

When Rhetoric Attempts to Trump Reality: Why a Constitutional Convention Would Not Take Away Public Employee Rights

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Rockefeller Institute of Government President's Note:

Every 20 years, New Yorkers have the chance to vote on whether to hold a constitutional convention (known as a ConCon). The next vote will be held this November. If the voters approve a convention, delegates will be elected in November 2018, and the convention will open in April 2019. To help educate New Yorkers on the process and potential issues, we have created a website at http://www.rockinst.org/nys_concon2017/. We recommend you take a look. As the vote fast approaches, the Rockefeller Institute will continue to provide New Yorkers with information in various forms: public education sessions, publications, and debates. Please follow on Twitter or sign up on our website for all the latest information.

Today's piece by Peter Galie and Christopher Bopst continues a series of pieces between pro and anti-ConCon experts. We hope the dialogue provides insight to help inform voters come November.

Imagine, if you will, a day when the state of New York ... is relieved of its pension obligations to retirees ...

— [Ned Hoskin, New York State United Teachers](#)

Large scale campaigns consisting of emails and presentations sponsored by 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.

What Rights Does the State Constitution Afford Public Employees?

A first step in evaluating the concerns of public employees is understanding what the constitution currently protects and what it does not protect:

- **Collective bargaining.** Many people would be surprised to learn that *collective bargaining on the part of public-sector employees is not even guaranteed by the state constitution*. That's correct: although the state constitution [protects the rights of employees to organize and collectively bargain](#), it contains [no reciprocal obligation on the part of government employers to negotiate with worker organizations](#). Rather, collective bargaining for public employees is protected only by the Taylor Law, a legislative enactment that could be undone through the legislative process (single passage by a majority of both houses and approval by the governor). So in the case of collective bargaining, there is not even a constitutional right to take away.[1]
- **Pension benefits.** The New York constitution makes [public employee pension benefits contractual and protects them from impairment](#). In treating pensions as contracts

between the state and the employee, as opposed to matters of legislative grace, New York's position on this matter resembles six other states.[2] Unlike some states that only protect accrued benefits, [New York's provision protects both accrued and future benefits](#).

Even though the pension provision of the state constitution protects retirees and current participants in the plan, the state has made a number of 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 felonies 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](#). Nonpublic employees have no constitutional exclusion from state income tax for pensions and annuities, [although by statute \\$20,000.00 of such income is excludable annually](#).

A Convention Could *Not* Reduce the Pensions of Current Employees and Retirees

The most irresponsible assertion being perpetrated by convention opponents is that the pensions of existing and retired public employees could “vanish” if a constitutional convention were to be held. This is patently false. Existing public employee and retiree pensions are protected by both federal and state law.

The U.S. Constitution has a provision known as the Contract Clause, which prohibits states from doing precisely what is feared — retroactively changing the terms of existing contracts. [It provides:](#)

No State shall ... make any ... Law impairing the Obligation of Contracts.

Ever since the Constitutional Convention of 1787 made public pensions contractual, the rights of each public employee have vested on the date he or she entered the system, and any impairment of those rights through elimination of pension, reduction of benefits, or unfavorable changes in the way cost of living adjustments are calculated would violate the U.S. Constitution.

Other states with similar constitutional provisions that have attempted to change the existing terms of their public employee pension programs through legislation have been routinely rebuffed by courts applying the Contract Clause. A 2013 Illinois statute that halted automatic cost of living increases for retirees, raised the retirement age for current employees, and capped the salary used in determining benefit amounts was held unconstitutional by a unanimous Illinois Supreme Court. Multiple Arizona laws adopted in 2011 that increased employee contribution rates for existing employees and altered the formula for calculating cost of living adjustments were found unconstitutional by a series of different courts.

In addition to violating the Contract Clause of the national Constitution, any attempt by a constitutional convention to retroactively reduce benefits to retirees or to adjust accrued benefits

to current employees would almost certainly run afoul of the state constitution — either the due process clause, the takings clause, or the pension provision in effect when every current and retired public employee entered the system. Even if a convention were inclined to eliminate the nonimpairment provision of the state constitution, such a change would apply only to employees hired after the effective date of the change; it could not bind existing employees whose rights already have been fixed.

New York's Support for Public Employees

The fear public employees have that they will be targets of a convention's anger is anecdotal and unsupported by any measure. Among the states, New York continues to maintain a significant union presence. While union membership nationwide continues to decline, [the percentage of employed New Yorkers that are union members — 23.6 percent — is the highest in the country, with the next highest state, Hawaii, having less than 20 percent.](#) Union membership in [New York City is on the rise and has been for three straight years, increasing from 21.5 percent in 2012 to 25.5 percent in 2016.](#)

New York also leads the states in public union membership. With close to one million public employee union members in 2014, [New York is second in the nation in raw number of members, dwarfing both Texas \(275,893\) and Florida \(276,746\) despite their larger populations.](#) That same study showed New York to be the highest in the nation in percentage of public employees belonging to unions, 72.3 percent, with Rhode Island coming in second at a distant 66.9 percent. Almost 5 percent of the state's total population belongs to public unions, the highest by far of the country's ten most populous states (the next closest in that group, California, claims only 3.3 percent of its total population as public union members). In addition to the state's large number of active public employee union members, there are currently over 900,000 retirees and beneficiaries receiving benefits from the state's different public pension systems.[3]

The state has shown substantial support for public unions. [A poll taken in 2011](#), when the country was just recovering from the Great Recession and support for unions had fallen off considerably nationwide, found that a majority of New Yorkers supported the Triborough Amendment, the statute that preserves salary and benefit levels when public employee contracts expire, as well as the right of public union workers to strike (a practice currently banned by the Taylor Law). More recently, [a Quinnipiac Poll showed](#) by a 49-41 percent margin public support for an amendment to prevent reductions in public employee pension benefits. The polling supports the notion that a constitutional convention would likely *ENHANCE* public employee rights (perhaps by adding the right to strike or giving more robust pension protections), not diminish them.

What Is a Constitutional Convention Likely to Do? The Politics

As we have noted above, a convention could not legally reduce or eliminate anybody's pension. 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. The same would likely be true for proposals banning public employee collective bargaining (e.g., a constitutional reversal of the Taylor Law) or elimination of the income tax exemption (for which no serious efforts have ever been made legislatively to do).

Any assessment of the likelihood that pensions or other public employee rights 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 does not comport with our constitutional tradition, the statistics cited above, or common sense. A more likely scenario would be that a convention would *STRENGTHEN* the collective bargaining rights of public employees by constitutionalizing them; would *AUGMENT* income tax exemptions for ALL retirees, public and private alike; and would *INCREASE* the state's obligation to constitutionally provide for its public servants.

Aside from the historical about-face that would be needed to rollback constitutionally protected pensions and other hard won benefits, 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 approximately two million active and retired 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 such 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, 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 percent. Moreover, New York has more favorable demographics in terms of numbers of public employees, percentage of public employees, and attitudes about public employment than either of those states. 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 and, 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 stop that practice — a palliative measure by a body unwilling either to address the underlying causes of the “pay to play” culture that provides the breeding grounds for those felonious acts or to correct the significant structural problems in the state's institutions.

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 nonissue for any convention.

In light of these facts, we pose the following questions: Do you believe delegates to a New York ConCon 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.

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

Endnotes

[1] One may respond that collective bargaining rights for public employees do not have to be in the state constitution to be “at risk.” After all, delegates to a constitutional convention could insert a provision in the constitution banning collective bargaining for public employees — in essence abolishing the Taylor Law by constitutional means. For the reasons stated throughout the remainder of this article, the evidence does not support that this is remotely likely.

[2] The other states having constitutional pension protections are Alaska, Arizona, Hawaii, Illinois, Louisiana, and Michigan.

[3] This number was calculated by reviewing the annual reports from each of the state’s (including New York City’s) eight public pension funds.