy:

First, after several earlier efforts failed, including first passage of one proposal in 1934, a constitutional amendment to permit pari-mutuel betting on horse races was adopted in 1939.⁸⁵ Second, an exception authorizing certain religious and not-for-profit organizations to conduct bingo games passed in 1957.⁸⁶ Third, an amendment to allow state lotteries in support of education was adopted by the voters in 1966—just under a century and a half after passage of the first general state constitutional prohibition of lotteries.⁸⁷ Lastly, in 1975, voters narrowly approved a constitutional exception for games of chance that benefit religious,⁸⁸ charitable, and certain other non-profit organizations, after recognizing that sponsoring them had become widespread practice. (The margin was 5,274 votes of 2,981,160 cast).⁸⁹ However, an

⁸³ See GALIE, *supra* note 78, at 239–40.

⁸⁴ See VERNON A. O'ROURKE & DOUGLAS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE 116, 189, 214 (1943); 1938 CONSTITUTIONAL CONVENTION COMM., *supra* note 49, at 427.

⁸⁵ Wesley D. Huber, *Gambling—Vice or Virtue?: The Federal Indian Gaming Regulatory Act Preempts the New York Constitution's Ban on Commercial Gambling*, Dalton v. Pataki, 835 N.E.2d 1180 (N.Y. 2005), 37 RUTGERS L.J. 1317, 1323–24 (2006).

⁸⁶ *Id.* at 1324.

⁸⁷ 1966 N.Y. Laws 3558. In 1984, Governor Mario Cuomo made an abortive attempt to advance sports betting with funds dedicated to broadly-defined educational purposes (i.e., libraries, a teacher corps) in New York under the aegis of this lottery provision. Edward A. Gargan, *Cuomo Figures Odds on Sports Betting*, N.Y. TIMES, Jan. 15, 1984, at E9. The Office of Attorney General Robert Abrams argued, however, that such an initiative would require a constitutional amendment. Edward A. Gargan, *Abrams Aide Casts Doubt on Legality of Betting Plan*, N.Y. TIMES, Jan. 17, 1984, at B5; see Edward A. Gargan, *Cuomo to Propose Legalized Betting on Sports Events*, N.Y. TIMES, Jan. 9, 1984, at A1, B4; Edward A. Gargan, *Cuomo's Betting Plan is Illegal, Abrams Says*, N.Y. TIMES, Jan. 27, 1984, at B8.

⁸⁸ Interestingly, religious interests had earlier been at the core of anti-gambling sentiment in New York.

⁸⁹ *If the New York State Constitution Bans Gambling, Why is there So Much Opportunity to Gamble in New York*, CITIZENS' COMM. FOR AN EFFECTIVE CONSTITUTION, <http://effectiveny.org/printpdf/671> (last visited Feb. 10, 2012) (citing *Changes in Terms of Office and Gambling on Ballot*, N.Y. TIMES, Oct. 28, 1984, at 57).

attempt in 1984 to remove prize limits for these games from the constitution, and leave their levels to legislative determination, failed.⁹⁰

The state lottery has developed far beyond its original form and scope. According to a 2004 summary prepared by Senator Frank Padavan, one of the leading opponents of the extension of gambling, when he served in the New York State Senate:

In 1967, the New York State lottery was limited to a monthly drawing with a top prize of \$100,000. The lottery was expanded in 1976 to include an instant lottery; Lotto was introduced in 1978; the daily “numbers” game and “Win-4” were introduced in 1980 and 1981, respectively; “Pick 10” began in 1988; “Take-5” was added in 1992; and Quick Draw was authorized in 1995. Quick Draw began as a game played every five minutes; currently, the game is played every four[] minutes. The New York State lottery is the largest lottery system in North America. The sale of instant scratch-off tickets alone means that New Yorkers have the opportunity to gamble twenty-four hours a day, seven days a week, 365 days a year.⁹¹

Extension of pari-mutual betting to off-track betting on horse racing in New York City was passed in the legislature in 1970 after decades of advocacy by city leaders.⁹² Change was resisted by track owners, who believed (correctly, as it proved) that it would seriously diminish their business.⁹³ The 1970 legislation also permitted OTBs in other areas of New York City.⁹⁴ Outside of New York City, only the City of Schenectady moved ahead with a local OTB.⁹⁵

This blow to the long-established efforts to confine wagering to tracks alone survived a state constitutional challenge by track owners in 1972, as had other earlier challenges to legislative

⁹⁰ See *Changes in Terms of Office and Gambling on Ballot*, *supra* note 89, at 57.

⁹¹ FRANK PADAVAN, ALL GAMBLING, ALL THE TIME: TURNING THE *EMPIRE STATE* INTO THE *GAMBLING STATE* 8 (2004) (footnotes omitted).

⁹² See *History of the Board*, N.Y. STATE RACING & WAGERING BD., <http://www.racing.state.ny.us/history.php> (last visited Feb. 10, 2012).

⁹³ See *Company History & Profiles: New York City Off-Track Betting Corporation*, FUNDINGUNIVERSE, <http://www.fundinguniverse.com/company-histories/New-York-City-OffTrack-Betting-Corporation-company-History.html> (last visited Feb. 15, 2012) (describing the racing industry as “outraged” at the prospect of OTB in New York and noting that the tracks tried in vain to have OTB declared unconstitutional by state courts).

⁹⁴ See *History of the Board*, *supra* note 92 (describing the New York City OTB as one of several OTBs that opened after this legislation was passed).

⁹⁵ See *id.* (stating that after the New York City OTB opened, the Schenectady OTB followed close on its heels in 1971).

initiatives to bypass constitutional gambling limits.⁹⁶ Six other regional OTB agencies were authorized, and five established in New York in the following year.⁹⁷ The earlier-initiated Schenectady OTB became the Capital District OTB. A Central Region OTB was never established. An experiment with video simulcasting of horse races, which began in 1981, became fully authorized in New York in 1984 “and was extended permanently in 1990.”⁹⁸ With the internet, live streaming followed. Currently, telephone and internet betting accounts are available in the state.⁹⁹ After several losing years, the off-track betting agency in New York City was closed in 2010;¹⁰⁰ the five other OTB agencies persist in business elsewhere in New York.

V. EFFORTS TO REMOVE OR ALTER THE STATE CONSTITUTION’S GAMBLING LIMIT

A. *The 1967 State Constitutional Convention*

The convention’s committee on Bill of Rights—which had jurisdiction because the anti-gambling provisions were (curiously) moved to that location in the document in 1846—“proposed the deletion of the lengthy and contradictory section of the article dealing with divorce, gambling, pari-mutuel betting, bingo games, and lotteries.”¹⁰¹ This recommendation was based upon “overwhelming agreement that the material was clearly statutory and did not require constitutional attention.”¹⁰²

⁹⁶ See *Finger Lakes Racing Ass’n v. N.Y. State Off-Track Pari-Mutuel Betting Comm’n*, 30 N.Y.2d 207, 221, 282 N.E.2d 592, 597, 331 N.Y.S.2d 625, 632 (1972).

⁹⁷ See Paul Post, *New York OTB Realignment Comes Up Short*, THOROUGHBRED TIMES (June 23, 2011), <http://www.thoroughbredtimes.com/national-news/2011/06/23/new-york-off-track-betting-otb.aspx> (noting the existence of the six other regional OTB agencies in New York State).

⁹⁸ See *History of the Board*, *supra* note 92.

⁹⁹ See Russ Buettner, *New York Betting Parlors Close Doors*, N.Y. TIMES, Dec. 8, 2010, at A41, <http://www.nytimes.com/2010/12/09/nyregion/09otb.html> (noting use of the Internet and telephone betting system by New York State OTBs); see also *New York State Racing Expands Online*, IGAMING BUSINESS (Dec. 14, 2010) <http://www.igamingbusiness.com/content/new-york-state-racing-expands-online> (describing recent advances in the online betting system used in many New York State locations, including Nassau Regional OTB and Catskill Regional OTB); Richard Sandomir, *HORSE RACING; Phone Bets Put OTB and Racing Unit at Odds*, N.Y. TIMES, May 10, 1995, <http://www.nytimes.com/1995/05/10/sports/horse-racing-phone-bets-put-otb-and-racing-unit-at-odds.html?pagewanted=all&src=pm> (noting the successful impact that phone bets had on the New York City OTB).

¹⁰⁰ See generally Buettner, *supra* note 99 (discussing the long political and public saga that led to the “unexpected” conclusion of the New York City OTB closing down).

¹⁰¹ HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK’S 1967 CONSTITUTIONAL CONVENTION 263 (1997).

¹⁰² *Id.*

However, political considerations interceded. Protestant leaders, some of whom were already disposed against the work of the 1967 convention because of its proposed repeal of the Blaine Amendment banning state aid to parochial schools, feared that removal of the constitutional restriction would lead to authorization of unrestricted gambling by a legislature historically susceptible to the influence of pro-gambling interests.¹⁰³ In this context, Harold Fisher, an influential Brooklyn Democrat delegate, convinced his colleagues that retaining existing gambling provisions was politically prudent if the constitution they planned to propose in a single question was to succeed at the polls.¹⁰⁴ Fisher prevailed upon the committee to leave existing constitutional provisions concerning gambling in place.¹⁰⁵ The committee acceded. A following proposal to strengthen restrictions on gambling by making continuation of state run lotteries subject to statewide referenda held every five years failed.¹⁰⁶ So New York's constitutional provisions concerning gambling would have remained the same even if the proposed 1967 constitution was adopted. Of course, it was not.¹⁰⁷

The Constitutional Revision Commission, created in 1993 to prepare for a potential convention call in 1997, paid no attention in its research to the gambling issue.¹⁰⁸ A convention was not convened.¹⁰⁹

B. Abortive Attempts at Amendment Through the Legislature

In 1972 the Senate and Assembly, both in Republican hands, gave first passage to a constitutional amendment that left the prohibition in place, but devitalized it entirely by giving the legislature broad authority to legalize any form of gambling at its discretion.¹¹⁰ However, this measure failed to achieve second passage in the following session.¹¹¹ In 1977 the Democratic Assembly passed a

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See id.* (stating that this idea, proposed by Assemblyman Charles Henderson, "was quickly defeated" by a 26 to 99 vote).

¹⁰⁷ *See* Thad Kousser, *Bi-Coastal Constitutional Conundrum*, L.A. TIMES (Oct. 13, 2009) <http://articles.latimes.com/2009/oct/13/opinion/oe-kousser13> (noting that New York State voters rejected the proposed new constitution at the polls in 1967).

¹⁰⁸ Benjamin, *supra* note 33, at 1025, 1027–28.

¹⁰⁹ *See id.* at 1025.

¹¹⁰ *Summary of Actions Taken in 1972 Legislative Session*, N.Y. TIMES, May 15, 1972, at 39.

¹¹¹ *Summary of Actions Taken in 1973 Legislative Session*, N.Y. TIMES, May 30, 1973, at 22.

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more limited amendment authorizing gambling in specified resort areas, with local approval,¹¹² but this failed that year to garner support in the Republican Senate.¹¹³ An unexpected consequence of the requirement for second passage of a constitutional amendment, before its proposal to the people, was that it diminished the pressure for compromise on key issues between the legislative houses and among interested parties before first passage. Rather than reaching agreement concerning four core sets of issues in a single measure—casino siting, local consent for siting, public or private ownership and operation, and the locus of governmental benefit from resources generated—the legislature gave first passage to three separate amendments concerning gambling in 1978.¹¹⁴ But this still required that one of these gain majority backing in both houses after an intervening election if it was to be offered at the polls; a hybrid could not be constructed, as it would not have received first passage in its final form. In fact, none of the three proposed amendment passed in 1978 received second passage.¹¹⁵ According to one account:

There was no agreement between Assembly Speaker Stanley Fink and Governor Hugh Carey over the operation of these casinos. Speaker Fink favored public ownership of the casinos, and Governor Carey, allied with Senate Majority Leader Warren Anderson, supported private operation of these casinos.¹¹⁶

Instead, in 1980, the legislature passed six separate potential amendments.¹¹⁷ Again, second passage of an agreed amendment was not achieved by the newly elected legislature.¹¹⁸

The effort to gain an amendment to permit casino gambling was renewed in 1994, now with its strongest support in the Republican Senate, but the Assembly failed to reach agreement on this and

¹¹² See Assemb. B. 8663, 200th Reg. Sess. (N.Y. 1977); Assemb. B. 7817, 200th Reg. Sess. (N.Y. 1977); S. 6281, 200th Reg. Sess. (N.Y. 1977) (listing three gambling proposals in legislature, including games of chance and resort areas).

¹¹³ One motivation was the legalization in 1976 of gambling for Atlantic City, in neighboring New Jersey. See REPORT TO THE GOVERNOR, *supra* note 50, at 3.

¹¹⁴ See Liebman, *supra* note 8, at 49.

¹¹⁵ See *id.*

¹¹⁶ *Id.*

¹¹⁷ See Assemb. B. 11994, 203d Reg. Sess. (N.Y. 1980); Assemb. B. 11998, 203d Reg. Sess. (N.Y. 1980); Assemb. B. 12002, 203d Reg. Sess. (N.Y. 1980); Assemb. B. 11990, 203d Reg. Sess. (N.Y. 1980); Assemb. B. 12206, 203d Reg. Sess. (N.Y. 1980); Assemb. B. 12209, 203d Reg. Sess. (N.Y. 1980).

¹¹⁸ Liebman, *supra* note 8, at 49.

linked matters in the session's waning hours.¹¹⁹ The next year the legislature did pass an amendment to permit casino gambling in certain cities and counties in New York, and "electronic games of chance and slot machines" at selected racetracks¹²⁰ under limited conditions, again justified as a needed revenue source.¹²¹ But second legislative passage after a following election again was not achieved.¹²² There was deep division in the ranks of Senate Republicans and considerable influence on New York City Democratic members as a result of energetic opposition by a well-financed and multi-faceted opposition coalition that included Donald Trump, acting in defense of his casino investment in Atlantic City, New Jersey.¹²³

From this record, the core issues connected in the past with altering the state's constitutional gambling prohibition may be deduced:

Location: Gambling has been most often promoted as a potential economic development engine in the state's economically distressed rural regions, or as a path to renewal for already established racetracks in fiscal trouble. New York City mayors have said that they will oppose any constitutional change that does not bring direct benefit to the City; the focus upon existing tracks would address this. Other downstate locations—Long Beach on Long Island, for example—have also in the past expressed interest.

Ownership: Earlier, a key element of the debate concerned whether gambling facilities should be owned and run by the government or by private business, under governmental regulation. In recent discussions, possible because of the development over the last two decades of Native American casinos, this element of the debate has faded.

Purpose and Limits: Gambling restrictions are grounded in the fundamental belief that gambling behavior is socially damaging. This has been addressed and overcome in the past by assuring the direction of a substantial share of revenues to public purposes,

¹¹⁹ See James Dao, *Lawmakers Finish Session in Albany at Odds on Issues*, N.Y. TIMES, July 4, 1994, at A1.

¹²⁰ S. 5557, 218th Reg. Sess. (N.Y. 1995); see also Liebman, *supra* note 8, at 49.

¹²¹ See Liebman, *supra* note 8, at 49.

¹²² *Id.*

¹²³ See James Dao, *New York Senate Roundly Rejects Casino Gambling*, N.Y. TIMES, Jan. 29, 1997, at A1; see also REPORT TO THE GOVERNOR, *supra* note 50, at 3 (explaining the particulars of Senate Bill 5557). See generally James Dao, *The Bill That Fell From Grace: Casino Measure Seemed a Winner, Till an Alliance Dug In*, N.Y. TIMES, Feb. 3, 1997, at B1 (describing the alliances Mr. Trump made in his opposition to New York casinos).

social ends, or organizations deemed worthy, and/or by placing limits on the size scope and character of gambling activities.

The incremental development of legal gambling venues through constitutional and statutory change inside the state, and the establishment of a thriving gaming industry in adjacent states, has created an industry with a large stake in protecting its interests as state constitutional change is considered. One primary driver of these developments is the growth of Indian gaming in accord with the Indian Gaming Regulatory Act (“IGRA”).¹²⁴ Adopted in the wake of the U.S. Supreme Court decision in *California v. Cabazon Band of Mission Indians*,¹²⁵ this federal law provided a legislative basis for the operation/regulation of Indian gaming, protected gaming as a means of generating revenue for the tribes, encouraged economic development of these tribes and protected the enterprises from negative influences (such as organized crime).¹²⁶

VI. INDIAN GAMING

Congressional passage of the IGRA in 1988 redirected the focus of the casino gambling debate in New York. This statute gave Indian tribes “the exclusive right to regulate gaming activity on Indian lands” in states that did not prohibit gambling so long as federal law was not violated.¹²⁷ However, tribes that sought to establish casinos (categorized as “Class III” gambling) were required to enter into compacts with the state within which the facility was to be located to negotiate the conditions under which they could be operated.¹²⁸

In 2003 the New York Court of Appeals determined that a compact entered into by Governor Mario Cuomo in 1993 with the St. Regis Mohawk tribe, and a subsequent agreement by Governor George Pataki in 1999, both without legislative authorization, permitting the opening of a casino in Franklin County, New York violated the separation of powers requirements of the state constitution.¹²⁹

¹²⁴ See, e.g., Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435, 439 (2008) (noting that there has been accelerated growth not only in tribal-owned gaming since the passage of the Indian Gaming Regulatory Act, but other tribally-owned business).

¹²⁵ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

¹²⁶ Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–21 (2010).

¹²⁷ *Id.* § 2701(5).

¹²⁸ *Id.* § 2710(d)(3)(A).

¹²⁹ *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 808, 809, 823, 798 N.E.2d 1047, 1049–50, 1060–61, 766 N.Y.S.2d 654, 656–57, 667–68 (2003). This decision

Between the time that this agreement was made and the court decision reached, and justified by the urgent need for revenues in the wake of the September 11th attacks on the United States in New York, the legislature authorized the governor to enter into a subsequent compact with the Seneca Indians to establish up to three casinos in western New York.¹³⁰ The conditions set out in the law would be satisfied, it said, through certification by the governor that they were met.¹³¹ Up to three more casinos in Ulster and Sullivan counties in the Catskill region were also authorized under similar terms, though with unspecified tribal compact partners.¹³² Additionally, the law provided for the use of Video Lottery Terminals (“VLTs”) at a number of racetracks.¹³³ It also permitted state participation in a multi-jurisdictional lottery.¹³⁴

Regarding casinos, in *Dalton v. Pataki* the New York Court of Appeals determined that, notwithstanding the state constitutional prohibition of gambling,

Through IGRA, Congress has preempted the states in this area. Since New York allows some forms of class III gaming—for charitable purposes—such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact.¹³⁵

The court found further that there was no violation of the state constitutional gambling prohibition in authorization of VLTs or the participation in an interstate lottery, as the conditions for constitutionally authorized exceptions were met.¹³⁶

VII. OUTCOME: A PROHIBITION THAT DOES NOT PROHIBIT

Gambling in multiple forms is widespread in New York. The “absolute” limitation in the state constitution now prohibits only sports betting, betting on dogs and jai-alai and—the focus on

did not reach alleged violations of the state constitution’s gambling prohibitions. *Id.* at 824, 798 N.E.2d at 1061, 766 N.Y.S.2d at 668.

¹³⁰ N.Y. EXEC. LAW § 12(a) (McKinney 2012); 2001 N.Y. Laws 2780.

¹³¹ EXEC. § 12(a); 2001 N.Y. Laws 2780.

¹³² EXEC. § 12(b); 2001 N.Y. Laws 2781.

¹³³ N.Y. TAX LAW § 1617-a (McKinney 2012); 2001 N.Y. Laws 2782–83.

¹³⁴ TAX § 1604; 2001 N.Y. Laws 2784.

¹³⁵ *Dalton v. Pataki*, 5 N.Y.3d 243, 259, 835 N.E.2d 1180, 1189, 802 N.Y.S.2d 72, 81 (2005) (citing 25 U.S.C. § 2710(d)(1) (2005)).

¹³⁶ *Dalton* 5 N.Y.3d at 265, 835 N.E.2d at 1193, 802 N.Y.S.2d at 85 (citing TAX § 1604(a)(8)).

current effort to achieve change—commercial casinos.¹³⁷ A prohibition first imposed and then given great stringency at state constitutional conventions was repeatedly bypassed by statute and constitutional amendment by legislatures not willing to accept its constraints; state courts were largely supportive of the legislature, interpreting its amendments and the scope of its legislative authority broadly.¹³⁸ Preemptive national government action opening the possibility of gaming on Indian lands, both through decision of the U.S. Supreme Court and action by Congress, created another path for the state legislature to bypass the state constitution.¹³⁹ In this example, at least, a detailed legislature-limiting state constitution did precious little limiting.¹⁴⁰

Yet there has been no effort to entirely repeal the provision. Rather, its opponents have continued to seek statutory paths around it, or further constitutional exceptions.¹⁴¹ Of the constitutional amendments that have been proposed and passed once, but have not gained second passage and been put to a statewide vote, even the one that would have effectively eliminated the constitutional gambling ban (1972) left it in the state constitution, though empty of its content.¹⁴² Given the chance to remove the gambling ban, the 1967 constitutional convention—perhaps not wanting to provoke opposition to the draft document introduced as a single question at the polls—chose to leave it in place.¹⁴³

Long, detailed state constitutions are justified as means to limit the power of otherwise unlimited state legislatures. The evisceration of the constitutional gambling prohibition in New York over the last century raises the question of whether state constitutions can really effectively limit determined legislatures over the long term in highly controversial areas of policy, in the face of changing fiscal, social, and political circumstances.

Or perhaps, better put, the question is *when*—not *whether*—such limits are effective. Two quick comparisons are illustrative. State

¹³⁷ Liebman, *supra* note 8, at 48.

¹³⁸ See *Dalton*, 5 N.Y.3d at 259, 835 N.E.2d at 1189, 802 N.Y.S.2d at 81.

¹³⁹ See *id.* at 299–300, 835 N.E.2d at 1218, 802 N.Y.S.2d at 110 (citing *Alden v. Maine*, 527 U.S. 706, 748, 758 (1999)).

¹⁴⁰ See N.Y. CONST. art. I, § 9.

¹⁴¹ See Liebman, *supra* note 8, at 47.

¹⁴² See *id.* at 47 (citing *Finger Lakes Racing Ass'n v. N.Y. State Off-Track Pari-Mutuel Betting Comm'n*, 30 N.Y.2d 207, 217, 220, 282 N.E.2d 592, 594, 596, 331 N.Y.S.2d 625, 628, 631 (1972)).

¹⁴³ Liebman, *supra* note 8, at 48.

borrowing limits, adopted in reaction to early-mid-nineteenth century fiscal excess in Albany, have not prevented New York from developing techniques to bypass the constitution that have resulted in a per-capita debt burden higher than in most other states.¹⁴⁴ In contrast, the “Forever Wild” provision of the constitution, adopted at the same convention as the gambling prohibition, has been remarkably successful in assuring the unsullied preservation of the Adirondack and Catskill preserves.¹⁴⁵

The key seems to be political, not constitutional. It resides in the persistent presence in the state of an alert and committed constituency in support of the constitutional limit once it is established. If such a constituency exits, it is further empowered by the constitutional basis of the policy outcome it seeks to protect. Because, after all, the state constitution does remain harder to amend than is a statute.

As gambling opportunities developed in the state, there were winners and losers. Current constitutional limits do not remain because they constrain legislative action; as demonstrated, the New York State legislature has shown itself ready and willing to further amend the constitution.¹⁴⁶ The barrier to further amendment is the complex political environment that has been produced by the incremental adoption over time of particular exceptions.¹⁴⁷

Business at horse racing tracks declined, creating a strong constituency for their potential salvation through constitutional change.¹⁴⁸ Declining tourist industries in parts of the state sought removal or mitigation of constitutional gambling limits as a path to their revival.

But on the other side, gambling interests already established in adjacent states did not want new competitors, especially in densely populated downstate. Indian gaming grew into an important force in some of New York’s most economically challenged regions.¹⁴⁹ Ironically, an interest that was established by circumventing the

¹⁴⁴ See *State Debt Per Capita and as a Percentage of State GDP, Fiscal Year 2009*, U.S. CENSUS BUREAU: TAX FOUND. (Feb. 25, 2011), http://www.taxfoundation.org/files/state_debt_pc_fy2009-20110301.pdf.

¹⁴⁵ See N.Y. CONST. art. XIV, § 1; see also Verlyn Klinkenborg, *Adirondack Park: Forever Wild*, NAT’L GEOGRAPHIC, <http://ngm.nationalgeographic.com/2011/09/adirondack-park/klinkenborg-text> (last visited Feb. 11, 2011) (describing the preservation of Adirondack Park).

¹⁴⁶ See Liebman, *supra* note 8, at 49.

¹⁴⁷ See *id.* at 47; N.Y. CONST. art. I, § 9.

¹⁴⁸ See Liebman, *supra* note 8, at 48.

¹⁴⁹ See *id.* at 49.

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state constitution thus gained a new, powerful stake in the state constitutional status quo.

All this was added to the mix of moral, religious, and social concerns that have always surrounded the gambling issue. The result was that periodic attempts to further amend the state constitution to remove one or more of its remaining limits foundered time after time on the inability to find a formula that would accommodate all the engaged interests.¹⁵⁰

The practical consequence has been the development of a vast gambling industry in New York, if not randomly—then without clear, reasoned policy or regulatory criteria regarding what sorts of gambling would be permitted in different locations across the state. If the justification for gambling prohibitions and limits was to regulate behavior, then this goal was not being achieved. If the justification for exceptions was to provide resources to meet essential governmental needs, then this has not been maximized.

One recently proposed remedy is to alter the constitution so as to allow the legislature to extend or alter state policy regarding gambling subject to popular referendum.¹⁵¹ In addition to offering a political solution, such an approach holds the potential of bringing state law into conformance with New Yorkers' experience. At a time that skepticism, even cynicism, about government abounds, this is not an insignificant added benefit that might accrue from changing New York's constitutional provisions on gambling.

¹⁵⁰ *See id.*; N.Y. CONST. art. I, § 9.

¹⁵¹ Liebman, *supra* note 8, at 49.

APPENDIX A: NEW YORK STATE CONSTITUTIONAL GAMBLING
LIMITATIONS

I. 1821 CONSTITUTION.

Article VII. § 11. *“[Lotteries prohibited.]—No lottery shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law.”*

II. 1846 Constitution

Moved to Article I (Bill of Rights) and conflated with right to assembly and provision re: divorce:

Article I. § 10. [Right to assemble and petition; divorces; lotteries prohibited.]—No law shall be passed abridging the right of the people peaceably to assemble, and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; *nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed within this state.*

III. Extended and detailed further in Constitution of 1894

Article I. § 9. [Right to assemble and petition; divorces; lotteries, pool-selling and gambling, laws to prevent.]—No law shall be passed abridging the right of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; *nor shall any lottery or the sale of lottery tickets, pool-selling, book making, or any other kind of gambling hereafter be authorized or allowed within this State; and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.*