Constitutional Convention in New York
Fundamental Law and Basic Politics

Franklin Feldman
A CONSTITUTIONAL CONVENTION IN NEW YORK:
FUNDAMENTAL LAW AND BASIC POLITICS

Franklin Feldman†

The constitution of New York provides that at the general election to be held in 1957, the voters are to be asked: "Shall there be a convention to revise the constitution and amend the same?" If the electorate votes "yes" there is to be an election for delegates in 1958 and a convention in 1959.‡ Not since 1936, when the voters were asked a similar question (with respect to the 1938 convention), has the issue of a constitutional convention appeared in New York. The purpose of this article is to examine briefly some of the issues relating to such a question as they in turn relate to the problems of government generally.

† See Contributors' Section, Masthead, p. 374, for biographical material.
‡ The full text of the provisions of the constitution dealing with the calling of a constitutional convention reads as follows (N.Y. Const., art. XIX, §§ 2, 3):
§ 2. 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; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegate shall receive for his services the same compensation as shall then be annually payable to the members of the assembly and be reimbursed for actual traveling expenses, while the convention is in session, to the extent that a member of the assembly would then be entitled thereto in the case of a session of the legislature. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the ayes and noes being entered on the journal to be kept. The convention shall have the power to appoint such officers, employees and assistants as it may deem necessary, and fix their compensation and to provide for the printing of its documents, journal, proceedings and other expenses of said convention. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the state at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendment, in the manner provided in the last preceding section, such constitution or constitutional amendment, shall go into effect on the first day of January next after such approval.
§ 3. Any amendment proposed by a constitutional convention relating to the same subject as an amendment proposed by the legislature, coincidently submitted to the people for approval shall, if approved, be deemed to supersede the amendment so proposed by the legislature.
BACKGROUND

The constitution of New York is a fairly old and fairly substantial document. Having been first adopted in 1777, it precedes the Federal Constitution by ten years, and it far surpasses its Federal counterpart in bulk. Starting with the Third Constitution of 1846, when it was felt that some orderly technique for amending the constitution should be found, there has been a provision that every twenty years or so there should be a referendum upon calling another constitutional convention to amend and revise the then existing one. This of course is not the only technique for amendment. Amendment is also authorized by having the legislature approve at two successive sessions (following an intervening general election) a proposed amendment which then is required to be submitted to the people for approval. And there have been introduced in the legislature proposals to add a third method, initiative by the people.

A constitutional convention, however, is a lesson in government all by itself. The most recent, and indeed most useful, experience with the concept available to New Yorkers is the 1938 convention. In fact, in part the setting of the referendum to be held in 1957 was cast by the 1938 convention. It was there decided that a convention, in order to activate the required degree of interest for the voters, should be held in an off-political year. Thus, instead of holding the convention twenty years later as had been the previous practice, the year 1959 was selected (a twenty-one year interval), necessitating the referendum to be held in 1957. Although the "off-political year" was directed to the year of the convention—which is probably also the year the results of the convention are to be submitted to the people for approval—the change also seriously affected the year of the referendum to call the convention. In 1936, when the last referendum was held, there was an election for president, for governor and for an entire slate of state officers; in 1957 the only important election will be the vote for mayoralty

2 There were constitutional conventions in 1801, 1821, and 1846 which were called by the people themselves after a vote on a proposition for a convention, submitted and recommended by the legislature. The constitution first adopted in 1777 was not submitted to the people for approval. For the convention of 1846, the delegates were chosen for the first time by universal suffrage.

3 N.Y. Const., art XIX, § 1.

4 See e.g., A. Int. No. 223, Pr. No. 223 (1956); S. Int. No. 1744, Pr. No. 1890 (1956); S. Int. No. 2424, Pr. No. 2641 (1956); A. Int. No. 398, Pr. No. 398 (1955); S. Int. No. 587, Pr. No. 588 (1955); S. Int. No. 5, Pr. No. 5 (1955); S. Int. No. 1690, Pr. No. 2887 (1956).

5 An excellent study of the workings of the 1938 constitutional convention is found in O'Rourke & Campbell, Constitution-Making in a Democracy (1943).

6 The constitution provides that the convention shall select the "time and . . . manner" of presenting any proposed constitution to the people, provided that there is at least a six week period after the adjournment of the convention. It may be that the convention will not complete its work in time to submit its product at the 1959 election.
of New York. Thus, the question of calling a constitutional convention is to be placed in greater focus. At the same time, contrasted with the 1938 experience, there has recently been created by statute a temporary state commission directed to prepare for the holding of a convention.

The Theory of a Convention

Whatever theory is accepted as underlying the holding of a convention, it must stem from the theory of government itself. Traditional theory starts with the premise that a constitution is the fundamental law. Since a constitutional convention is writing or revising fundamental law, its powers must be derived directly from the fundamental fount, the people, without recourse to the ordinary governmental processes which surround the non-fundamental law, the statutory and the case law. Thus a constitutional convention, created to produce a body of fundamental law, and no other law, must be immune from those impediments which, because of some then-existing constitutional mandate, inhibit a legislature or a court from considering any matter or invoking any rule of conduct either wishes.

This might have been true only in the abstract. The existence of a dynamic federal system has the potential to create very important distortions in the picture. If a federal constitutional convention were considering a revision of the federal constitution, presumably no then-existing limitations could affect the course of its proceedings. Thus, if it were determined that the power to raise a constitutional question in a federal court need not depend upon the existence of a "case or controversy" or that the Supreme Court's jurisdiction shall extend to "law," but not to "fact," no overriding mandate would prevent it.

With respect to a state constitutional convention that is not necessarily the case. The power of a state constitutional convention must be measured against the proscriptions of the existing federal constitution. These proscriptions, however, are so few and so basic to our system of government that realistically a state constitutional convention operates completely within its own limitations.

The convention's own confines might have been the establishment of a state, the separation of powers within the state, and creation of shields

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8 The scarcity of early judicial decisions construing the New York constitution is probably chiefly due to the fact that legislative bills, before they could become laws, were subject to the "revival and consideration" of the Council of Revision, composed of the governor, the chancellor, and the judges of the Supreme Court. Since they would have determined the constitutionality of a proposed law, a subsequent court attack would have been a fruitless step. See 1 Lincoln, The Constitutional History of New York 162 (1906).
against arbitrary state or local action much akin to the federal shields of contract impairment and due process. The details of state-local relationships it might have left to the legislature.

Whatever might have been, was not. Having the power to act the convention was soon persuaded to act. One act invited another with the result that, instead of having a constitution speak on very few items very generally, the product was a document touching on many items very specifically. Thus, once the test for imprinting a constitutional result was relaxed, applications to effect the constitutional mandate increased. As it became generally known that no criteria existed for inclusion of material in the constitution, the extent of requests, and the subject matter which they encompassed, enlarged. At the same time the importance of including a provision in the document magnified, for once it was in only a subsequent constitutional change could modify it. Finally, the technique of control could make resort to the courts less fruitful and less likely. All in all, it has become relatively clear that a constitutional convention offered a most attractive forum for parties interested in affecting the legal framework as it may touch upon their special interest. In short, the man with the special interest or his authorized agent, the lobbyist, has had no more fertile ground than at a constitutional convention.

A constitutional convention does not, however, just happen. However "fundamental" it is thought such a convention and its product, a constitution, may be, some mechanical preliminaries must be accomplished. Their accomplishment, however, may have important substantive effects and may well depend on the view one has of the constitution itself. If

The technique of control which the legislature chooses, assuming it to be valid, is determinative of the later dynamics of growth of the state's law with respect to the matters in question. If the new statute remains subject only to judicial interpretation and enforcement in the same fashion as the pre-existing judge-made law, the courts retain responsibility as the first-line agency of official settlement of the ensuing uncertainties and problems. If, on the other hand, the legislature resorts to an administered scheme of control, then first-line responsibility passes to the administrative agency, subject or not subject to a second-line judicial review.

10 See the graphic report of Warren Moscow in his Politics in the Empire State 208 (1948):
There was one field day for lobbyists and special interest groups in New York state in the past decade, when the boys could operate on a legislative body that did not have to run for re-election. It was in the constitutional convention of 1938, consisting of 168 delegates, 15 elected from the state at large, and 3 each from the then 51 state senate districts. Many of the delegates had never held elected public office before, and many have not held one since. Seventeen of them were judges serving long terms on the bench. Others were important public figures, but in the twilight of their careers. Only a scattering were active functioning members of the state legislature, and they went around shaking their heads in amazement. For it seemed to them, and to other observers, that nearly all the delegates were themselves lobbyists, there to put into the state's basic law, if they could, some idea of their own or their clients.
the constitution is thought of as a basic document, a constitutional convention directed to amend or revise this basic law should contain powers commensurate with its task. Furthermore, if in writing this basic law the convention derives its powers directly from the people, its rule-making powers must be above and beyond those of the legislature, although of course until the proposed constitution is adopted by the people the legislature may be no less a creature of the people than the constitutional convention. If, however, the necessary mechanical preliminaries are to be accomplished in some reasonably orderly way, there must be some area for legislation affecting the course of a constitutional convention. If the legislature—rather than another body such as the Governor—has a role which it may properly perform with respect to the holding of a constitutional convention, this has decided importance, particularly in New York. The legislature is of course a political body and in New York a predominantly Republican organization; the governorship, as often as not, has been occupied by a Democrat, as it was at the time of the 1938 convention and will be through 1958. If a legislature can channel in any significant way the composition of the convention or the product it will produce, the constitutional convention may have a different character than if the legislature had no such role. This role is by no means clear.

THE LEGISLATIVE AREA

One authority has advanced the view that the legislature cannot, through legislation, affect the course of a constitutional convention. His language is sweeping:

I think it is very clear that the legislature has no power to limit the deliberations of a constitutional convention; such a convention may make or unmake the legislature itself. While the legislature represents the people, it represents them for the purpose of exercising the law-making power, and not the power to make a constitution, nor to direct or control the action of other representatives of the people chosen for the express purpose of revising the constitution. The power to make a constitution is one thing; the legislative power is quite another.¹¹

Despite the theoretical correctness of such a position it still seems clear that there is some room for legislative action. For example there must be an appropriation to cover the expenses of the convention, as it would not seem that the convention has power itself to appropriate money although under the constitution it fixes the compensation of its staff. Furthermore, legislative action would seem appropriate to arrange for the necessary routine details such as arranging contracts for the printing

¹¹ 2 Lincoln, op. cit. supra note 8 at 414. The author was legal advisor to Governors Morton, Black, and T. Roosevelt.
of the reports and proceedings of the convention. Moreover, some method must be established for electing delegates to the convention as the constitution itself is largely silent on the question.

When the problem arose for the 1938 convention, Attorney General Bennett delivered an opinion holding that no legislation was required in order to permit the electors to vote on the question of whether there should be a convention. He then stated:

... no action on the part of the Legislature is necessary or proper in order to carry the constitutional mandate into effect. The Secretary of State should undertake the necessary procedure in order that the question may properly appear on the ballot at the forthcoming general election.

Yet despite the Attorney General's opinion, the legislature did pass a statute in 1936 (governing the submission of the question to the people and subsequent election of delegates) and another in 1938 (governing the procedure at the convention and including an appropriation). When the first statute was presented to him for approval, Governor Lehman, while signing it, issued a short memorandum in which he stated:

There is a difference of opinion as to whether the provisions of Section 2 of article XIV of the constitution with respect to submitting to the people of the state in the year 1936 the question "shall there be a convention to revise the constitution and amend the same" is self-executing. To remove any doubt I believe this bill directing by legislative enactment that such a question be presented to the people should be signed and become law.

The 1936 statute, for the light it may throw on the type of statute required prior to the 1957 referendum, is worth a brief examination. This statute, which was denominated "An Act to facilitate compliance with the mandate of the state constitution that the question" regarding the holding of a convention be submitted to the electorate at the 1936 election, was concerned almost exclusively with the nomination and election of delegates at the 1937 general election in the event the voters decided at

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12 In 1938, prior arrangements had not been made for the necessary printing. At the convention, a resolution was passed directing the Committee on Printing to "prepare terms and conditions, and advertise for and receive bids for the printing of the Convention..." (Journal and Documents of 1938 Convention 12) (hereinafter referred to as Journal and Documents). Immediately thereafter the Solicitor General addressed a letter to the Chairman of the Printing Committee in which he advised the convention to use the existing printing contracts of the State covering departmental and legislative printing. (See Journal and Documents 15.) This opinion was adopted by the Printing Committee. This procedure should be contrasted with that used at the 1915 convention. There, a prior statute (N.Y. Sess. Law c. 76 (1915)) imposed a duty upon the then Printing Board of the State to advertise for the convention printing. This statute permitted the Committee on Printing of the Convention of 1915, upon its appointment, to have on hand printing bids and thus it could promptly recommend to the convention a form of contract.

13 1936 Ops Att'y Gen. 333, 334.
16 See 1936 Public Papers of Governor Lehman 477.
the 1936 election that there would be a convention. Thus except for a possible change in the statute of 1937 (which there was not) the people, when they voted for or against a convention in 1936, knew the manner in which the delegates would be nominated and elected. The statute did the following:

(i) it declared that the provisions of the Election Law governing the submission to the people of a proposed amendment to the constitution shall apply to the question regarding the holding of a convention;

(ii) it gave the Secretary of State, and the various boards of canvassers and of elections the same powers they possessed with respect to a proposed legislatively-instituted amendment to the constitution;

(iii) it declared who may vote on the question (conforming to the constitution, those qualified to vote for members of the Assembly);

(iv) it declared the laws governing the election of public officers applicable to the election of delegates, to the extent not inconsistent with specific provisions there contained; and

(v) it set forth the procedure for the nomination of candidates for the district delegates and delegates-at-large, and since it dealt with the election of delegates-at-large by "ballot label" it also dealt with the election of delegates.

Inasmuch as the constitution is silent on most of the matters dealt with in the foregoing Act, it would be difficult to argue that the statute is not within the province of the legislature to regulate the details of holding a convention. The statute did not attempt to propose any specific or new qualifications for eligibility to vote for delegates and thereby did not run into the Court of Appeals decision in Green v. Shumway, which invalidated a statute imposing an oath to be taken by voters before they voted for delegates to a constitutional convention.

The 1938 statute which was passed subsequent to the affirmative vote on holding a convention and the consequent election of delegates, but just prior to the holding of the convention, represented a comprehensive treatment of the procedure to be followed at the convention and, in addition, appropriated moneys for expenses of the convention. Generally, this statute, too, would not seem an inappropriate exercise of legislative power. That part of the Act, however, which regulated in detail the privileges and powers of the delegates by limiting the kinds of offenses which could be punishable would seem to fly in the face of the constitu-

37 39 N.Y. 418 (1868). Unless the private citizen has suffered damages peculiar to himself, he most probably could not bring an action to test the statute relating to the calling of a convention. See Schrefflin v. Komfort, 212 N.Y. 520, 106 N.E. 675 (1914), affirming 163 App. Div. 741, 149 N.Y. Supp. 65 (1st Dep't 1914).
tional language "that the convention shall determine the rules of its own proceedings. . ." 18

The substance of these two statutes, however, accompanied by gubernatorial approval, indicates that an area for legislative action dealing with the convention has been thought to exist. Their subject matter should provide a ready precedent for legislative action to be taken prior to the 1959 convention.

There is, moreover, another clear area for legislative action which was not availed of prior to the 1938 convention. In 1937, after the electorate voted for a constitutional convention, Governor Lehman in his annual message requested the legislature to establish a special commission to do the preparatory work—such as the compiling of information and analyses—for the convention. 19 Such commissions had been established for the constitutional conventions of 1894 and 1915. The commission established in 1915 had "full power and authority to collect, compile and print such information and data as it may deem useful for the delegates to the constitutional convention during the course of [the] constitutional convention as well as before the opening of the convention." 20 The legislature in 1937, however, failed to act on the Governor's recommendation.

Despite the legislature's failure to act, Governor Lehman on July 8, 1937 announced the appointment of the New York State Constitutional Convention Committee. 21 This Committee (which popularly became known as the Polletti Committee, producing the Polletti reports) was established as "an unofficial committee, non-partisan and non-political in character and in motive to undertake and direct the preparation and publication of accurate, thorough, and above all, impartial studies on the important phases of government, certain to be considered at the Constitutional Convention." Forty-two persons were subsequently appointed by the Governor to the Committee.

Not having legislative sanction, the Committee initially had the problem of obtaining funds to carry on its work. Its solution was reported by Chairman Polletti in his General Introduction to the Reports of the Committee, thus:

The committee was faced with the problem of procuring funds to undertake its work. In accordance with a resolution adopted at the first meeting, the chairman appointed a subcommittee for this purpose, consisting of

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18 N.Y. Const., art XIX, § 2.
19 See 1937 Public Papers of Governor Lehman 33:
"Studies should be made, research carried on, data collected, so that the delegates will have the benefit of considerable preliminary work. It seems to me extremely shortsighted for us to do nothing until the convention assembles."
21 See 1937 Public Papers of Governor Lehman 663.
Winthrop W. Aldrich, John Godfrey Saxe, Henry L. Stimpson, and Gerard Swope. Attempts were unsuccessfully made to procure funds from private foundations. With the assistance of the Governor, it was then arranged with the legislative leaders of both parties and the chairman of the Senate Finance Committee and the Assembly Ways and Means Committee to appropriate to our committee the sum of $25,000. At this point it should also be stated the Governor recommended in his Executive Budget of this year the additional sum of $40,000\textsuperscript{22} to be used for the printing of the studies and the reports of the committee. This appropriation was subsequently made by the Legislature.\textsuperscript{23}

Thus, although the Committee started out without legislative approval and the appointments were solely that of the Governor, the legislature did appropriate moneys to cover the work of the committee. The net effect of this procedure was that the legislature (Republican) by not initially authorizing the committee as requested by the Governor (Democrat), had no power over the appointments or work of the committee yet nevertheless provided the money to pay the expenses. In comparison, the 1915 Commission, which then consisted of the president of the Senate and the speaker of the Assembly, in addition to three citizens of the state appointed by the Governor, selected the staff and fixed their compensation.

The lesson of the 1938 experience was learned well. In 1956, the offensive (with respect to the 1957 referendum) was the other way and is illustrative of party politics in its more sophisticated form in New York. First, the Republican legislature, more than a year prior to the referendum on the convention passed a bill\textsuperscript{24} creating a temporary state commission to “study and report on proposals for changes in and simplification of the constitution. . . .” It was directed to “collect and compile such information and data as it may deem useful for the delegates and the people before the convening of, and during the course of, the constitutional convention.” The composition of the commission was to be 15 citizens of the state, 5 of whom were to be appointed by the Governor, 5 by the temporary president of the Senate and 5 by the speaker of the Assembly. Thus, the Republican legislature was to appoint 10 persons and the Democratic Governor 5. The appropriation was $75,000. On March 20, 1956 it passed both Houses and on March 23 was transmitted to the Governor.

March 23, 1956 was however the adjournment date of the legislature. Thus, inasmuch as the Governor had not yet signed the bill, if he failed

\textsuperscript{22} See N.Y. Sess. Law c. 20 (1938), appropriating $25,000 for the “payment of loans and interest on loans” for the constitutional convention commission and an additional $45,000 (not $40,000) for “other maintenance and operation including the printing of reports and personal service not to exceed $10,000.”

\textsuperscript{23} 1 Reports of New York State Constitutional Convention Committee X (1938).

\textsuperscript{24} A. Int. No. 3865, Pr. No. 4323 (1956).
to sign it or veto it there would be no commission to plan for the 1957 referendum or the 1959 convention. No risks were to be taken. On that last day (March 23) the next to final resolution introduced in the Senate was S. Res. No. 162, which was immediately adopted in both Houses. This resolved that:

A special legislative committee, to be known as the committee on the constitutional convention, is hereby created to study and report on proposals and plans for a constitutional convention and on proposals for improvement in and simplification of the constitution.

Instead of 15 members, as was provided in the bill submitted to the Governor, the committee was to consist of 12 members selected as follows: (1) 3 members of the Senate to be appointed by the temporary president of the Senate; (2) 3 members of the Assembly to be appointed by the speaker of the Assembly; and (3) 6 members to be appointed without regard to membership in the legislature, 3 of whom shall be appointed by the temporary president of the Senate, and 3 by the speaker of the Assembly. Thus under this resolution (adopted in a Republican legislature), which did not require gubernatorial approval, no appointments at all were to be made by the Democratic Governor. The resolution, however, had an important proviso, reading:

Provided, however, that if the bill entitled "an act creating a temporary state commission to collect and compile data and to study and report on proposals for constitutional revision; and making an appropriation for the expenses of commission" enacted at this session of the legislature is approved by the Governor, the committee created by this resolution and the appropriation provided for herein [$50,000, rather than $75,000] shall be deemed not to have been made.

Thus, through a very sophisticated technique, very little choice was presented to the Governor. If he vetoed the bill, the resolution would create a committee the composition of which he could not affect. If he approved the bill, he was sanctioning a commission, the control of which he could not affect and which unquestionably in its reports will have significant statements regarding the political issues surrounding the convention, such as perhaps the question as to whether there should be a convention at all. He might, however, have attempted to take the offensive himself by vetoing the bill and appointing his own committee (as per Governor Lehman) notwithstanding the legislative resolution. Governor Harriman, however, pursued a more discreet and politically wise course in signing the bill.25

25 It might have been that the Governor was unaware of the resolution. The writer's experience in Albany during the "30-day bill period" is that the Governor's office has all that it can handle with the bills presented to it. The New York Times, which covers the state capitol news very thoroughly, did not mention the resolution.
Although there was little, if any, public notice of this maneuvering, it is clear that the lesson has been that a constitutional convention is viewed as a political issue the potency of which is second to none. It is now apparent that the thinking of the political parties is not to forget about a constitutional convention and treat it as a mere subsidiary issue to be presented to the people in a November election. In an important sense this first-class use of legislative technique indicates that a constitutional convention has become a concept in its own right.

The Structure of the Convention

The constitution, of course, in dealing with the provisions for a constitutional convention does not speak in terms of party politics or control. The idea that a constitutional convention brings to it people either without party affiliation or nonetheless above and beyond the maneuverings of practical politics is so out of harmony with past practice that it does not merit any serious discussion. If previous conventions have taught one thing it is that the composition and control of the convention is of paramount importance in determining the kind of constitution that will evolve.

The constitution provides the method for selecting delegates to the convention: (a) the electors of every Senate District "as then organized" are to elect 3 delegates and (b) the electors of the state are to elect 15 delegates-at-large. On the important initial question the constitution is silent, viz., how are the delegates to be nominated? This precise question was presented to the Attorney General in 1937. His answer, in part, was as follows:

Delegates at large are to be nominated by the parties and by independent petitions in the manner provided in the Election Law for nominations of candidates for State office (Chapter 598, Laws 1936). District delegates are to be nominated in the same manner provided in the Election Law for the nominations of candidates for the Office of State Senator ( Chap. 598, Laws 1936); designating petitions must contain the number of signatures required by section 136 of the Election Law... 26

It is to be noted that the answer of the Attorney General was completely dependent upon the statute passed by the legislature in 1936 "to facilitate compliance with the mandate of the state constitution" regarding the referendum on the calling of the constitutional convention.27 Thus the legislature proclaimed, and the Attorney General adopted the view that the provisions of the Election Law with respect to nominations of candidates for state office were to govern nominations of delegates-at-large and the provisions of the Election Law governing the nominations

26 1937 Ops Att'y Gen. 218.
27 See pp. 334-35 supra.
for candidates for State Senator were to govern nominations for district delegates.

As for the vote for district delegates, the organization of the Senate districts is today governed by the Legislative Apportionment Act of 1953,\(^28\) implementing article 3, section 4 of the Constitution. This provides for 58 Senate Districts, with the result that the electors voting on this basis, will elect 174 delegates. The delegates are to be voted for separately.\(^29\)

With respect to the 15 delegates-at-large, an important question is the manner of voting for them. In two opinions handed down in 1937 (with respect to the 1938 convention) the Attorney General attempted to answer the problem.

In the first decision\(^30\) he was asked: "Will the delegates be voted for separately or in a block?" His answer was short and simple: "The delegates-at-large will be voted for in a block and in the same manner as presidential electors are voted for" citing the statute which had been passed by the legislature.\(^31\) The statute had however provided: "But suitable provision must also be made where voting machines are used, to enable the voter to cast his vote for any one or more of the 15 delegates-at-large for whom he desires to vote, as in the case of presidential electors." This provision formed the basis of the Attorney General's second decision where, somewhat inconsistently with his first decision, he held that the voters must be accorded an opportunity to vote for any delegates-at-large they wished and could not be confined to a straight party ticket. In short, a voter must be given a chance to split his vote among the candidates, representing the parties, for delegates-at-large.

The language of the Attorney General was significant and is here quoted in part:

From the provisions of chapter 598, Laws of 1936, it is clear that the names of the candidates for delegate-at-large will not appear on the machine, but merely the party name and the words "Constitutional Delegates-at-Large." Nevertheless, the voters must be accorded "suitable" opportunity to vote as they desire for such candidates. The provisions of Section 260 of the Election Law indicate that the irregular or "split" ballot must be affixed to, or written in "the receptacle or device provided on the machine for that purpose." There is a vast and real distinction between the purpose of the presidential electors of each party, as the Electoral College has evolved in our national system of government, on the one hand, and the delegates to a Constitutional Convention of the State. By providing for "straight" party balloting on the machine, the Legislature cannot

\(^{28}\) N.Y. Sess. Law c. 893 (1953).
\(^{29}\) See 1937 Ops Att'y Gen. 218.
\(^{30}\) Ibid.
\(^{31}\) N.Y. Sess. Law c. 598 (1936).
work a violation of the voters' rights. The Constitution provides for fifteen delegates-at-large to be selected by the electors of the State (Article XIV, Section 2). The voters must be accorded full opportunity to vote for fifteen candidates, be they of one, or more, or no parties. You are advised, therefore, that a "suitable" and adequate method of voting individually for delegates-at-large to a constitutional convention must be made available to the voter.\textsuperscript{32}

Thus, to recap, each Senate District is to elect three delegates, for a total of 174, and the State-at-large is to elect an additional 15 delegates-at-large, making a grand total of 189. Accordingly, 95 delegates will control the convention.

The best indication as to who will get the bulk of the delegates comes from an examination of the Senate vote just prior to the 1958 vote for delegates, which is the recent State Senate election of 1956. Parenthetically, though, it should be carefully noted that the control of the Senate voting in an immediately preceding election is not conclusive as to control of the delegates, as was borne out by the 1938 convention. In 1936, the Democratic party had succeeded in gaining control of a majority of the State's Senatorial districts, yet the Republicans captured the convention.\textsuperscript{33}

Based on the 1956 Senate vote, however, of the 58 Senate seats there are 38 Republican seats and 20 Democratic seats.\textsuperscript{34} Assuming that each Republican seat represents a Republican district in 1958 (and correspondingly for the Democrats) and assuming that each such district will carry for the particular party the entire 3 delegates from that district, the Republicans can lose all 15 delegates-at-large and still significantly control the convention (114-75). Only if the Republicans lose seven full districts will the vote for the delegates-at-large become a factor in determining control. Once the Republicans lose a sufficient number of districts so that they will not keep control of the convention regardless of the votes on the delegates-at-large, they must win 3 delegates-at-large for every complete district they lose. Ironically enough, it was the Democratic Attorney General in 1937 who made it difficult for the Democrats to gain control of the convention in 1958, for by holding that delegates-at-large must be voted for separately, rather than in a block, he facilitated efforts to obtain at least some delegates-at-large even though the State as

\textsuperscript{32} 1937 Ops Att'y Gen. 220, 221.
\textsuperscript{33} See O'Rourke & Campbell, op. cit. supra note 5 at 66 et seq.
\textsuperscript{34} Shortly after the 1956 election, 3 vacancies occurred in the Senate as a result of deaths (2 Republicans; 1 Democrat), but the seats were retained by the same parties as a result of the special election held on February 14, 1957. The 1954 Senate vote resulted in 34 Republican and 24 Democratic seats, which changed during the session to a 35-23 count as a result of the special election held on February 7, 1956 in which a Republican won the seat previously held by a Democrat who died in office. See New York Times, Feb. 8, 1956, p. 24, col. 5.
a whole may vote Democratic. Clearly, the Republicans are in the driver's seat as far as control of the convention is concerned.\textsuperscript{35}

The most reasonable assumption, of course, is that the control of the Senate districts will remain the same. Does that necessarily mean that the same persons who control the Senate will necessarily control the convention? The answer may appear to be no. Individuals who desire election to the State Senate are often not of the same stature as those who desire to be members of the constitutional convention.\textsuperscript{36} Though a candidate to a convention will be forced to run under a political party label, his political career may have long passed. His interests, motivations, and inclinations may well be significantly different from the State Senator representing his district.

Experience would indicate, however, that a constitutional convention does not take on a different form from that of the legislature itself. The experience of the 1938 convention, as detailed by O'Rourke and Campbell in their work on that convention,\textsuperscript{37} indicates most persuasively that the pressures, the special interests, and the procedures at the convention closely parallel those of the legislature itself.

This of course has important implications. As suggested above, if a special interest group is desirous of making itself felt at a legislative session it has even more reason for making itself felt at a constitutional convention. Once it can get its interests impressed in the constitution it will be that much more difficult to change. Consequently the stakes are higher. Furthermore the delegates to a constitutional convention do not have to face the voters again in a test for re-election and thus may support projects that may be rejected by more cautious legislators.\textsuperscript{38} In the light of the recent interest in the power of special interest groups to influence legislation, this may well be one of the problems to which the 1959 convention would be particularly sensitive. Interestingly enough,


\textsuperscript{36} Although not representative of the entire convention, one may obtain some idea of the type of individual who permeated the convention by examining the names of the 15 delegates-at-large to the 1938 convention. They were: Robert F. Wagner, Samuel Untermyer, Charles Polletti, Morris S. Tremaine, Harlan W. Rippey, Caroline O'Day, Lithgow Osborne, Abbot Low Moffat, Edward F. Corsi, Frederick E. Crane, Charles B. Sears, Phillip J. McCook, Harry E. Lewis, George R. Fearon and Benjamin F. Feinberg. Among the district delegates were Alfred E. Smith and Robert Moses.

Although the constitution does not contain any eligibility requirements for delegates, the Attorney General held in 1937 that the requirements of the Public Officers Law, applicable to all public offices, would govern. (1937 Ops Att'y Gen. 218.) Judges, even though they may hold no other public office or trust, are expressly eligible. (N.Y. Const., art. VI, § 19.) Even the Governor himself would be eligible as a delegate; in 1938, Governor Lehman declined the invitation, stating that he would be more useful as an adviser to the convention. See Letter of Governor Lehman to James A. Farley, dated Sept. 24, 1937, reprinted in 1937 Public Papers of Governor Lehman 669.

\textsuperscript{37} See note 5 supra.

\textsuperscript{38} See note 10 supra.
prior to the 1938 convention the legislature passed a statute which dealt comprehensively with the procedures to be followed at the convention and included among other things a provision authorizing the office of Secretary of State to be a proper receptacle for the filing of appearances by interested persons (lobbyists) "if the convention should adopt a rule regulating their appearances." The statute declared it to be a misdemeanor to disobey such a rule, if adopted, yet apparently the convention did not do so.

Special interest groups are not, however, confined to outsiders approaching the convention. The structure of the convention is such that it itself is composed of very important special interest groups, viz., the political parties represented by the delegates. On most, if not all, of the issues presented to the convention, the component parties have a view and a special interest. Thus, home rule, power of New York City, debt limits, taxing powers, public power, legality of gambling, public housing, and elected or appointed judiciary all represent constitutional problems which have special concern for the political parties. The most important issue to the parties, of course, and the one on which their interest is most intense, is legislative apportionment.

The issue of legislative apportionment can be viewed in a number of ways. Whatever the way, there will probably be presented at the 1959 convention the basic question as to whether there should be a unicameral or bicameral legislature. It has been argued—indeed, just prior to the 1938 convention for example—that there should be but one house in the state legislature, without any relation to the national political parties, since issues at the state level bear little or no relation to national questions. Although such a position would command substantial theoretical support, it represents a position so out of harmony with current political organizational thinking in New York that it cannot realistically be considered as a possible outgrowth of a constitutional convention.

CONCLUSION

The New York voter in 1957 will be asked if there should be a constitutional convention in 1959. Judged by past experience, he will probably answer yes, although that itself is not certain. He will be asked the...
question in a year in which only one important election (the Mayoralty of New York City) exists to cloud the issue. Furthermore, unlike the past, more than a year before he is asked to express his opinion a state commission has been established to study and report on the question. If there ever will be a time when a citizen of New York will have little excuse not to inform himself of a proposed constitutional convention, that time will be in 1957.

More important, however, the occasion of a constitutional convention presents an opportunity, perhaps only once or twice in a person's voting life, to re-assess the fabric of his government. True, the experience has been that the products of constitutional conventions have not been unique documents reworking the structure of government, but that has as much been to the disinterest of the voter as to anything else. Certainly special interest groups are well aware of the schedule for the constitutional convention and if they are to be channeled into reasonably worth-while paths continued public awareness is required. Indeed, as some developments promised for the future seem never to be fully attained, a constitutional convention offers an unusual vehicle for re-doing the problem at once, perhaps with a sacrifice of detail for over-all coverage. For example, it may well be that the clamor for judicial reform may reach its climax at the constitutional convention. There are, doubtless, certain basic questions which must be answered with respect to the constitution and the convention. What basic governmental purpose is served by having reviews of the state constitution? Since the procedure is unknown at the federal level, why at the state level? Should the state

thereon shall decide in favor of a convention." Thus, it is possible to call a convention even though most of the people who vote in the general election do not vote for the convention. In 1936, precisely that happened. There, the total gubernatorial vote was 5,690,093; the vote for the convention was 1,413,604 to 1,190,275. Therefore, not only did a majority of the people who voted in the gubernatorial election not vote for a convention; a majority of those voting in the election did not even vote on the question of holding a convention.

And this election, of course, is only present in New York City.

Although the Governor signed the bill creating the temporary state commission on the constitutional convention on April 18, announcement of the selection of a chairman was not made until July 8, 1956. The man selected was Nelson Rockefeller, former Under Secretary of the United States Department of Health, Education and Welfare. See New York Times, July 9, 1956, p. 25, col. 2.

The full commission was appointed on August 30, and had its first meeting on Sept. 26, 1956, at which time Mr. Rockefeller was confirmed as Chairman. See New York Times, Aug. 31, 1956, p. 11, col. 5; Id., Sept. 27, 1956, p. 32, col. 3. The commission was scheduled to report to the legislature by March 1, 1957 (N.Y. Sess. Law c. 814, § 9 (1956)), and submitted its first interim report to the Governor and the Legislature on February 18, 1957 (Report dated February 19) which simply presented a brief background of prior Constitutional Conventions and grouped proposed changes in the Constitution into 6 categories. See N.Y. Leg. Doc. No. 8 (1957).

See the observation of Governor Smith who had been a member of the constitutional conventions of 1915 and 1938 in his book (written prior to the 1938 convention), The Citizen and His Government 260 (1935):

A study of the proceedings of this [1915] convention and the result, or rather lack of result, obtained from it is incontrovertible proof that complete revision by the convention system is not as workable in practice as it may be in theory.
constitution continue to incorporate a vast mass of law that is not fundamental but merely "incidental and statutory in character"? 45

It is reasonably clear that, however fundamental a constitution may be, a constitutional convention is a fairly practical and expensive 46 exercise in government. True enough, it concerns itself with fairly basic issues, but the consideration often stems from very basic politics. 47 A constitutional convention is a political convention and must be viewed as such. The pressures which are continually at work in the formulation of any law are present to an increased degree at a constitutional convention.

There have been in the past some efforts at public education, but the efforts usually accompanied the holding of the convention itself, which was too late. 48 If there is to be an intelligent consideration of the basic question of whether there is to be a convention at all, that consideration should begin now. It may well be that through an early public interest in the convention, the constitutional convention of 1959 (if there is to be one) will be most responsive to the wishes of the people.


46 For the 1938 convention, the amount appropriated was $1,350,000 (N.Y. Sess. Law c. 376 (1938) ), but there remained a balance of over $233,000, so that the 1938 convention cost approximately $1,117,000. At that time, however, the compensation of each delegate was $2,500 whereas in 1959 the amount will be at least $7,500 ("the same compensation as shall then be annually payable to the members of the assembly . . .") N.Y. Const., art. XIX, § 2; N.Y. Sess. Law c. 314 (1954) ). There was some discussion at the early part of the 1957 session of increasing the compensation, probably to $9,000, effective in 1959, which would be in time for the convention. See New York Times, Jan. 15, 1957, p. 1, col. 2. Even at the $7,500 rate however, the 1959 convention will cost considerably over three million dollars. See 1937 Ops. Att'y Gen. 148, 213, 218.

47 See the statement attributed to Warren Moscow, former political reporter for The New York Times, on the fly-leaf of his book, Politics in the Empire State (1948): "He regards the (1938) state constitutional convention as his most educational assignment. 'It cost the state $2,000,000, but it was worth it to me,' he says."

48 The Polletti Reports were authorized after it was decided to hold the 1938 convention and were prepared just in time for the convention. The New York Times (which had been opposed to the calling of the convention (New York Times, Nov. 2, 1936, p. 20, col. 3)) prepared a document, entitled "The New York Times Constitutional Convention Almanac 1938" which was distributed just prior to the convention.

When the people voted in 1936 to call the 1938 convention, their lack of information and interest was self-evident. A statistical survey of the vote (see note 41 supra) has been summarized by O'Rourke and Campbell, op. cit. supra note 5 at 64, as follows:

Viewing the results geographically and in terms of local majorities, we find that the "call" for convention came from New York City. Four of the five counties in that area favored the convention, while Albany was the only one of the 57 upstate counties in which the convention was favored. The proposition won in New York City by a 2-1 vote, with 55% of those voting indicating their stand on the convention. The proposition lost in the upstate regions by a 5 to 3 vote, with 37% of those voting declaring themselves in the issue. . . .

The purpose of holding a convention had been little explained, attacked or defended. The question of holding a convention had hardly achieved the status of being an issue before the public.

The New York Times' position on the matter may be indicative of the changing moods toward the question. In 1936 they gave the Issue of calling the Constitutional Convention scant treatment and were opposed. Today, a year before a vote on the question and more than 2 years prior to the convention they have had a number of editorials in which they have categorically stated that a convention should be held. See New York Times, Oct. 3, 1956, p. 32, col. 1; Id., Aug. 2, 1956, p. 24, col. 3.