

Setting the Record Straight: Putting the Pension Issue Back in Pandora's Box

By Peter J. Galie and Christopher Bopst

The doom and gloom predictions about a New York State Constitutional Convention are unfounded and exaggerated. Many of the groups that oppose a Constitutional Convention are benefiting from the current power culture that is rife with corruption, dysfunction and gridlock.

A Constitutional Convention is a path forward to remedying the problems of the current system, while strengthening positive rights for people in New York State.

Here is the scenario portrayed by convention opponents:

Imagine if you will a day when the state of New York has no obligation to educate its young people; a day when it is relieved of its pension obligations to retirees; a day when you have no rights to collective bargaining or even to join a union. Imagine a day when the Adirondacks are no longer "forever wild."

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A signpost is up ahead but it's not the "Twilight Zone": It's the potential disaster known as a constitutional convention.

Ned Hoskin, "Why we must say NO to a state constitutional convention," Official Publication of NYSUT, Feb. 2016)

What can a Constitutional Convention do? The Law

Recent large scale campaigns consisting of emails and presentations sponsored by the public employees unions such as the Civil Service Employees Association (CSEA) and the New York State United Teachers (NYSUT) have sounded an alarm about the dangers a constitutional convention might pose to their members. The picture is ominous, frightening, and meant to be so. The charges are that a constitutional convention would, among others, endanger public sector pensions and the right to organize and bargain collectively. The union literature makes it clear that these dangers are real and that a convention is an existential threat.

A first step in evaluating these concerns is understanding what the constitution protects and what it does not protect.

- **Collective bargaining** on the part of public sector employees is not guaranteed by the constitution. Rather, it is protected only by the Taylor Law, a legislative enactment that could be undone by a simple majority vote of both houses at one session and approval by the governor. A con-con could constitutionalize the right of public employees to collectively bargain, securing it from legislative interference.
- **Pension benefits.** The New York Constitution makes public employee pension benefits contractual and protects them from impairment. Any attempt by a convention to reduce benefits to retirees or to take accrued benefits from current employees would almost certainly violate the Contract Clause of the national Constitution. Even if a convention

eliminated the state constitutional protection for pensions, the U.S. Constitution would require that such changes applied only to employees hired after the effective date of any such change.

The state has made numerous changes over the course of time to the pension system for future employees. The most recent revision was in 2012, when the legislature put in place a new Tier (Tier VI) and significantly altered the pension conditions for employees joining the retirement system on or after April 1, 2016 (while not affecting existing employees and retirees). In 2017, New Yorkers will vote on a constitutional proposition that would allow pensions to be taken from public officials who have been convicted of a felony related to their public office.

- **Health benefits.** These are not protected by the state constitution so there is no constitutional protection that could be taken away.
- **Income taxes.** The state constitution protects public employee pension benefits from state income taxation. Since a preferred tax status is not a contractual right, any changes to this provision would not violate the Contracts Clause.

What is a Constitutional Convention likely to do? The Politics

The headline is alarming: “Your pension could vanish in a Constitutional Convention.” As we have noted above, a convention could not legally make anybody’s pension “vanish.” The unions are well aware of this. Beyond the legal prohibitions, however, an examination of the constitutional and political tradition of New York, our current political culture, and party divisions in the state, make it clear that elimination of pensions would be dead on arrival at a convention.

There many things a convention could possibly do. It could:

- Eliminate the state’s Bill of Rights;
- Extend the governor’s term for life;
- Adopt a parliamentary system of government;
- Eliminate local governments; and
- Abolish the “forever wild” provision and permit unimpeded commercial and industrial development in the Adirondacks.

A convention could do all these things. Are any of them even remotely likely? No! And the same can be said about pension eliminations.

Any assessment of the likelihood that pensions could be eliminated or impaired should begin with an examination of our constitutional tradition. Conventions in New York have added, not taken away, rights. Nearly every right--individual or collective--in the New York State Constitution is the product of a constitutional convention. The notion that the values and ideals that have defined New York, including its commitment to organized labor and its desire to compensate those who have served the public good, will somehow fall prey to a rogue

convention defies history, logic and common sense. A more likely scenario would be that a convention would STRENGTHEN the collective bargaining rights of public employees by constitutionalizing them, would STRENGTHEN the state's commitment to clean air and water, and would STRENGTHEN the state's obligation to providing a sound basic education for all New Yorkers.

Aside from the historical about-face that would be needed to roll back constitutionally protected pensions, such an effort would face a political obstacle course. Where are the delegates who would promote such an agenda going to come from? Convention delegates will be selected by voters, among whom are the million-plus active and informed members of public sector unions unlikely to support delegates who would propose radical changes outside the values embodied in our constitutional tradition. Finally, voters at a general election must approve all convention proposals. It strains credulity to assert that in a state with very large numbers of active and retired public union members; where enrolled Democrats won majorities in both houses of the legislature; where the last Republican to win any statewide race was George Pataki in 2002; and where Democratic registrations are more than double those of Republicans, voters would support changes that threaten our constitutional and political values, and especially the state's commitment to organized labor.

To those who may ask: how can we be sure New Yorkers won't reflect the same hostility towards unions as Wisconsin, where collective bargaining rights of public employees were drastically reduced in 2011, or Michigan, which adopted right to work legislation in 2013, one need look only at the most recent presidential election. Donald Trump took both Wisconsin and Michigan; Hillary Clinton won New York by 23%. In addition to the political demographics noted above that make it difficult to locate a constituency of any significant size and cohesion that would support and have sufficient power to effect such changes, there is no public demand for eliminating or even reducing pension protections. In response to concerns in the early 21st century that the pension system as it was then financed was not sustainable, significant reforms were adopted that most commentators agree have put the pension system on a sounder financial footing. In response to the spectacle of prominent members of the government convicted of felonies and receiving comfortable pensions, the legislature placed an amendment on the November ballot to remedy that situation.

Convention proposals generally reflect the problems and conditions that exist when conventions are called. The real issues confronting New Yorkers today are political corruption and government dysfunction. Whatever legitimate concerns about the pension system that might have spilled over into convention deliberations have dissipated, making it a non-issue for any convention.

In light of these facts, we pose the following questions: do you believe delegates to a New York Con-Con would vote to eliminate pensions for public sector workers in New York? Do you believe *voters* in New York would approved such a measure? We do not; and we do not think you do either.

New York State needs real constitutional reform—even opponents of a convention concede that much. To hold that reform hostage to a phantom danger is to deny the good sense and common decency of New Yorkers and do a disservice to the future of our state.