

Stuck on Marijuana Legalization, Could Lawmakers Offer a Referendum as Cuomo Suggested?

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the state capitol (photo: Mike Groll/Governor's Office)

In an [interview at the end of May](#), Governor Andrew Cuomo made a provocative assertion: he said opponents to recreational marijuana legalization in the state Senate have argued no state in the country has legalized the controversial measure without first putting the question to voters in a ballot referendum. No such referendum has taken place in New York, but Cuomo -- who has pushed for marijuana legalization this year -- indicated on WNYC radio that it was a possibility as legislative efforts to legalize and regulate recreational, adult-use cannabis in the state have stalled.

In a state government with virtually no tradition of holding referenda on policy initiatives, what this means for the embattled marijuana push in the final days of the legislative session is uncertain. Reports indicate that negotiations on legalization among the Democratic majorities in the Senate and Assembly and Cuomo's office have continued throughout the weekend, with the parties eyeing the scheduled end of the session on Wednesday.

“The opposition Senate position is, there is no state that has passed it without a referendum. It’s never been done just by the Legislature,” Cuomo, a third-term Democrat, told Brian Lehrer on WNYC on May 28. “They think it’s an overreach by the Legislature,” he added.

While it appears true that this narrative has floated around Senate circles fearing the consequences, both political and pragmatic, the assertion itself that no state has legalized recreational marijuana without a referendum, is not ([Vermont](#) legalized marijuana possession through its legislature in 2018, and Illinois did the same for marijuana sales [just days](#) after Cuomo’s comments). Nevertheless, the governor appeared to lend credence to the notion that it could be done this way in New York, despite the state’s historically closed attitude toward referenda.

The goal of making recreational marijuana legal in New York became a realistic prospect when Democrats took control of the state Legislature earlier this year, joining a slew of priorities backed by progressives that had been backlogged under the previously Republican-controlled state Senate. It was spurred on by parallel efforts in New Jersey, which have since [collapsed](#). Garden State lawmakers now plan to put the issue directly before voters in a referendum in 2020.

As the end of the legislative session in Albany approaches, the momentum on some reforms has faltered as more centrist, and vulnerable, Democrats from Long Island and north of New York City hedge against political backlash.

“New Jersey was going to legalize it, New Jersey stopped. I think that started to shift the political environment. The senators say on the record that they don’t have the votes to pass it politically,” Cuomo told Lehrer. This is true, but senators, led by Manhattan’s Liz Krueger, the lead sponsor of her chamber’s marijuana legalization bill, have said that it’s in part due to Cuomo’s lack of engagement on the issue. As he did on rent regulations, Cuomo has mostly sat back and said senators are being cowed by political considerations, and he’d sign whatever the legislative majorities could agree on.

The effort may only require support from two additional senators to reach a majority in the 63-seat chamber, the Democrat and Chronicle [reported](#) at the beginning of June. While a legislative path may be there, especially with new compromises packed amid a “big ugly” end-of-session omnibus package, Cuomo did indicate another potential path.

In the WNYC interview, after Cuomo pointed out the national referendum trend, he was asked whether a referendum approach could work in New York. The governor responded, “Yes, the short answer is you could do a referendum for a sense of the people where you sketch out the provision and have a referendum, and if it passes then the Legislature could say, ‘We will pass it.’”

The long answer is not as clear. While certain types of measures require ballot referenda, like state constitutional amendments and bond issues, New York does not have the mechanism known as “initiative and referendum” [at the state level](#), which many other so-called “direct democracy” states do (New Jersey doesn’t have it either). Initiative and referendum is a process that allows either the legislature or the public through petitions to put proposals directly onto the ballot to be advanced or blocked by voters.

In some states, referenda are also used to solicit public opinion to provide non-

binding guidance (and political cover) to legislators. This may be more along the lines of what the governor was describing in his comments on WNYC.

New York does not have the infrastructure or political tradition of conducting either type of referendum, according to Gerald Benjamin, an expert on New York State government and director of the Benjamin Center at SUNY New Paltz.

“It’s just a matter of fact that we don’t have the institutional design that supports decision-making by referendum in state government on policy,” Benjamin told Gotham Gazette.

The governor’s office has not returned a request for comment to provide more information about Cuomo’s assertion or thinking on the matter.

At the state level, referenda are used in a narrow set of matters that invoke the self-determination of the people, when the form and structure of the government is at stake and lawmakers’ interests pose a conflict to changing them. New York has a lengthy and politically exhausting legislative process for constitutional amendments that culminates in a referendum after passage in consecutive legislative sessions.

The question of whether to hold a constitutional convention to amend the state’s foundational document is also mandated by law to be placed on the ballot every 20 years. And any bond issue requiring borrowing on the “full faith and credit” of the state is supposed to be approved by voters in a referendum (though much borrowing, like by [public authorities](#), is not), according to Benjamin.

Calling for a referendum can also be a political tool for lawmakers to diffuse responsibility on contentious issues, like recreational marijuana.

“We have at least some body of law that says the representative bodies and the elected representatives of the state government should make these decisions, not try to essentially diminish their accountability by turning to the public on matters that are controversial,” Benjamin said.

Other practical considerations also complicate the equation. There is a difference between the concept of putting a question of importance directly to voters and the pragmatic demands of getting a meaningful response.

In the world of referendum politics there are state rules about qualifying a ballot proposal, and a number of considerations can change the meaning of the question to voters. On a complex topic where the merits are also the subject of current debate, the language of a marijuana question is significant.

Stakeholders are still weighing the particulars of what legalizing adult-use cannabis would mean, and the outcome of that discussion could impact how a potential referendum is framed. Debates are far from settled on questions like whether criminal records for marijuana offenses should be sealed or completely expunged, the legally permissible quantities, and what the state should do with the revenue generated from licenses and taxes.

Outside the issue-specific questions are more technical ones that would have to be answered: will the referendum be written in plain language that is easily understood; how much of the issue will make it onto the ballot; and how will it be explained to voters?

“It’s an easy thing to say, ‘Well, let’s ask the public,’” said Benjamin, and another thing to do it. “We’re not set up to do it, we don’t have the rules and regulations and process. Would we just commission a Siena poll?”

Still, some lawmakers are pushing for that approach to legalizing recreational marijuana, and the governor’s comments may give them traction. Especially for state Senate Democrats, who were elected to the majority last November by flipping swing districts and unseating party members who shared power with Republicans, the [political ramifications](#) of supporting marijuana legalization in conservative-leaning or recently Republican-led districts could be treacherous.

“I do believe that it is true that certain members may have said we should do this through referendum because it’s a way of saying we should let the public vote on this,” a spokesperson for Senator Krueger told Gotham Gazette in an interview.

Some senators seem to be in favor of the most progressive elements of the marijuana debate but fall short of supporting it through the legislative process. State Senator Monica Martinez, a first-term Long Island Democrat representing a swing district, has said she would not support Krueger’s bill but a spokesperson told Gotham Gazette she is in favor of decriminalizing marijuana and of expunging the records of people with prior offenses. (Expungement is considered a stronger stance than sealing because it means records are destroyed completely rather than sealed but still accessible by police.)

“Senator Martinez does support the legalization of Marijuana through a statewide referendum,” wrote a spokesperson for the senator in an email.

According to a [Siena College poll](#) conducted in April, 52 percent of registered voters statewide supported legalization while 42 percent were opposed at the time. The math was flipped in the suburbs, where several of the Democratic state senators who don’t support the legislation live: 44 percent support the proposal and 49 percent oppose it. A more recent Siena poll conducted in the [first week of June](#) found those numbers had balanced out, with support both statewide and in the suburbs at 55 percent. (Earlier this year the Democratic county executives of both Suffolk and Nassau on Long Island said their counties would opt out of allowing marijuana sales if the governor’s bill, which includes opt-outs for localities, was passed.)

The marijuana bill in the state Assembly, sponsored by Assemblymember Crystal Peoples-Stokes, a Buffalo Democrat, appears to have [stronger support](#) in the majority conference, where the partisan balance isn’t as delicate.

New Yorkers have not always been warm to the referendum mechanism in the past. At the turn of the 20th century, the Progressive Movement in the state was concerned with changing the institutions of government, in part, to mitigate the power of political parties. While New Yorkers adopted a number of proposals like electing party officials and statewide party nominees (at times, through constitutional convention referenda), they spurned the idea of initiative and referendum, according to Benjamin.

“Historically, referendum is regarded as essentially the ducking of responsibility by the representative government elected to make decisions,” he told Gotham Gazette.

Still, the idea of going directly to the people appears to be attractive as the new cohort of state senators that swept into office this year grapple with the potential loss

of a signature progressive campaign promise.

“I think that’s the problem here, is the political reality that you don’t have the votes in the Senate,” Cuomo told Lehrer.

Later he added, “Everything else is smoke.”