

We the People: A Constitutional Convention Opens the Door to Reform



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Introduction

The mandatory referendum on whether to call a New York State Constitutional Convention will soon be with us. When this question was last presented to the voters in 1977 and 1997, it was rejected.¹ Whether that same decision will be made in 2017 is anybody's guess, but it is essential that the decision be as informed as possible.

Let's face it. Most residents of the Empire State pay scant attention to the U.S. Constitution, let alone the document that sets the stage for governmental activity and individual freedom here in the Empire State. When asked to recall from their high school civics courses provisions of the federal Constitution, many people will tell you something about three branches of government and a bill of rights. Journalists may specifically reference something to do with freedom of the press, gun owners will testify to their rights under the Second Amendment and a few women may mention their right to vote. Beyond that, however, it's a pretty blank page.

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 State of New York" generally have absolutely no idea as to what they are promising to uphold.²

We need to shed a bright light on this living document. It is a "living document," because it has been

frequently amended and is highly detailed.³ It has often been referred to as one of the longest state constitutions in the United States.

And in its own way it is a radical document. Its most important words can be found in its Preamble: "We The People . . . Do Establish This Constitution."⁴ From the very beginning of our state's history, the state Constitution affirms that its source is not the legislature, not the governor, not the judges, but the people themselves.

Structural Change

When it comes to constitutional change, both ends of the ideological spectrum become conservative pretty quickly. Traditional conservatives are hesitant about structural change of any type, while liberals and progressives fear that hard-won protections of the past may be swept away by a Tea Party-like majority. My own view is that fundamental reform of the structures of state government, particularly of the legislature and the political process itself, can only come from the work of a constitutional convention.

A. Executive Branch Reorganization

The Constitution contains a limit on the number of state departments and agencies, setting the limit at 20. It is a theoretical limit only, since the omnibus "Executive Department" has been used to house dozens of agencies, large and small, each created with a separate commis-

sioner or agency head and, of course, each with distinct legislative and public constituencies. Nelson Rockefeller sought broad gubernatorial reorganization authority, but had to settle for specific changes. Governors who are held accountable for the operations of the executive branch should have the authority to manage the executive branch efficiently and effectively, and to that end they should have the ability to reorganize state agencies subject to legislative veto. Governors should be authorized to submit comprehensive reorganization plans to the legislature which will take effect if not rejected by a two-thirds margin in each house of the legislature. Opposition to such broad-based reorganization and consolidation will be fierce, especially from the special interests and public sector employee organizations affected by the changes.

A new convention would in all likelihood take another look at the roles of the state comptroller and the attorney general. Serious consideration might also be given to eliminating the position of lieutenant governor. Bills considered by the legislature under "messages of necessity" from the governor might be required to have a supermajority of some level in order to be exempted from the rule that they be available in some format for at least three days prior to passage. Bills passed by the legislature might be required to be sent to the governor not more than sixty days after their adoption.

B. Legislative Branch Reorganization

The public's respect for the New York State legislature is at an all-time low. The vast majority of members of the Senate and Assembly are honest, well-intentioned and generally hard-working individuals, but something is wrong in a system where legislative leaders and rank-and-file members alike on both sides of the aisle and in both chambers are indicted and convicted year in and year out for violations of the public's trust. It should be emphasized, of course, that the legislature has no monopoly on the presence of scandal; in recent memory Governor Eliot Spitzer resigned from office in disgrace and State Comptroller Alan Hevesi was sentenced to jail on charges of corruption.

Ever since the reapportionment cases of the 1960s required that legislative bodies be comprised of members elected on the basis of population rather than area, questions have arisen as to why New York and the other 48 states excepting Nebraska have retained a two-house or bicameral model for their legislative structure. While it can be argued that having a two-house structure provides opportunities for greater scrutiny of pending legislation by virtue of the delays typically inherent in their separate debate and consideration, the most frequently heard comment in New York is that the Upstate-Downstate split in perceived political interest is best reflected with Republican control of the Senate and Democrat control of the Assembly. The arrangement has a certain symmetry: "One for Us and One for Them."

No other governmental unit in New York State has a bifurcated, two-chamber legislative body. Counties function with either a single county legislature or board of representatives, towns have town boards, villages have village boards, cities have city councils, school districts have school boards, and special districts have single boards as well. These bodies legislate, make or confirm appointments to office, set policies, approve budgets, and authorize appropriations. To the best of my knowledge, no one in or out of state government is suggesting that bicameral bodies be established locally.

Why do we continue to have this duplication of function at the state level? For the last 50 years in New York, with the exception of the six years from the elections of 1968 until 1974, the objective has been to assure that each major political party has control of at least one house of the legislature no matter who is in control of the executive branch. This practice vastly complicates the budget-making process in Albany, with the majority party in the Assembly championing higher spending while the majority in the Senate presses for greater tax cuts. Governors have been known to find some comfort in the present arrangement. Nelson Rockefeller found it useful to have some of his spending proposals initiated by the Democrats in the Assembly, while Democratic governors have been known to occasionally exhibit relief that fiscal brakes were being applied in the Senate.

To streamline state government, improve transparency and accountability, and ultimately save billions of dollars for the taxpayer, radical surgery is required. It will never happen through the piecemeal constitutional amendment process controlled by the legislature itself. What might a new legislature look like? The Constitution should be amended to create a single, 100-member House of Delegates, elected on an equal population basis from compact, contiguous, and coterminous districts drawn by an independent redistricting commission.

A permanent legislative and Congressional redistricting commission would be established, comprised of members appointed by the governor, the legislature and the Court of Appeals, with the chair named by the Court of Appeals. Gerrymandering in all its forms would be prohibited, and the incumbent protection system would be diminished. The redistricting plans initially proposed by the commission would be made public, submitted to scrutiny by all interested parties, amended as necessary and approved in final and binding form by the commission.

Delegates would serve for four-year terms, with one-half of the seats up for election every two years. The delegates would be paid an initial starting salary of \$125,000 per annum and would be expected to conduct their legislative business throughout the course of the entire calendar year. No longer would members of the legislature arrive in Albany at the start of January and essentially do nothing until the negotiations over the budget have concluded. Nor would they adjourn in June to go home

for summer plantings and fall harvests. Rules of the new legislative body would preclude the legislative leader from single-handedly appointing all committee members and removing them at will, and legislation could be brought to the floor of the house by petition. These and other reforms would increase the individual rights and responsibilities of the individual delegates.

Even with a suggested increase in legislative salaries, from a base of \$79,500 to a new level of \$125,000, the state would immediately see a savings of more than \$4.4 million due to the reduced number of members, and a further consolidation of legislative staff would bring major savings as well. The most significant savings, however, would be the result of greater fiscal transparency and accountability. Strict limits need to be placed on the practice of including “member items” in the appropriation bills, since they have risen in size to become mini-foundations, primarily for legislators in the majority party, to dole out taxpayer dollars at will in furtherance of their legislative careers as well as for the good of their respective communities. There is an appropriate role for such appropriations, but only when they are equitably allocated and appropriately monitored to prevent malfeasance. No longer would there be “one-house bills,” approved in one chamber with the full knowledge that the measure would never see the light of day in the other.

C. Judicial Branch Reorganization

When it comes to the judiciary, former Chief Judge of the Court of Appeals, the late Judith Kaye, and her successor, former Chief Judge Jonathan Lippman, joined by a host of professional and civic organizations, have repeatedly called upon the legislature to streamline the state’s court system. While some progress has been made over the last decades, fundamental reform is likely to be considered only at a constitutional convention. “New York State has the most archaic and bizarrely convoluted court structure in the country. Antiquated provisions in our state Constitution create a confusing amalgam of trial courts: an inefficient and wasteful system that causes harm and heartache to all manner of litigants, and costs businesses, municipalities, and taxpayers in excess of half a billion dollars per year.”⁵

The current system is costly to the taxpayer, with savings in excess of \$59 million per year estimated from the Special Commission on Court Reform’s consolidation proposal.⁶ More dramatically, the savings to litigants and the affected businesses and individuals touched by the legal system may amount to more than \$450 million annually.⁷ The Judiciary Article is the longest and some would say the most complicated in the constitution. This is not the place to review the judicial system’s potential for reorganization in detail, but the repeated failure of the legislature to deal with this inefficiency is both a terrible financial burden for the state and a threat to the provision of fair and impartial justice.

D. Other Potential Subjects

I have touched on several structural changes, in greater and lesser detail, that could be the subjects of public debate going forward as we approach the mandatory referendum on the call of a constitutional convention in 2017. Many others cry out for consideration: campaign finance reform in the light of the *Citizens United* decision;⁸ the balance of public safety and personal privacy in the world of the internet and unparalleled electronic eavesdropping; increasing the deplorable lack of voter participation in both general and special elections; guaranteeing equality of educational opportunity for all residents of the state; permanently prohibiting capital punishment; reducing or eliminating bail as a condition for release of persons charged with nonviolent offenses; facilitating the opportunities for local government and school district consolidation; expanding the provisions for local government home rule; updating the state’s commitment to environmental protection; reviewing the pros and cons of term limits for elected officials; and examining the use of initiative and referenda in the consideration of legislation and constitutional amendments.

Conclusion

The natural tendency of voters in 2017 will be to be skeptical of the call for a new constitutional convention. Fiscal conservatives will decry the extra expense of paying for the salaries and staff of such a body. Legislators will object that they are fully capable of handling the need for any constitutional revision through the existing legislative amendment process. Public employees will express concern that the contractual protection of their pensions may be repealed. Progressives will fear that conservatives will dominate, and conservatives will be sure that a liberal majority will abandon important fiscal and social protections. The failure of the 1967 convention reflected in the rejection of its single package revised document will be pointed to as evidence that the constitutional convention is an institution that cannot be trusted in our complex, modern society.

Governor Andrew Cuomo has the opportunity to follow in the footsteps of his father and appoint a broad-based, nonpartisan temporary state commission to examine potential constitutional revision issues well in advance of the mandatory referendum. The commission should solicit analyses and recommendations from a wide cross-section of the state’s communities with a view toward identifying a range of high-priority issues that could likely be the subjects of debate and public discussion if a new convention were to be called. The time for putting such a commission to work is now.

The upcoming question on the ballot ultimately challenges our faith in the ability of the citizenry to engage in a periodic, fundamental review of the workings of our state and local institutions and of the rights and protections provided to individuals by the constitution. Will

there be a popular movement calling for reform? Will our political, legal, social, business and labor leaders be willing to step out of their normal comfort zones and champion the opportunity for serious and simultaneous dialogue on a wide range of substantial issues? A New York City mayoral election has the potential to increase voter turnout in 2017, and it will come on the heels of a presidential election in the prior year. Will events on the national scene or scandals at the state and local level produce a demand for reform? Will they generate a positive response to the mandatory question: "Shall there be a convention to revise the constitution and amend the same?"⁹ The answer will rest with We the People, the true source of the Constitution. ■

1. *New York State Constitutional Conventions and Constitutional History*, N.Y. State Library, <http://www.nysl.nysed.gov/scandocs/nyconstitution.htm> (last updated Sept. 21, 2015).
2. N.Y. Const. art. XIII, § 1.
3. Brian M. Kolb, "New York's Last, Best Hope for Real Reform": *The Case for Convening a State Constitutional Convention*, 4 Alb. Gov't L. Rev. 601, 603 (2011).
4. N.Y. Const. pmbl.
5. Special Comm'n on the Future of the New York State Courts, *A Court System for the Future: The Promise of Court Restructuring in New York State* 9 (2007).
6. *Id.* at 12.
7. *Id.*
8. See *Citizens United v. FEC*, 558 U.S. 310 (2010).
9. N.Y. Const. art. XIX, § 2.

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