

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

**WHETHER NEW YORKERS SHOULD
APPROVE THE 2017 BALLOT QUESTION
CALLING FOR A CONSTITUTIONAL
CONVENTION**

ADOPTED BY

**THE COMMITTEE ON THE NEW YORK
STATE CONSTITUTION**

APRIL 20, 2017



The opinions expressed are those of the committee preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

**Membership of the New York State Bar Association's
Committee on the New York State Constitution**

CHAIR:

Henry M. Greenberg, Esq.

MEMBERS:

Mark H. Alcott, Esq.

Martin Bienstock, Esq.

Christopher Bopst, Esq.

Hon. Cheryl E. Chambers

Hon. Carmen Beauchamp Ciparick

Linda Jane Clark, Esq.

David Louis Cohen, Esq.

John R. Dunne, Esq.

Hon. Margaret J. Finerty

Hon. Helen E. Freedman

Mark F. Glaser, Esq.

Hon. Victoria A. Graffeo

Peter J. Kiernan, Esq.

A. Thomas Levin, Esq.

Bennett Liebman, Esq.

Justine M. Luongo, Esq.

John M. Nonna, Esq.

Hon. Karen K. Peters

Joseph B. Porter, Esq.

Andrea C. Rendo, Esq.

Sandra Rivera, Esq.

Prof. Nicholas Adams Robinson

Hon. Alan D. Scheinkman

Hon. John W. Sweeny, Jr.

Claiborne E. Walthall, Esq.

G. Robert Witmer, Jr., Esq.

Hon. James A. Yates

Stephen P. Younger, Esq.

Jeremy A. Benjamin, Esq., Liaison to Civil Rights Committee

Hermes Fernandez, Esq., Liaison to Committee on State Legislative Policy

Betty Lugo, Esq., Liaison to Trial Lawyers Section

Alan Rothstein, Esq., Liaison to New York City Bar Association

Richard Rifkin, NYSBA Staff Liaison

Ronald F. Kennedy, NYSBA Staff Liaison

TABLE OF CONTENTS

Introduction and Executive Summary	1
I. Background of the Report	4
II. Principal Arguments Supporting and Opposing a Call for a Constitutional Convention.....	7
A. Arguments Supporting a Call for a Convention	7
1. A Convention Could Streamline and Modernize the Constitution.....	7
2. A Convention Is Needed to Fix Basic Structural Problems with State Government.....	9
3. A Convention Provides an Opportunity to Establish New Positive Rights.....	11
4. There Is No Practical Alternative to a Convention for Enacting Needed Reforms	12
B. Arguments Opposing a Call for a Convention.....	14
1. A Convention Places at Risk Cherished Constitutional Rights	14
2. A Convention Could Add Harmful New Provisions to the Constitution.....	15
3. A Convention will be Faced with the Same Political Hurdles that Undermine the Legislative Process	16
4. Legislators and Judges Serving as Delegates Will Receive Double Salaries.....	17
5. A Convention is Unnecessary.....	20
6. A Convention Will be Expensive	21

III. Recommendations	21
IV. Conclusion.....	32

INTRODUCTION AND EXECUTIVE SUMMARY

On November 7, 2017, New Yorkers will vote on a 13-word referendum question: “Shall there be a convention to revise the constitution and amend the same?” That question appears on the ballot because the New York State Constitution commands that at least once every 20 years voters are asked whether or not to call a Constitutional Convention.¹ The mandatory referendum presents a rare chance for direct democracy; arguably a “grand stroke of intelligent populism” in which New Yorkers can reinvent their State government, if they so choose.²

Since its formation in July 2015, the New York State Bar Association’s Committee on the New York State Constitution (the “Committee”) has undertaken a comprehensive study of many of the Constitution’s 20 articles. To date, the Committee has held 20 meetings; heard presentations from more than two dozen experts; issued four substantive reports; and sponsored and participated in CLE programs, symposiums and webinars that have contributed to the growing public discourse about a Constitutional Convention.

¹ N.Y. CONST. art. XIX, § 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.”).

² Sam Howe Verhovek, *Cuomo Opens a Session with Barbs and a Gambit*, N.Y. TIMES, Jan. 12, 1992, at E6 (quoting Governor Mario Cuomo); PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 109-10 (1996) [hereinafter, “ORDERED LIBERTY”].

In January 2017, the leadership of the State Bar asked the Committee for its opinion whether a Constitutional Convention should be called. Committee meetings on which this issue has been addressed revealed that members hold a range of viewpoints on a potential Convention, and concerns in both directions sparked respectful debate. What follows is the Committee’s report and recommendations, reflecting its best judgment on this profoundly important question.

After careful reflection, the Committee recommends that the State Bar support a Convention call on the November ballot question.³ This recommendation is based primarily on the Committee’s belief that the restructuring and reorganization of the State’s court system — for nearly five decades an abiding concern of the State Bar — has little practical chance of being achieved without a Constitutional Convention. In addition, the Committee believes that our 52,000-word Constitution needs to be streamlined and modernized and measures should be taken to increase voter participation, and a Convention is the only practical means of achieving these goals.

The Committee advocates an affirmative position on the ballot question mindful of the thoughtful arguments against a Convention. Serious potential drawbacks include concerns about the delegate selection process, the possibility of domination of the Convention by “special interests,”

³ The positions taken in this report have been reached by the Committee as an entity and should not be attributed to any particular member of the Committee or to any groups, committees, or affiliations associated with a member. In particular, Hon. Alan D. Scheinkman, a member of the Committee, has been named by Chief Judge Janet DiFiore to serve as Co-Chair of the Judicial Task Force on the New York State Constitution, and has abstained with respect to the recommendations contained in this report. Hon James A. Yates has also abstained.

threats to cherished Constitutional rights, amendments adding harmful new provisions to the Constitution, and double compensation for certain delegates. However, the Committee has examined these concerns and found that they do not outweigh the promise and possibility that a “Yes” vote would present. It bears emphasis that anything approved by a Convention would be a proposal only. No Constitutional change can be made unless affirmatively approved by the electorate. The voters stand as the guardians of that which should be preserved in the Constitution and can reject any proposed Constitutional changes that they regard as improper.

In its deliberations and reports, the Committee has faithfully attempted to present all issues thoroughly and dispassionately, detailing arguments for and against, followed by a conclusion. This report follows that model as an aid to the deliberations and anticipated debate in the House of Delegates, as well as to frame some of the main issues for the broader public discourse certain to occur as the November vote draws near.

Section 1 of the report presents the background work of the Committee, including prior reports and the process leading to this report and recommendations. Section 2 sets forth the principal arguments made for and against a Convention. The report then concludes with Recommendations, setting forth the basis for the Committee’s support for an affirmative vote. It also discusses related issues, such as advocating for a preparatory commission, proposing reforms to the delegate selection process, and opposing salary and pension “double dipping” by public officials.

In this report, the Committee seeks to provide not only recommendations, but also a roadmap for the rational, deliberative and well-

informed discussion New Yorkers deserve.

I. BACKGROUND OF THE REPORT

Mindful of the coming ballot referendum on whether to call a Constitutional Convention, then State Bar President David P. Miranda announced, on July 24, 2015, the creation of the Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the November ballot question; and promote initiatives designed to educate the legal community and public about the State Constitution.⁴ The Committee's membership is diverse and highly experienced with respect to State government and Constitutional law. It includes four former State Bar presidents; seven sitting and former trial and appellate jurists; former State and local legislators; former high-level executive and legislative branch officials; and other distinguished members of the Bar from around the State.

Since its establishment, the Committee has met regularly (typically once every six weeks), heard presentations from 30 distinguished authorities on different aspects of the State Constitution, and sponsored educational programs that provided valuable information about a potential Convention and related issues. Additionally, the Committee issued lengthy substantive reports on the Establishment of a Preparatory State Commission on a

⁴ Press Release, N.Y. State Bar Assn., N.Y. State Bar Assn. President Miranda Forms Committee to Study NYS Constitution (July 24, 2015), *available at* <http://www.nysba.org/NYSConstitutionReviewCommittee/>.

Constitutional Convention (October 8, 2015);⁵ Constitutional Home Rule (April 2, 2016);⁶ and the Environmental Conservation Article of the State Constitution (August 3, 2016).⁷

Most recently, on December 12, 2016, the Committee issued its fourth report, entitled “Opportunities to Restructure and Modernize the New York Courts,”⁸ which focuses on Article VI of the State Constitution, the Judiciary Article. Approximately 16,000 words long, and representing approximately one-third of the Constitution, Article VI creates the structure and organization of the court system in New York. By contrast, Article III of the United States Constitution, which outlines the court system for the Federal government, consists of a mere 375 words. In its report, the Committee reviewed a multitude of issues governed by Article VI, including its history, the design of our court system, and methods used for selecting judges of different courts. The Committee found that Article VI represents “an

⁵ N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMM’N ON A CONSTITUTIONAL CONVENTION (2015), *available at* <http://www.nysba.org/nysconstitutionreport/> [hereinafter, “Preparatory Commission Report”].

⁶ N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING CONSTITUTIONAL HOME RULE (2016), *available at* <http://www.nysba.org/homerulereport/> [hereinafter, “HOME RULE REPORT”].

⁷ N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV) (2016), *available at* <http://www.nysba.org/ArticleXIVreport/> [hereinafter, “CONSERVATION ARTICLE REPORT”].

⁸ N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., THE JUDICIARY ARTICLE OF THE N.Y. ST. CONST.: OPPORTUNITIES TO RESTRUCTURE AND MODERNIZE THE N.Y. COURTS (2017), *available at* <http://www.nysba.org/judiciaryreport2017/> [hereinafter, “JUDICIARY ARTICLE REPORT”].

unnecessarily large and complex portion of the State Constitution,” and raises critical features of New York’s legal system that are ripe for discussion. Indeed, the report maintains that a Convention would provide an opportunity to institute reforms that would “reorganize, modernize and simplify the constitutional structure of the Unified Court System,” and “improve the Judiciary in New York.”

Each of the Committee’s reports has been approved unanimously or with near unanimity by the State Bar’s policymaking body, the House of Delegates.

On January 26, 2017, the State Bar’s Executive Committee requested a recommendation from the Committee to aid it and ultimately the House of Delegates in taking a position on the November ballot question. In response, the Committee held a meeting on March 9, 2017 to hear presentations from Evan A. Davis and Arthur J. Kremer, two well-known figures in the public debate on whether to hold a Constitutional Convention,⁹ and reviewed a detailed outline summarizing arguments both for and against a Convention. The Committee met to discuss a draft report on April 6, 2017 and adopted this report on April 20, 2017.

⁹ Evan A. Davis is manager of the Committee for a Constitutional Convention, which describes itself as “a leadership group to support advocacy in favor of calling a Convention to convene in 2019 to craft proposals for voter consideration that would make needed changes in the New York State Constitution.” See website of the Committee for a Constitutional Convention, *available at* <http://www.concon19.org/>. Arthur J. Kremer is the co-author of “Patronage, Waste, and Favoritism: A Dark History of Constitutional Conventions,” a book which argues that “New York State does not need another convention to revise its constitution.” ARTHUR J. KREMER, ANTHONY M. FIGLIOLA & MARIA DONOVAN, PATRONAGE, WASTE, AND FAVORITISM: A DARK HISTORY OF CONSTITUTIONAL CONVENTIONS (2015) [hereinafter, “PATRONAGE, WASTE, AND FAVORITISM”].

II. PRINCIPAL ARGUMENTS SUPPORTING AND OPPOSING A CALL FOR A CONSTITUTIONAL CONVENTION

What follows are arguments that have been made both for and against holding a Constitutional Convention.

A. Arguments Supporting a Call for a Convention

1. A Convention Could Streamline and Modernize the Constitution

Over the last two generations, civic reformers, scholars, the media, and politicians have called for systematic and substantive reform of the State Constitution.¹⁰ The current version of the document, adopted in 1894 and amended over 200 times since, including substantial changes by the Constitutional Convention of 1938, is in significant need of revision.¹¹ Many of the provisions in the 52,500 word Constitution are: (1) outdated or obsolete;¹² (2) unconstitutional in the wake of subsequent decisions by the

¹⁰ See, e.g., Peter J. Galie & Christopher Bopst, *Constitutional ‘Stuff’: House Cleaning the New York Constitution—Part I*, 77 ALB. L. REV. 1385, 1388 n.12 (2013/2014) (citing a representative list of calls for reforming the Constitution) [hereinafter, “*House Cleaning—Part I*”].

¹¹ See *id.*

¹² Antiquated sections include the authorized issuance of state bonds that have been retired for generations. See, e.g., N.Y. CONST., art. VII, § 14 (allowing the issuance of bonds for the removal of railroad crossings at grade that were retired during the 1987-88 fiscal year); N.Y. CONST., art. VII, § 18 (allowing the legislature to create debt to pay a bonus to veterans of World War II; such debt has been retired since 1958). For a detailed analysis of the sections of the state constitution that are obsolete, see Galie & Bopst, *House Cleaning—Part I*, *supra* note 10 and Peter J. Galie & Christopher Bopst, *Constitutional ‘Stuff’: House Cleaning the New York Constitution—Part II*, 78 ALB. L. REV. 1513 (2014/2015).

United States Supreme Court;¹³ (3) wholly legislative in character;¹⁴ and/or (4) inconsistent with the demands of the modern state.¹⁵

In fact, the State Constitution has long been subject to neglect and ridicule, and is often honored in the breach.¹⁶ In contrast to the United States Constitution, our State’s fundamental document is not known or read by the public or most public servants, including many if not most government attorneys who have sworn to uphold it.¹⁷

¹³ These unconstitutional sections include the provision requiring that a public official who refuses to waive his or her Fifth Amendment privilege against self-incrimination involving the performance of official duties is to be terminated from employment and the segments of the apportionment sections of the Legislative Article that have been held to violate one-person, one-vote requirements of the United States Constitution’s Equal Protection Clause. The public officer waiver provision was held unconstitutional in *Gardner v. Broderick*, 392 U.S. 273 (1968). The apportionment scheme was held unconstitutional in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964) and *In re Orans*, 15 N.Y.2d 339, 258 N.Y.S.2d 825, 206 N.E.2d 854 (1965).

¹⁴ These include the provision in N.Y. CONST., art. III, § 24 providing the terms and conditions under which prison labor may be used.

¹⁵ These include portions of the public debt and finance provisions written in the 1840s. For a description of how the state’s finance provisions are inconsistent with financing mechanisms used in the twenty-first century, see Kenneth Bond, ‘*Till Debt Do Us Part: The Opportunity for New York Finance Law to Enter the Twenty-first Century*, in *NEW YORK’S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS* 187 (Peter J. Galie, Christopher Bopst & Gerald Benjamin, eds., 2016) [hereinafter, “BROKEN CONSTITUTION”].

¹⁶ Galie & Bopst, *House Cleaning—Part I*, *supra* note 10, at 1388 (“By trivializing its content, these provisions have done more than discourage reading: they have derogated from the constitution’s character as a fundamental document, engendering disrespect if not ridicule.”).

¹⁷ Henrik Dullea, *We the People: A Constitutional Convention Opens the Door to Reform*, Vol. 89/No. 2 N.Y. ST. B.J. 32, 32 (Feb. 2017) (“When it comes to the New York State Constitution, most people aren’t aware of its existence. Even the hundreds of thousands of public employees who, when taking their oaths of office, swear or affirm that they ‘will support the constitution of the United States, and the constitution of the

2. A Convention Is Needed to Fix Basic Structural Problems with State Government

The workings of many institutions of New York State government are inextricably tied to, and impaired by, the State Constitution. Of concern is the Constitution's Judiciary Article (Article VI), which promises a unified court system and then proceeds to establish the most byzantine and complex system in the nation. In painstaking detail, the Judiciary Article describes the composition of the State's eleven trial-level courts, the most in the nation (California, a state with approximately double the population of New York, has one trial level court).¹⁸ Despite numerous pleas for reform by Chief Judges of the State dating back to Charles Breitel in 1974,¹⁹ and multiple recommendations by blue ribbon panels for court consolidation and mergers,²⁰ change has not occurred. New York's byzantine court system is not merely a matter of academic concern; the New York State Special Commission on the Future of the New York State Courts has concluded that

State of New York' generally have absolutely no idea as to what they are promising to uphold.”).

¹⁸ NEW YORK STATE SPECIAL COMMISSION ON THE FUTURE OF THE NEW YORK STATE COURTS, A COURT SYSTEM FOR THE FUTURE: THE PROMISE OF COURT RESTRUCTURING IN NEW YORK STATE 30-32 (2007), *available at* http://www.nycourts.gov/reports/courtsys-4future_2007.pdf [hereinafter, “A COURT SYSTEM FOR THE FUTURE”].

¹⁹ Chief Judge Judith S. Kaye, Testimony before Joint Legislative Hearing on Court Restructuring, October 7, 1997, https://www.nycourts.gov/press/old_keep/cjtestim.shtml (accessed Mar. 21, 2017).

²⁰ *See, e.g.*, A COURT SYSTEM FOR THE FUTURE, *supra* note 18, at 67-78; NEW YORK STATE SPECIAL COMMISSION ON THE FUTURE OF THE NEW YORK STATE COURTS, “JUSTICE MOST LOCAL: THE FUTURE OF TOWN AND VILLAGE COURTS IN NEW YORK STATE” 83-103 (2008), *available at* http://www.nycourtreform.org/Justice_Most_Local_Part1.pdf.

these inefficiencies cost the State, litigants, employers and municipalities approximately \$502 million in unnecessary spending annually.²¹

In a similar vein, the State’s relationship with its municipalities is a source of ongoing tension and frustration for many local officials.²² The Local Government Article (Article IX) added to the State Constitution in 1963 remains un-amended since the time of its adoption.²³ This article, which was intended to give local governments significant autonomy over their own affairs, has not realized its potential. The article was intended to eliminate the State’s power to pass special laws on matters of purely local concern without the consent of the impacted municipality.²⁴ In practice, however, this limitation has proven illusory. The Legislature today has unfettered authority to enact legislation impacting municipalities that involve matters of “state concern.”²⁵ Additionally, unlike other states, New York’s State Constitution contains no provision to protect municipalities from unfunded mandates.²⁶

²¹ See A COURT SYSTEM FOR THE FUTURE, *supra* note 18, at 96.

²² See HOME RULE REPORT. *supra* note 6, at 2-3, 20-21, 25-33.

²³ See N.Y. Const., art. IX; HOME RULE REPORT. *supra* note 6, at 7-15.

²⁴ See HOME RULE REPORT. *supra* note 6, at 13-15.

²⁵ See *id.* at 23-28; Richard Briffault, ‘Mind The Gap:’ *The Promise and Limits of Home Rule in New York*, in BROKEN CONSTITUTION, *supra* note 15, at 170 for a description of *Greater New York Taxi Assn. v. State*, 21 N.Y.3d 289, 970 N.Y.S.2d 907, 993 N.E.2d 393 (2013), a case in which the court of appeals unanimously upheld State legislation regulating medallion cabs and livery vehicles in New York City only, which legislation had been adopted without a home rule message.

²⁶ See HOME RULE REPORT. *supra* note 6, at 29-30.

Thus, a Convention would provide the opportunity to consider fundamental reforms to New York’s court system, reinvigorate New York’s local governments, fix basic structural problems in the State, enhance the overall performance of government, and strengthen public ethics.

3. A Convention Provides an Opportunity to Establish New Positive Rights

The current Constitution does not include some rights that have been recognized by the United States Supreme Court (e.g., right to marriage for same-sex couples, reproductive rights) or potential new rights that New Yorkers may wish to enshrine in their basic law (e.g., environmental bill of rights, Equal Rights Amendment, expanded privacy rights). Similarly, although the State Constitution safeguards certain voting rights,²⁷ the State Bar has previously adopted a position calling for much-needed changes to modernize registration procedures to permit, for example, same-day registration and early voting. Such measures would increase overall voter participation, which remains at historically low levels in New York.²⁸

²⁷ See N.Y. CONST., art. II, § 1 (“Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election.”). The Legislature by statute has lengthened this registration period from the constitutional minimum of 10 days before an election to 25 days prior to an election. N.Y. ELEC. LAW § 5-210.

²⁸ See N.Y. STATE BAR ASSN. SPECIAL COMMITTEE ON VOTER PARTICIPATION, FINAL REPORT 1 (2013), available at <http://www.nysba.org/voterreport/> [hereinafter, “VOTER PARTICIPATION REPORT”] (“In both national and local elections voter participation in the State of New York has for over a decade been far below that of most other states. New York also compares unfavorably to other states in the percentage of its eligible citizens who are registered to vote[.]”) (citations omitted). See also *New York: Voter Turnout Appears to be Record Low*, N.Y. Times, Nov. 6, 2013 (“Turnout in Tuesday’s election for New York City mayor appeared to have set a record low of 24

Thus, a Convention would provide an opportunity to enhance existing positive rights or propose new ones that the Constitution’s framers did not envision. Prior Constitutional Conventions proposed positive rights, approved by the voters, that are among the State’s most cherished. For example, the 1938 Convention established a requirement to care for the State’s needy²⁹ and a right to collective bargaining.³⁰

4. There is No Practical Alternative to a Convention for Enacting Needed Reforms

A Constitutional Convention is the only practical way to make necessary major changes to the State Constitution. The Legislature could, if it wanted, propose Constitutional amendments. The Constitution provides that it may be amended through legislatively initiated amendments.³¹ In this

percent of registered voters.”), *available at* https://www.nytimes.com/news/election-2013/2013/11/06/new-york-turnout-appears-headed-for-record-low/?_r=0; Matthew Hamilton, Report: *New York ranks 41st in voter turnout in 2016*, Albany Times Union, Mar. 16, 2017 (citing report from Nonprofit VOTE that showed “New York ranked 41st in the country for voter turnout in the 2016 general election, with just more than 57 percent of the ‘voting-eligible population’”), *available at* <http://blog.timesunion.com/capitol/archives/273112/report-new-york-ranks-41st-in-voter-turnout-in-2016/>. Presently, the State Constitution requires registration to occur at least 10 days prior to an election. *See* N.Y. CONST., art. II, § 5 (“Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters; which registration shall be completed at least ten days before each election. Such registration shall not be required for town and village elections except by express provision of law.”).

²⁹ *See* N.Y. CONST., art. XVII, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”).

³⁰ *See* N.Y. CONST., art. I, § 17 (“Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.”).

³¹ *See* N.Y. CONST., art. XIX, § 1 (“Any amendment or amendments to this constitution may be proposed in the senate and assembly whereupon such amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty

process, an amendment must be adopted by two consecutively-elected legislatures, and then approved by a majority of the voters voting on the question.³² However, there is no reason to believe the Legislature is willing to address the State's Constitutional deficiencies in a comprehensive way, or will be able to resolve in the next 20 years the problems not fixed over the past several decades.

Thus, a Constitutional Convention presents a unique opportunity to enact comprehensive Constitutional reforms. If the State misses this opportunity in 2017, it will likely not have another chance until 2037.

days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his or her failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.”).

³² *Id.* The State Constitution has been frequently amended in this manner. There have been 222 legislatively initiated amendments approved by voters since the 1894 Constitution took effect. The number of amendments, however, does not necessarily correlate with an effective Constitution. However, the number of amendments in recent decades has dropped significantly.

B. Arguments Opposing a Call for a Convention

1. A Convention Places at Risk Cherished Constitutional Rights

A Convention could open a Pandora’s Box of potential constitutional mischief, placing at risk of elimination or alteration cherished fundamental rights.³³ It is hard to imagine New York State without the right to a free education;³⁴ the right to “freely speak, write and publish [one’s] sentiments on all subjects”;³⁵ the “forever wild” protection for the Adirondack and Catskill Parks;³⁶ the mandate for State provided “aid, care and support” for

³³ See, e.g., Assn. of the Bar of the City of N. Y., REPORT OF THE TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION, 52 RECORD OF THE ASSN. OF THE CITY BAR OF N.Y. 535-36 (1997) [hereinafter, “CITY BAR 1997 TASK FORCE REPORT”] (“[T]ime-honored provisions, which in many cases afford greater protection than the United States Constitution, would be opened to amendment or repeal by a constitutional convention.”); Ned Hoskins, *Why we must say NO to a state constitutional convention*, NYSUT UNITED (Jan. 26, 2016) (quoting NYSUT Vice President Paul Pecorale, “Delegates to a possible convention can essentially blow up the way of life New Yorkers enjoy and the expectations and priorities each of us have. . . Whether it's public education, collective bargaining, our retirement security, environmental protections, spending caps in the budget, or any other issue one cares about, it's all at risk.”), available at <http://www.nysut.org/news/nysut-united/issues/2016/february-2016/why-we-must-say-no-to-a-state-constitutional-convention>.

³⁴ See N.Y. CONST., art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”).

³⁵ N.Y. CONST., art. I, § 8 (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”).

³⁶ See N.Y. CONST., art. XIV, § 1 (“The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands.”).

the needy;³⁷ pension rights for public employees;³⁸ and the “bill of rights for labor,” including the rights to workers’ compensation, belonging to a union and collective bargaining.³⁹ The current State Constitution, with its focus on individual liberty, social welfare, and the environment, in many cases affords greater protections for its citizens than the United States Constitution.

A Constitutional Convention has the potential to place at risk established protections and other longstanding provisions by opening up the entire Constitution, without limitation, for extensive modifications. Should those rights that have no equivalent in the United States Constitution, such as the mandate to aid the needy, be weakened or eliminated, they could be lost for at least the next twenty years, if not longer.

2. A Convention Could Add Harmful New Provisions to the Constitution

Just as a Convention could propose eliminating established Constitutional rights, it could also propose new provisions that would be highly controversial and divisive and/or harmful to responsible governance. For example, while some argue that the Constitution should be amended to add limits on State debt, recalibrate the balance of power between the

³⁷ N.Y. CONST., art. XVII, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”).

³⁸ N.Y. CONST., art. V, § 7 (“After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.”).

³⁹ N.Y. CONST., art. I, §§ 17 (labor not a commodity; hours and wages in public work; right to organize and bargain collectively), 18 (workers’ compensation).

Governor and Legislature in the State budget process, and establish an environmental bill of rights, others warn that such amendments could lead to unintended and deleterious consequences for the State. To be sure, reasonable minds can differ on such controversial and complex issues, and often do.⁴⁰ In any event, since a Convention opens up the entire Constitution for potential revisions, there is no way to control or limit the delegates' ability to propose changes to the document.

3. A Convention will be Faced with the Same Political Hurdles that Undermine the Legislative Process

Ensuring a fairly represented and balanced Constitutional Convention process requires a diverse body of delegates untethered to special interest group financing, with varied political leanings, integrity and sincere concern. Some argue, however, that a Convention's outcome will be constrained by a partisan and possibly unlawful delegate selection process under New York State and Federal campaign and election laws.⁴¹ Candidates for delegate must engage in political campaigns that may be financed by campaign contributions from special interests. As is the case in other political spheres,

⁴⁰ Nothing herein should be construed as taking a position, one way or the other, on such issues.

⁴¹ See, e.g., CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 535 ("If a constitutional convention were called in 1997, delegates would be elected in November 1998 under the present system, thus risking not only a lack of fair representation among delegates to the convention, but also the prospect of costly Voting Rights Act litigation."); *Diverse Perspectives*, 70 N.Y. ST. B.J. 9 (1998) ("The Executive Committee [of NYSBA] voted at its June 1997 meeting to oppose a constitutional convention absent legislative approval of a delegate selection process that would assure full and fair citizen participation. Concerns included the use of a multimember district selection process, in light of the Voting Rights Act, and the need for sufficient opportunity for broad participation to provide diverse participation in addressing issues that would be raised at a convention.").

the financial influence of special interests could undermine the ability of delegates to serve the public interest. In other words, special interests could command excessive influence over a Convention, as is argued they often do in the Legislature.

According to some commentators, Conventions have historically been similar to a typical legislative session, influenced by Albany insiders and special interests.⁴² They argue that because the current delegate selection process virtually ensures that many delegates will be legislators, judges, and other politically-connected individuals, the Convention would be controlled by those who are unlikely to propose significant reforms or otherwise disturb the status quo.⁴³

4. Legislators and Judges Serving as Delegates Will Receive Double Salaries

There is no Constitutional bar to sitting legislators or judges simultaneously serving as delegates to a Constitutional Convention. The Constitution mandates that a delegate “shall receive for his or her services the same compensation as shall then be annually payable to the members

⁴² See KREMER, FIGLIOLA & DONOVAN, PATRONAGE, WASTE, AND FAVORITISM, *supra* note 9, at 1 (“The fact is, constitutional conventions in New York may have a noble purpose and are filled with lofty goals, but they often fell victim to the same types of hurdles that a typical session of the state legislature does.”).

⁴³ See, e.g., Alan Chartock, *One big problem with New York state constitutional conventions*, DAILY FREEMAN, Sept. 25, 2016 (“The problem [with a Constitutional Convention] is, and even the proponents of the proposed convention know it, that the same politicians who are always protecting their fannies by refusing to pass sensible ethics reform will be the ones controlling the proposed Convention. Why in the world would they or their hack friends vote for the same sort of reform in a Constitutional Convention?”) [hereinafter, “One big problem”], available at <http://www.dailyfreeman.com/opinion/20160925/alan-chartock-one-big-problem-with-new-york-state-constitutional-conventions>.

of the Assembly,” regardless of how long the Convention lasts.⁴⁴ The Constitution also prevents the reduction of salaries for legislators or judges by statute during their terms.⁴⁵ As a result of these provisions, those individuals who simultaneously serve as delegates and legislators or judges will be able to receive two public salaries, so-called “double dipping.”⁴⁶ In addition, because pensions are based upon total earnings over three consecutive years, legislators or judges who serve as delegates may be able to enhance their pensions.⁴⁷

⁴⁴ See N.Y. CONST., art. XIX, § 2 (“Every delegate shall receive for his or her 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.”).

⁴⁵ See N.Y. CONST., art. III, § 6 (“Neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he or she shall have been elected, nor shall he or she be paid or receive any other extra compensation.”), & art. VI, § 25.a. (“The compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a judge of the county court, a judge of the surrogate’s court, a judge of the family court, a judge of a court for the city of New York established pursuant to section fifteen of this article, a judge of the district court or of a retired judge or justice shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed.”).

⁴⁶ CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 541-43.

⁴⁷ See *id.* at 542. The Constitution provides that the benefits of membership in any State or local pension system “shall not be diminished or impaired.” N.Y. CONST., art IV, § 7. Several sections of New York’s Retirement and Social Security Law were amended to cover the delegates to the 1938 and 1967 Constitutional Conventions by specifically including their service as “government service” when they were delegates. See, e.g., Retire. & Soc. Sec. Law §§ 2 (definition of “annual compensation”), 44 (with respect to 1967 delegates in local pension system), 216(a) (regarding re-employment of 1967 delegates), & 302(12)(a)(1) (with respect to members of police and fire pension systems).

Such “double dipping” and pension enhancements are problematic for a number of reasons. First, “the perception of public officials using the convention to engage in double dipping would significantly undermine public confidence in the integrity of the process.”⁴⁸ Second, “[i]t is wrong for an elected official or any person to be paid two annual salaries for public service in the same year.”⁴⁹ Third, the prospect of dual compensation will give sitting legislators and judges an inappropriate financial incentive and motivation to serve as delegates — especially in view of the salary levels involved.⁵⁰ A Convention should not become an opportunity for individuals who are already on the public payroll to enhance their salaries and pensions.⁵¹

⁴⁸ CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 542; *cf.*, N.Y.C. BAR TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION, REPORT ON DELEGATE SELECTION PROCEDURES 2 (Feb. 2016) (“Though the Task Force has concerns about whether government officials elected as delegates should be able to accept the delegate salary in addition to the salaries they earn from their government position, current constitutional provisions lead to the conclusion that all public officials should be entitled to collect delegate salaries in addition to their other salaries, as has been done at past conventions.”), *available at* <http://www2.nycbar.org/pdf/report/uploads/20073044-DelegateSelectionProceduresConConReportFINAL2.9.16.pdf>.

⁴⁹ TEMPORARY N.Y. ST. COMM’N ON CONSTITUTIONAL REVISION, *The Delegate Selection Process: Interim Report of the Temporary New York State Commission on Constitutional Revision* (March 1994), *reprinted in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 434 (Gerald Benjamin & Hendrik N. Dullea eds., 1997) [hereinafter, “*Delegate Selection Process*”] (quoting concurring statement of commission member Malcolm Wilson).

⁵⁰ *Delegate Selection Process*, *supra* note 49, at 426; CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 542.

⁵¹ CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 541.

5. A Convention is Unnecessary

Some argue that a Convention should only be held if it provides the sole avenue to amend the Constitution. Because a Convention is unnecessary to amend the Constitution, which can be amended through a legislatively initiated process,⁵² the risks associated with holding a Convention cannot be justified. In fact, the legislative process has been used to amend the Constitution over 200 times in the past 100 years.⁵³ Accordingly, “there is virtually nothing that a Constitutional Convention would do that the Legislature couldn’t do.”⁵⁴

⁵² N.Y. CONST., art. XIX, § 1 (“Any amendment or amendments to this constitution may be proposed in the senate and assembly whereupon such amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his or her failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.”).

⁵³ Seth H. Agata, *Should New York Have a constitutional convention? No*, STATE BAR NEWS (Nov./Dec. 1996), at 16 (“While there may be a desired reform, a convention may not be the most appropriate avenue by which to achieve it. There is an amendment process which affords the public the opportunity to consider discrete, carefully crafted reform.”).

6. A Convention Will be Expensive

The staging of a Constitutional Convention would be a highly expensive enterprise. The 1967 Constitutional Convention cost taxpayers as much as \$15 million.⁵⁵ The cost of a Convention in 2019 would likely dwarf that figure, with the largest expense being salaries for delegates and staff.

III. RECOMMENDATIONS

The Committee has carefully considered the arguments summarized above, among others, both for and against a Convention. Both sides of the debate present serious, thoughtful views about the possibilities and risks of a Convention. The Committee carefully reviewed reasons not to support a Convention, and agreed that they raise serious concerns. The difficult question the Committee struggled with was whether the potential for making major improvements in the State Constitution through a Convention outweighs the risks in holding one.

In the end, the Committee concluded that the State should not forfeit this rare, generational opportunity to modernize and significantly improve

⁵⁴ Chartock, *One big problem, supra* note 43 (“We are talking about spending millions of dollars of the people’s money to make this happen, when there is virtually nothing that a Constitutional Convention would do that the Legislature couldn’t do. They just won’t. So, if one and one make two and the Legislature won’t do what has to be done, why should we believe that a convention would fare any better?”).

⁵⁵ See Bill Mahoney, *How the Cost of a Convention Became Urban Legend*, POLITICO/NEW YORK, Feb. 9, 2017 (noting that Henrik Dullea, an expert on the 1967 Constitutional Convention, believed that the total cost to prepare for and stage that Convention exceeded \$10,800,000, but doubted that it topped \$15 million) [hereinafter, “*Cost of a Convention*”], available at <http://www.politico.com/states/new-york/albany/story/2017/02/how-an-implausible-cost-estimate-for-a-constitutional-convention-spread-109467>.

the Constitution that forms the foundation of State government. Accordingly, the Committee recommends that the State Bar support a Convention call, primarily because a Convention presents the one practical opportunity this generation will likely have to modernize and restructure New York's court system.

Court reorganization is a matter of supreme importance to the legal profession, and a subject on which the State Bar has long and repeatedly advocated. For too long lawyers and their clients have had to accept and endure a costly and byzantine system that few understand, and no one can justify. Despite the best efforts of reformers, the Legislature has shown little interest in consolidating trial courts or taking other steps that would significantly improve the delivery of justice. Forty years of commissions, studies and reports by the State Bar and others have not yielded the structural changes necessary to ensure an efficient, modern and sustainable system that will provide access to justice for all.⁵⁶ Thus, the Committee sees

⁵⁶ JUDICIARY ARTICLE REPORT, *supra* note 8, at 2, 34-70. For example, the Fund for Modern Courts has repeatedly called for court simplification, and in 2011, the Fund organized a broad-based coalition, which was supported by the State Bar, to advocate for this reform. See <http://moderncourts.org/programs-advocacy/courtstructuring-and-simplification/>; see also N.Y. ST. BAR ASSN., REPORT OF ACTION UNIT NO. 4 (COURT REORGANIZATION) TO THE HOUSE OF DELEGATES ON TRIAL COURT MERGER AND JUDICIAL SELECTION (1979); see also Jan Hoffman, *Chief Judge Offers a Plan to Consolidate the Court System*, N.Y. TIMES (Mar. 20, 1997), available at <http://www.nytimes.com/1997/03/20/nyregion/chiefjudge-offers-a-plan-to-consolidate-the-court-system.html>. So, too, The New York City Bar Association has frequently supported consolidating all trial courts into a single trial court of general jurisdiction. See September 27, 1977 Association Statement to the Assembly Committee on the Judiciary by Michael A. Cardozo (Chair, Committee on State Courts of Superior Jurisdiction); April 24, 1979 Association Statement to the Senate Judiciary Committee by Merrell E. Clark, Jr. (President); "Legislative Proposals on Court Merger and Merit Selection of Judges," by the Committee on State Courts of Superior Jurisdiction, 35 THE RECORD 66 (1980); December 5, 1983 Association Statement to the Senate and Assembly Judiciary Committees by Michael A. Cardozo (Chair, Council on Judicial Administration);

a Convention as the most efficient path to achieving fundamental court reform.

Notably, the League of Women Voters, which opposed a Constitutional Convention in 1997, now has called for a Convention in 2019, citing court reform as an issue that could be taken-up “that Albany has refused to undertake.”⁵⁷ Likewise, Citizens Union of the City of New York supports a “Yes” vote on the November ballot question because a Convention would provide an opportunity to “streamline and enhance operations” of the court system, “with a consolidated trial court system and merit-based appointments for judges.”⁵⁸

September 30, 1985 Association Statement to the Senate Judiciary Committee by Bettina B. Plevan (Chair, Council on Judicial Administration). In 1997, the City Bar, under its then President Michael A. Cardozo, supported Chief Judge Kaye’s plan to create a two-tier trial court in New York. Assn. of the Bar of the City of New York, Council on Judicial Administration, *The Chief Judge’s Court Restructuring Plan, with Certain Modifications, Should Be Adopted*, available at http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=46.

⁵⁷ Press Release, League of Women Voters of New York State, *League of Women Voters of New York State Announces Support for 2017 Constitutional Convention Ballot Question* (Mar. 27, 2017) (“A Constitutional Convention would provide New Yorkers the opportunity to consider critical reforms that Albany has refused to undertake, including in the areas of . . . [s]tremlining and modernizing our court system, making it more effective”), available at http://lwvny.org/programs-studies/concon/2017/Press-Concon_032717.pdf.

⁵⁸ Citizens Union of the City of New York, *Policy Position on the 2017 Constitutional Convention Ballot Question*, available at <https://echalk-slate-prod.s3.amazonaws.com/private/districts/466/resources/e300a6e5-0229-44e7-a61b-a80cd9fee545?AWSAccessKeyId=AKIAIZQPKIVDQVS7TUJA&Expires=1790866192&response-content-disposition=%3Bfilename%3D%22Position%2520in%2520Support%2520of%2520ConCon%2520-%252012-2015.pdf%22&response-content-type=application%2Fpdf&Signature=fvgebwKPPI26CjyztP2HnA7zh1I%3D>.

Also, there is much-needed “house cleaning” of the Constitution to remove anachronisms, redundancies and needless details that demean the document.⁵⁹ The Committee’s own detailed look at the Judiciary and Conservation Articles identified opportunities to streamline and improve the document, even without making significant substantive changes.

Furthermore, “[w]hereas citizens of New York might once have seen themselves as on the cutting edge as to the registration and voting process, that is no longer the case.”⁶⁰ Certain election administration reforms such as Election Day and same-day registration would require Constitutional amendment, and a Convention would provide an opportunity to consider these and other measures to enhance voter participation.

More broadly, the State Constitution was meant to be amended over time to reflect the needs and concerns of each era, while remaining a foundational document.⁶¹ The Constitution proposed by the 1894 Convention continued the basic structure of the government and adopted

⁵⁹ The text of the Judiciary Article alone comprises approximately 16,000 words, representing almost one-third of the State Constitution. The City Bar’s 1997 Report of the Task Force on the New York State Constitutional Convention called the article “substantially more comprehensive and detailed than any other part of the Constitution.” CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 595. *See also* Galie & Bopst, *House Cleaning—Part I*, *supra* note 10, at 1424 (“[T]here are numerous provisions of the article that can either be removed or truncated without significantly changing the substantive nature of the article.”).

⁶⁰ VOTER PARTICIPATION REPORT, *supra* note 28, at 1.

⁶¹ In his capacity as President of the 1915 Constitutional Convention, Elihu Root said: “The most obvious duty before us is to scrutinize attentively the framework of the State government in order to ascertain in what respect, if any, the established institutions are insufficient or ill-adapted to accomplish the ends of government. Great changes have come in the industrial and social life of the State since the last convention.” ‘*Save Rights*’ – Root, *Washington Post*, Apr. 7, 1915.

fundamental protections such as “forever wild,” while also bringing “good government” ideas and protections into the structure of State government. The amendments proposed by the 1938 Convention responded to the Great Depression by addressing the need for social justice and the demands of a modern administrative state. The 1967 Convention, called in the wake of the “one-person, one-vote” decisions of the United States Supreme Court, proposed a Constitution (ultimately rejected by voters) that attempted to further refine the Constitution. Approximately once a generation, until 1967, New Yorkers had seized the opportunity to reconsider the fundamentals of how we govern ourselves.

However, with respect to significant structural issues of governance, the Constitutional amendment process has long been dysfunctional.⁶² There has been no Constitutional Convention in 50 years, and no new Constitution in nearly 120 years. As a result, we have a Constitution that, despite its

⁶² See John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, MONT. L. REV. 395, 396 (2010) (“For many years, constitutional conventions were called regularly; however, in recent years they have become increasingly rare. In the 195-year period from 1776 to 1970, the 50 states held 220 conventions, and most were called by legislatures, which are generally, but not always, required to obtain approval from the people beforehand; but the 40-year period from 1971 to 2010 has produced only 13 conventions (and none after 1992).”) (citations omitted). Over the last three decades, legislatively initiated amendments to the State Constitution have declined in number relative to the period before then. For example, from 1986 to 2015, the State Legislature submitted 32 amendments to the voters, who approved 26 of them. See Peter J. Galie & Christopher Bopst, *Constitutional Revision in the Empire State: A Brief History and Look Ahead*, in MAKING A MODERN CONSTITUTION: THE PROSPECTS FOR CONSTITUTIONAL REFORM IN NEW YORK 77, 89 (Rose Mary Bailly & Scott N. Fein, eds., 2016). Contrast this with the ten-year period between 1956 and 1965, when voters approved 36 of the 46 amendments placed before them. *Id.* Ironically, when most needed to provide Constitutional revision during the longest convention drought in New York’s history, the Legislature has adopted the least number of amendments in generations. Most significantly, the amendments that have been approved during the last 30 years have largely been tinkering around the edges.

timeless values and storied provisions, contains simply too much detritus and unreadable verbiage and does not meet the ever-changing problems of our time.

Although the Committee supports a 2019 Convention, there are serious, good faith concerns that have been expressed about calling one. For example, some are fearful that certain fundamental rights would be at risk of alteration or elimination if a Convention were held. It is true that delegates would not be prohibited from proposing such changes. But the Committee believes it is unlikely Convention delegates in sufficient numbers would rollback established rights, given the State's history and political demographics.⁶³ The nine constitutional conventions held during the State's history have accounted for almost every single right — individual and collective — present in the Constitution today.⁶⁴ There is no empirical basis for believing that the 204 Convention delegates who will be elected by New Yorkers (three per senate district, and 15 at large delegates) would undermine the State's core principles. Moreover, the Constitutional requirement that any proposals from the Convention must be approved by

⁶³ Peter J. Galie, Christopher Bopst & Gerald Benjamin, *Coda*, in their *BROKEN CONSTITUTION*, *supra* note 15, at 307-310; Peter J. Galie, *A Pandora's Box: Holding a Constitutional Convention in the State of New York* in *TEMPORARY STATE COMMISSION ON CONSTITUTIONAL REVISION, EFFECTIVE GOVERNMENT FOR THE NEW CENTURY: A REPORT TO THE PEOPLE, THE GOVERNOR AND THE LEGISLATORS OF NEW YORK* 69-81 (1995).

⁶⁴ See Peter J. Galie & Christopher Bopst, *Another Voice: Constitutional Convention is Needed to Reshape State*, *BUFFALO NEWS*, Feb. 1, 2017, available at <http://buffalonews.com/2017/02/01/another-voice-constitutional-convention-needed-reshape-state/>.

the voters⁶⁵ would make the roll back of any rights even more unlikely.

In this regard, the Committee undertook a detailed study of Article XIV, dealing with Environmental Conservation, which included a historical examination of the “forever wild” clause, an oft-cited example of one such precious provision that could be threatened by a Convention.⁶⁶ The historical record demonstrated that the “forever wild” clause — itself a product of the 1894 Constitutional Convention in response to insufficient statutory protections for the State Forest Preserve — had been addressed at multiple Conventions and had never been weakened, but instead has been consistently affirmed.⁶⁷ Thus, at least with respect to the “forever wild” clause, the Committee found no evidence supporting fears that delegates at a 2019 Convention would try to repeal it, but rather, a solid 120-year history of strengthening coupled with a host of other provisions deserving serious study and consideration.⁶⁸

⁶⁵ See N.Y. CONST., art. XIX, § 2.

⁶⁶ CONSERVATION ARTICLE REPORT, *supra* note 7, at 11-15.

⁶⁷ *Id.* at 19.

⁶⁸ See *id.* at 19 (“In 1997, when New York held its last mandatory referendum on whether to call a Constitutional Convention, concern that a Convention might consider ill-advised changes to Article XIV prompted opposition in some quarters. After more than 120 years, however, the forever wild clause remains intact. Throughout its history, there has never been broad-based public support for repealing or diluting the forever wild protections, and nothing in the lengthy record of past Conventions and amendments to Article XIV suggest that delegates to a 2019 Convention would seek to do so. In any event, worries over the forever wild clause’s future should not inhibit study and robust debate over other provisions in Article XIV. Simply put, while there is no reason to modify the forever wild clause, opportunities to simplify and enhance other provisions in Article XIV merit serious consideration by policymakers and the public.”).

In short, the Committee is unpersuaded that delegates to a 2019 Convention or the public at large would be moved to rip out of the State Constitution fundamental rights and freedoms.

Likewise, the Committee is not persuaded that the costs of staging a Convention, sizable though they may be, provide sufficient reason to cast a “No” vote on the November ballot question. Depending on the source, calculations of the cost of the most recent Convention in 1967 ranged from \$6.5 million⁶⁹ to \$15 million (approximately \$47 million to \$108 million in 2017 dollars).⁷⁰ This is a significant amount of money, but even at \$108 million in 2017 dollars, represents less than one-tenth of one percent of the State’s 2017-2018 budget.⁷¹ This is a good investment if it leads to a better functioning State government.

Finally, the Committee carefully considered a number of procedural issues relating to a Convention, some of which were the basis for several groups (including the State Bar) opposing a Convention call in 1997.⁷²

⁶⁹ Civil Service Employees Association, New York State Constitutional Convention, *available at* <https://cseany.org/wp-content/uploads/2015/10/con-conflier.pdf>.

⁷⁰ *See Mahoney, Cost of a Convention, supra* note 55.

⁷¹ *See* State of New York, Andrew M. Cuomo, FY 2018 EXECUTIVE BUDGET FINANCIAL PLAN, *available at* <https://www.budget.ny.gov/pubs/executive/eBudget1718/financialPlan/FinPlan.pdf>.

⁷² *See* N.Y. St. Bar Assn., Minutes of Executive Committee Meeting (June 26-27, 1997) (setting forth resolution opposing call for Constitutional Convention in the absence of legislative reform of the delegate selection process); *see also, e.g.,* CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 537-38 (“On balance, we conclude that a constitutional convention should not be called by the November 1997 referendum. Without a mandate for comprehensive reform, and improvement of the process by which

These issues include delegate selection concerns (particularly worries about multimember district elections for Convention delegates as violative of the Federal Voting Rights Act), concerns about dominance of the Convention by interest groups and sitting legislators, and concerns about dual compensation for legislators and judges. Here again, the Committee found that these concerns do not outweigh the potential benefits from holding a Convention, although they should nevertheless be addressed, especially if voters call for a Convention this November.

Thus, although the Committee recommends that the State Bar support a Convention call, we nevertheless believe that, between the calling of a Convention and its commencement in April 2019, the State Bar should continue to urge policymakers to establish a preparatory commission, reform the delegate selection process and address the subject of dual compensation by delegates, as explained below.

- **Establishing a Preparatory Commission**

The Committee's first report in the fall of 2015 described the history of preparatory commissions and constitution review commissions that have been called since the 19th Century to prepare for the 20-year vote or for a Convention called by legislation. During the 20th Century, the question of whether to hold a Constitutional Convention was placed before the voters on seven occasions (1914, 1916, 1936, 1957, 1965, 1977 and 1997) and was answered in the affirmative three times, resulting in Constitutional

convention delegates would be elected, we have little confidence that a constitutional convention would offer a realistic possibility of achieving satisfactory reform.”).

Conventions held in 1915, 1938 and 1967.⁷³ Preparatory commissions were established by the State in advance of these Conventions as well as the mandatory Convention votes in 1957 and 1997.⁷⁴ Initial indications following the Committee's first report in the fall of 2015 and advocacy by other organizations on this same issue seemed to favor creation of such a Commission prior to the November 2017 vote. However, this effort has thus far not been successful. In the event a Convention is called in November 2017, there will be relatively little time to undertake the preparations necessary for an effective Convention in the spring of 2019. Therefore, the State Bar should renew its call for establishment of a preparatory commission as soon as possible, and in any case, immediately following an affirmative vote to the November ballot question.

- **Reforming the Delegate Selection Process.**

The State Bar's Executive Committee opposed the 1997 Constitutional Convention vote over concerns about delegate selection,⁷⁵ joining other organizations such as the League of Women Voters.⁷⁶ Although a range of

⁷³ The 1915 and 1967 Conventions were called in response to affirmative votes by the electorate to ballot questions initiated by the State Legislature — not the 20-year mandatory referendum provided for under the State Constitution. In the 20th Century, the 1938 Convention was the only Convention held as a result of an affirmative vote in response to a mandatory referendum. See GALIE, ORDERED LIBERTY, *supra* note 2, at 188, 230-31, 307-08.

⁷⁴ See the full discussion of these issues in the Committee's PREPARATORY COMMISSION REPORT, *supra* note 5, at 6-19.

⁷⁵ N.Y. St. Bar Assn., Minutes of Executive Committee Meeting (June 26-27, 1997) (setting forth resolution opposing call for Constitutional Convention in the absence of legislative reform of the delegate selection process).

⁷⁶ League of Women Voters of New York, *1993 Constitutional Convention Position*, available at

issues surfaced over delegates, including dual office-holding by sitting public officials, overly partisan “slate elections,” and campaign finance, the primary issue concerned potential Federal Voting Rights Act violations occasioned by the constitutionally prescribed multimember districts for election of delegates.⁷⁷ The multimember district procedures in Article XIX, Section 2 long pre-date modern voting rights laws and court decisions which strongly disfavor such districts because they tend to prevent minority voters from electing a candidate of their choice. Various remedies were studied and proposed prior to the 1997 vote, including a comprehensive study by the State Temporary State Commission on Constitutional Revision (often referred as the “Goldmark Commission”)⁷⁸ and thorough examination of the question by the New York City Bar Association.⁷⁹ The Committee recommends that, following a Convention call, consideration should be given to favoring or requiring reform of voting procedures to ensure Voting Rights Act compliance and avoid undue partisanship prior to any Convention delegate elections in 2018. Numerous campaign finance proposals are also worth serious study and consideration.

<http://www.lwvny.org/advocacy/impact/issues/government/ConstitutionalConvention.pdf> ; League of Women Voters of New York, *LWVNY Opposes Constitutional Convention*, State Board Report (Jan. 1997).

⁷⁷ N.Y. CONST. art. XIX, § 2.

⁷⁸ *Delegate Selection Process*, *supra* note 49, at 407-434.

⁷⁹ Assn. of the Bar of the City of N. Y., Task Force on the N.Y. St. Constitutional Convention, *Countdown to the Constitutional Referendum: A Report on Delegate Selection, Election and Ethics Issues*, 50 THE RECORD 748 (June 1995) [hereinafter, “City Bar Countdown Report”]; CITY BAR 1997 TASK FORCE REPORT, *supra* note 33.

- **Dual Compensation (Salary and Pension “Double-Dipping”)**

Article XIX, Section 2 of the Constitution provides a convention delegate “shall receive for his services the same compensation as shall then be annually payable to the members of the assembly.” Both sitting judges and legislators have salary guarantees preventing the reduction of their salary during their time in office and receive pension credit based on highest salary earnings. At the 1967 Constitutional Convention, delegates included 24 judges and 13 legislators, comprising approximately 20% of the total delegates. Various thoughtful reform proposals were circulated prior to the 1997 vote by the Goldmark Commission⁸⁰ and the New York City Bar Association.⁸¹ The Committee recommends that the State Bar should support measures that would prohibit or provide disincentives for double-dipping by any public officials in connection with Convention service.

IV. CONCLUSION

Once in a generation, New Yorkers exercise a unique Constitutional right with no Federal counterpart: a vote on whether to hold a Constitutional Convention.⁸² This treasured right of direct democracy represents a trust placed in us long ago, in 1846, by delegates at a Constitutional Convention that was called only after years of partisan deadlock.⁸³ In our own time, we

⁸⁰ *Delegate Selection Process*, *supra* note 49, at 407-434.

⁸¹ City Bar Countdown Report, *supra* note 78, at 748; *see also* CITY BAR 1997 TASK FORCE REPORT, *supra* note 33.

⁸² N.Y. CONST. art. XIX, § 2.

⁸³ *See* GALIE, ORDERED LIBERTY, *supra* note 2, at 99, 109-10.

have become increasingly timid about making major, comprehensive, structural change to State government — preferring to live with the devils we know, rather than risking those we fear. Members of this Committee hold a range of viewpoints on whether a Convention should be called, and serious concerns in both directions deserve careful consideration. Nonetheless, the Committee believes that a Constitutional Convention presents a rare opportunity to achieve much-needed progress on issues at the very center of the State Bar’s concerns⁸⁴ — such as court restructuring and modernization — and that the arguments against a Convention do not outweigh this opportunity.

In the final analysis, the Committee has chosen to accept the challenge posed by the framers of the State’s mandatory call for a Convention referendum — namely, that We the People can be trusted to make beneficial changes to our government; that our best days are yet to come; and that the State’s motto, “Excelsior,” Ever Upwards, remains a living promise we must continually renew.

⁸⁴ The holding of a Constitutional Convention clearly fits within original purposes of the New York State Bar Association as established by Ch. 210, L. 1877, in that a Convention would serve “to cultivate the science of jurisprudence, to promote reform in the law, [and] to facilitate the administration of justice.”