

## COMMISSION AND STAFF

In 1993, Governor Cuomo appointed an eighteen-person Constitutional Revision Commission made up of New Yorkers of some prominence and balanced in all the usual ways: partisanship, race, ethnicity, gender, geography, organizational base, ideology, and profession.<sup>33</sup> The chair was Peter C. Goldmark, Jr., then the head of the Rockefeller Foundation. Goldmark had been State Budget Director under Governor Hugh Carey, and later served as the executive director of the Port Authority of New York and New Jersey. As State Budget Director, he worked with Governor Carey to successfully bring the state through its fiscal crisis in the mid-1970s.

Commissioners were not selected merely because they had a commitment to the constitution convention idea. Some, like former Republican Governor Malcolm Wilson, were thoroughly familiar with the state constitution, deeply experienced in state government, and convinced that a convention was needed. Others, like former hostage Terry Anderson, knew little about state government or the state constitution, and learned about the convention's potential simultaneously with receiving inquiries about their possible interest in being appointed. Notwithstanding its balanced membership and the assurances the governor gave Goldmark that his inquiries could go freely wherever they took him, the commission was very much seen as Cuomo's. The legislature took no role in the appointment process, another example of its strategy of passive aggression.<sup>34</sup> The loyalty of Republicans appointed by a Democratic governor—even former Governor Wilson—were somewhat suspect in GOP party councils.

In this context, with a modest budget from the governor's discretionary funds and no legislative appropriation, Goldmark's tasks were to build a staff, knit the group together, bring all commissioners to a reasonable level of information on the issues, lead the commission in developing an agenda, and bring the convention question to the public. The three key staffers he chose had experience serving the Commission that had successfully developed the new charter that New York City adopted in 1989.<sup>35</sup> Early meetings were devoted to creating a working relationship among the commissioners, launching a research program, and establishing a network of relationships with interested constituencies throughout the state.

## HISTORY'S LEGACY

Experience has shown that voters may call a constitutional convention only to find that nothing then happens or that action is long delayed. This is why several states have provisions in their constitutions that take the matter out of the hands of the legislature and make a positive result on the mandatory constitution convention question self-executing. As one authority on state constitutional change has written: "In view of the difficulty encountered in many states in obtaining legislative action looking toward a referendum on the question of constitutional revision, the self-executing character of the provisions of this article is . . . extremely important."<sup>36</sup>

The self-executing provision of the New York constitution was added in 1894.<sup>37</sup> It came on the heels of an eight-year delay in assembling the convention called by New Yorkers voting on the mandatory convention question in 1886.<sup>38</sup> Roiled by partisan differences, the governor and legislature could not agree on how delegates would be selected. Seeking to avoid a repeat of this experience, the 1894 convention adopted a provision that requires the election, at the next following general election, of three delegates from each state Senate district and fifteen at-large delegates. It specifies when and where the convention will meet, requires that delegates be paid at the same rate as Assembly members, and indicates how vacancies will be filled. It even establishes in some detail the procedures and decision rules for the convention.<sup>39</sup>

One generation's solutions are another's problems. The partisan and good government concerns raised by these self-executing provisions—as the 1997 referendum vote approached—caused the Constitutional Revision Commission to give them priority attention.<sup>40</sup> As a result of New York's bipartisan legislative gerrymander, Senate districts are designed by Republicans to favor Republicans.<sup>41</sup> This was not a problem for Republicans, but most Commissioners were, of course, Democrats, as were many good-government advocates. Another worry was the use of Senate districts as multimember districts, and the required election of some delegates at-large, statewide. At-large elections and multimember districts had come to be "red flags" under the Federal Voting Rights Act. Commission members would not support processes that were or appeared to be racially discriminatory. Moreover, even if these procedures passed muster or could be made to, the mere consideration of potential Federal Voting Rights Act problems raised by the electoral process prescribed in the state constitution almost guaranteed that—if they were used and a convention was

authorized—litigation in federal court would follow.<sup>42</sup> An additional concern—at least of reformers who were not party stalwarts—was that (though not constitutionally mandated) delegate election would be partisan and conducted under the existing New York state election and campaign finance laws, advantaging the major parties and persons already holding elective office.

Here, more recent history came into play—the history of delegate selection for New York’s 1967 Constitutional Convention.<sup>43</sup> Elections were partisan. Legislative leaders dominated the Convention, which was organized on a partisan basis and functioned substantially in accord with legislative rules. Sitting legislators and others in the government industry were heavily represented at the convention. And, especially offensive to some, during the year that the convention met, the constitutional provision for delegate compensation “required” the legislators who were also delegates, and others on public payrolls, to collect two salaries and the attendant pension benefits.

Some of these problems were amenable to statutory remedies. Others could not be fixed except by constitutional amendment.<sup>44</sup> Both methods required legislative action. Even with its early start, time was short for the Commission to develop and propose changes. Within its first year it succeeded, and its changes were published in an interim report. The legislature, however, did not “own” the Commission. Its leaders did not want a convention. If they simply failed to act to fix what reformers saw was a flawed process (in part because it might have benefited legislators personally by allowing them to “double dip” as delegates) a further barrier to organizing support and gathering votes for a convention would be raised. There was thus no hope that these bills or amendments would be passed. It was a classic catch-22.

The history of the 1967 convention was important in another way, as well. The new constitution it proposed failed at the polls. This allowed those opposed to calling a convention in 1997 to label the 1967 experience as an expensive failure, a “waste of money.” Considering the politics surrounding the submission of that document to the people, this was a gross oversimplification. Moreover, the recent history of the state included an example of a very successful convention, and one that arose as a result of the automatic call—the convention of 1938.<sup>45</sup> But the story of the last war was most compelling. Some veterans were still around, and not all spoke well of the experience. History, thus, was one more weapon to use against approval of the convention call in 1997.

## THE COMMISSION REPORT

The Commission did its work. Meetings, which were open to the public, were regularly held. Research was commissioned and published. Contacts were established with media outlets and interested groups throughout the state. A periodic newsletter was developed and distributed. Educational materials were prepared for schools. Hearings and editorial board meetings were held throughout the state. Commissioners and staff made radio and television appearances and spoke before interested groups.

Nevertheless, no center of political support for a convention outside the commission developed. With process concerns unaddressed, few established groups responded to “good government” appeals for a convention. There were some expressions of support from Chambers of Commerce and newspaper editorial boards; but the League of Women Voters, the New York Public Interest Research Group (NYPIRG), and Common Cause all held back.<sup>46</sup> The prospect of important structural changes in state government—term limitation, initiative and referendum, judicial reform, reform of election administration, the creation of a legislative districting commission—neither garnered endorsement of the Commission nor catalyzed the organization of a substantial mainstream supportive constituency in the state. Among organized interests, the prospect of an open-ended convention was feared more for what it might undo than valued for what it might do. Protecting concrete particular interests was a far more compelling priority than creating an opportunity for speculative gains for a general interest. Neither environmentalists concerned about the loss of “forever wild” protection for the Adirondack and Catskill preserves, nor civil service unions worried about the “merit and fitness” and pension protection provisions in the state constitution were calmed by the argument that no convention elected in New York would change these.<sup>47</sup>

The problem for the chairman and staff was to find a direction for the Constitutional Revision Commission that would produce a consensus or near-consensus in the group when efforts at outreach, public hearings, and editorial board meetings had generated little public attention, and in a political environment in which traditional reform groups, labor unions, environmentalists and minority groups—most of these elements of the core Democratic constituency in New York—were either skeptical or openly hostile. It was clear almost from the first that agreement among the commissioners on the need for a constitutional convention would be

impossible to obtain.<sup>48</sup> Even key commission staffers differed on this basic question. Yet, in light of political and governmental conditions in the state, and the commitment of several commissioners to the idea that fundamental change was needed, the approach taken by the commission headed by Nelson Rockefeller in 1957 was not attractive. That group had been strongly divided along partisan lines. It presented its work in the form of information for the voters about the pros and cons surrounding the issues a convention might address, but made no recommendation for an “up” or “down” vote on the referendum question.<sup>49</sup>

Peter Goldmark’s solution in 1994 was to shift the focus from the convention itself and place it on “policy areas of persistent crisis in which perceived failure feeds the view of New Yorkers that government in the state is either simply not working or working to their detriment.”<sup>50</sup> In its deliberations the Commission narrowed these to four: “fiscal integrity, state [and] local relations, education, and public safety.” These were, it said, “core areas . . . infused with significant constitutional dimensions in New York. They are fundamental functions of government that are largely within the capacity of states and localities to affect in basic ways. And they are widely regarded by the public as needing basic reform.”<sup>51</sup> The Commission proposed the creation of four Action Panels designed to break the political/policy logjam in all of these issue areas. The panels would create integrated packages of legislation and constitutional amendments by the close of the 1996 legislative session. In creating these panels, the Commission also asked that the governor and legislature “clearly commit themselves to take definitive action on these final proposals by a date certain.”<sup>52</sup>

This approach was modeled after policy processes devised at the federal level to transcend “ordinary politics” and used for reforming social security, closing military bases, and arriving at trade agreements under the General Agreement on Tariffs and Trade (GATT). This gave the governor and legislature one last chance, and made the endorsement of a constitutional convention conditional. “A large majority of the members of this Commission recommends a ‘yes’ vote on the constitutional convention question in 1997,” the report concluded, “if the state fails to achieve far-reaching reform between now and that vote.”<sup>53</sup> Commission members who were advocates of a convention had little expectation that the Action Panel plan would be adopted in Albany. They accepted this conditional endorsement as the strongest outcome they could get in support of a convention. Meanwhile, many of those who continued to have some reservations were brought into the majority, while retaining some political “wiggle room.”

Former Governor Malcolm Wilson placed himself on record as unconditionally in support of a constitutional convention. Stanley Hill of District Council 37 (a major New York City public employee union) filed a dissent, citing his disagreement with the priorities of the report and his confidence in the “existing legislative structure.” A supplementary statement was filed by Commissioner Peggy Cooper Davis, Professor of Law at the New York University School of Law, in which she was joined by Margaret Fung of the Asian-American Legal Defense and Education Fund. Professor Davis argued that the action-forcing mechanism proposed by the commission was not suitable to its purported purposes; that a convention would be an inappropriate response to the failure of the action-forcing mechanism to bring reform in the four core areas of concern; and that a convention called without prior reform of the delegate-selection process would be “especially unfortunate.”<sup>54</sup>

Ms. Fung added a special concern about calling a convention at a time when political conservatism was ascendant in New York. In her statement she wrote, “The November 1994 elections have produced a starkly different political reality.” She was referring, of course, to Mario Cuomo’s defeat by George Pataki in the gubernatorial election and the Republican sweep into control of Congress. Ms. Fung continued, “The new Republican Governor has promised drastic changes in the role of state government, and the success or failure of these proposals for reform will become apparent to New Yorkers over the next few years. With a newly elected Congress whose majority seems intent on shunting federal responsibilities back to the states, the governor and the legislature will have a chance to demonstrate whether their vision of government works.”<sup>55</sup>

## THE CAMPAIGN

During the summer of 1997 it seemed likely that New Yorkers would call a constitutional convention. All the problems of state government non-performance in Albany persisted. A massive fight over the repeal of rent control in New York City forcefully reminded citizens downstate of the degree to which they were governed from Albany, and revived the constitutional “home rule” issue in the city’s mayoral election.<sup>56</sup> A Quinnipiac College poll completed in July 1997 showed that most registered voters in New York (61%) were still unaware that the convention referendum was in the offing, but also revealed that a majority thought a convention

was a good idea.<sup>57</sup> Polls persisted in showing majorities for a convention throughout the fall. There was especially strong popular support for two major structural changes in state government that a convention might bring: term limits, and initiative and referendum.<sup>58</sup> But there was no center of organized advocacy for a convention, nor was there any serious financing for a pro-convention campaign. The Commission no longer existed, and even if it did it would have been constrained by state law from spending public money for advocacy rather than the providing of information.

A number of other prominent political figures from across the political spectrum joined former Governor Cuomo in support of a convention. One was Tom Golisano, a Rochester area businessman who had spent \$6.6 million in seeking the governorship on the Independence Party ticket in 1994. Another was Governor George Pataki, who declared himself in favor of a convention on October 7, 1997, about four weeks before the scheduled vote. Still another was liberal Democratic Assemblyman Richard Brodsky of Westchester, who defied the leadership in his house to take this stand. Many upstate Republican Assembly members were convention advocates; and, in western New York, Democratic State Senator Richard Dolinger was also very active.<sup>59</sup>

Advocates argued that government in New York was in crisis and that, though the convention process was not perfect, it was the only way around the entrenched legislature to fix the system. The convention was, in this author's words: "a chance, not a guarantee. . . . We cannot be sure that holding a constitutional convention will give our state a more democratic, accountable political system or a more effective government. We can be sure, however, that we have insufficient democracy, unaccountability and ineffectiveness now. And judging from experience, we can also be sure that without a convention we will not have improvement."<sup>60</sup>

Proponents also pointed out that calling a convention required three votes: authorization of the convention, election of the delegates, and ratification of the convention's proposals. If citizens took the first step, they would also have to take the second to make change. If they did not like the results of the convention's work, however, they could simply reject it at the polls. A loose network of speakers crossed the state making these arguments in debates organized by civic groups, in the media, and before editorial boards. But on substantive matters convention proponents had no common message. These were truly strange bedfellows. Cuomo denounced Pataki's late endorsement of a convention as opportunistic.

Pataki—the anti-Cuomo—could not imagine appearing with his predecessor in public to support the convention idea. An attempt by advocates to form a bipartisan group of “198 New Yorkers for a New Constitution” never got off the ground.<sup>61</sup> Brodsky sought to craft a progressive agenda, including children’s rights, privacy rights, and a code of corporate responsibility. Pataki had no interest in these—he talked of term limits as well as initiative and referendum. Golisano also favored term limits. But Cuomo had no use for this idea, and supported only an indirect initiative process. The former governor wanted a thorough overhaul of the state constitution and urged trust in what the democratic process of a convention would bring.<sup>62</sup>

Meanwhile, with the exception of the Business Council and Chambers of Commerce, virtually every organized interest in the state opposed the convention. “Politicians and lobbying groups . . . have either pointedly chosen not to take a stand or, with startling unanimity, have come out against the idea of a convention,” wrote Betsy Kolbert in the *New York Times*.<sup>63</sup> Organized labor, civil rights groups, environmental organizations, abortion rights advocates, and the trial lawyers association joined to create “Citizens Against a Constitutional Convention.” The Conservative Party, Change New York (a smaller government/antitax advocacy organization), the League of Women Voters, and the Association for the Bar of the City of New York were also opposed.

The reasons for opposition varied, tracking those earlier heard by the Constitution Revision Commission. Conservatives stressed high costs, the likelihood of domination of the process by sitting politicians, and the further likelihood of few results. Though the legislative majorities persisted in their passive aggressive strategy, the State Senate did float a \$50 million cost estimate for a potential convention—exaggerated, according to the Governor—to lend substance to this argument. Liberals feared what they saw as a rigged electoral process prescribed in the constitution, the possible loss of rights protections, or the introduction into the constitution of new restrictions—for example on abortion rights. Unions worried about pension protection. Environmentalists were concerned about the “forever wild” provisions. Whatever their motivation, all these erstwhile adversaries could unite on one thing: that a constitutional convention was a bad idea.

Lacking organization, convention advocates did little fundraising. They pinned their hopes on finding one rich “angel” to finance their side. Former Governor Cuomo did not come forward with the surplus that



remained from his last failed campaign. Ron Lauder was only interested if the convention would surely support term limits, a change he had successfully championed via referendum for inclusion in the New York City Charter.<sup>64</sup> Of course, no such guarantee could be given. Tom Golisano appeared for a while to be a potential second coming of Howard Samuels: a rich upstater with gubernatorial ambitions, who might seek to rise to further statewide prominence as a reformer through a self-financed campaign for a convention. Golisano met with Cuomo and others and listened, but in the end he provided only \$300,000—spent almost entirely on media in western New York—for the pro-convention effort. Opponents, however, did have a potential source of political manpower and money—organized labor. With polls showing that a convention was likely to be called as election day approached, phone banks were manned and purse strings untied. Counting on a low turnout, the Citizens Against a Constitutional Convention deployed \$750,000 for a media blitz in the last few days before the election.<sup>65</sup> Their television advertisement pictured two fat, balding, white men partying, while a voice-over delivered this message: “The same old insiders, the bigwigs and billionaires, want to rewrite New York’s Constitution. Is that a good idea? And they expect New York taxpayers to pay \$50 million for their constitutional convention. Fifty million tax dollars? Your taxes, their party. It’s time to tell the bigwigs and the billionaires that the party is over. On Tuesday, November 4, send them a message. Vote no on their constitutional convention.”<sup>66</sup>

“The progressive opponents of the convention have adopted the most antigovernment rhetoric of the right,” reacted Gene Russianoff, a highly respected leader of NYPIRG, a reform organization that had remained neutral on the question.<sup>67</sup> Russianoff may have been right, but the tactic worked. Extensive editorial support throughout the state and positive late poll results notwithstanding, the tide was turned.

The turnout was low. (See table 5.4.) The interest in a convention identified in earlier polls failed to overcome the lack of information also indicated in those polls. There was too little organization among advocates of the convention idea, and potentially supportive voters were not mobilized. Of the four referendum questions on the ballot in 1997, the convention question ranked third in voter participation, and received the fewest “yes” votes. (See table 5.2.) A proposal to borrow \$2.4 billion for school construction, championed by Assembly Speaker Sheldon Silver, drew significant support in New York City and attracted the greatest number of voters. The convention went down to defeat in every county in the

TABLE 5.2  
New York State Constitution Question Referendum Votes in the Twentieth Century

<i>Year</i>	<i>Yes</i>	<i>No</i>	<i>Blank</i>	<i>Question Total</i>	<i>Election Total</i>	<i>Registered</i>	<i>Blank % of Total</i>	<i>Vote % of Registered</i>
1914*	153,322	151,963	5,153	305,285	310,438	N/A		
1936	1,413,604	1,190,275	2,986,214	2,603,879	5,590,093	6,218,334	46.6	89.9
1957	1,242,568	1,368,063	2,608,204	2,610,631	5,218,835	6,450,009	50.0	80.9
1977	1,126,902	1,668,137	1,936,054	2,795,039	4,731,093	7,856,241	59.1	60.2
1997	929,415	1,579,390	1,693,788	2,508,805	4,202,593	10,550,560	59.7	39.8

\*This is the result of a special election held on April 7, 1914.

TABLE 5.3  
Voting Participation on Proposition Questions in New York, 1997

<i>Question</i>	<i>Vote</i>		<i>Total</i>
	<i>Yes</i>	<i>No</i>	
Constitutional Convention	929,415	1,579,390	2,508,805
Monetary Jurisdiction of Courts	1,074,603	1,359,910	2,434,513
Civil Service Veteran's Bonus	1,663,611	883,312	2,546,923
\$2.4 Billion School Bond	1,265,150	1,430,830	2,695,980

*Source:* New York State Board of Elections, [www.elections.state.ny.us/elections/1997/](http://www.elections.state.ny.us/elections/1997/).

state. (See table 5.3.) Results were closest in Sullivan County in the Catskills, and in Monroe County, including the City of Rochester. In Monroe County there was extensive public television programming on the question, where Tom Golisano financed a supportive media campaign.

The 4,202,593 voters who came to the polls on election day comprised 39.8 percent of the 10,550,560 New Yorkers who were registered. Of those who entered voting booths across the state, a total of 2,508,805 citizens were recorded on the convention question. Turnout plummeted and drop-off from the top of the ballot had decreased over the decades. As a result, the size of the electorate voting on the question remained remarkably stable for much of the twentieth century. The 1997 vote marked the first time in the century that a majority of those voting on the question in New York City did not favor a convention.<sup>68</sup> In fact, only 14 percent of voters in New York City favored a convention, compared to 26.1 percent of voters outside of the City. As earlier noted, the mandatory convention question was defeated by a vote of 1,579,390 to 929,415. The majority comprised 15 percent of those registered to vote in the state; 37.5 percent of those voting in the election; and 62.9 percent of those recorded on the question.<sup>69</sup>

## LESSONS LEARNED

State legislators traditionally dislike constitutional conventions, especially those that are unlimited. It is their powers and prerogatives that are likely to be at stake when these are held. Legislatures can refuse to call conventions themselves and—as in New York in 1997—resist their being called