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Hope vs. Fear: The Debate Over a State Constitutional Convention

By Henry M. Greenberg*

On November 7, 2017, New Yorkers will go to their polling places and receive ballots containing a thirteen-word referendum question: “Shall there be a convention to revise the constitution and amend the same?”¹ That question appears on the ballot because the New York State Constitution commands that at least once every twenty years voters are asked whether or not to call a constitutional convention.² The mandatory referendum reflects Thomas Jefferson’s belief that every generation the people should be given a chance to revise their basic law.³

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1. N.Y. CONST. art. XIX, § 2.

2. *Id.* (“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;”).

3. See PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 109-10 (1996) [hereinafter ORDERED LIBERTY]; see also John Dinan, *Framing a “People’s Government”: State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933, 934 (1999). In the words of Thomas Jefferson:

[L]et us provide in our [state] constitution for its revision at stated periods Each generation is as independent of the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that received from its predecessors; and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the Constitution; so that it may be handed on, with

The November ballot question is a constitutional choice of profound importance. A constitutional convention presents a once in a generation opportunity for direct democracy. Mario Cuomo, an eloquent advocate for constitutional reform, envisioned popularly elected delegates at a convention making a “grand stroke of intelligent populism,”⁴ proposing changes that would enable our government to better meet the challenges of our time.

It is only fitting that law professors, practicing lawyers and law students gather, in a law school, to consider whether New Yorkers should vote “Yes” or “No” to a constitutional convention. For, when it comes to constitutions, institutions charged with training future generations of lawyers bear a singular responsibility. Every lawyer takes an oath of office in which they pledge to “support the constitution of the United States, and the constitution of the State of New York.”⁵ It’s not a coincidence that thirty-four of the fifty-five delegates that produced the United States Constitution were lawyers,⁶ or that the primary authors of New York’s First Constitution (John Jay, Robert R. Livingston, and Gouverneur Morris) were lawyers.⁷ Nor is it a coincidence that lawyers fill all nine seats on the United States

periodical repairs, from generation to generation, to the end of time, if anything human can so long endure.

Id. (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 675 (Adrienne Koch & William Peden eds., 1998)).

4. Sam Howe Verhovek, *Cuomo Opens a Session With Barbs and a Gambit*, N.Y. TIMES (Jan. 12, 1992), <http://www.nytimes.com/1992/01/12/weekinreview/the-region-cuomo-opens-a-session-with-barbs-and-a-gambit.html> (quoting Governor Mario Cuomo).

5. N.Y. CONST. art. XIII, § 1 (“Members of the legislature, and all officers, executive and judicial, except such inferior officers as shall be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: ‘I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of . . . according to the best of my ability’”).

6. See GORDON S. WOOD, *THE AMERICAN REVOLUTION: A HISTORY* 153 (2002).

7. See John P. Kaminski, *A Rein on Government: New York’s Constitution of 1777 and Bill of Rights of 1787*, 1 NEW YORK LEGAL HISTORY 7, 7 (2005) (noting that Jay, Livingston, and Morris were the primary authors of the New York State Constitution).

Supreme Court and all seven seats of the New York Court of Appeals.⁸ By training, disposition, and solemn oath, lawyers are the primary guardians of constitutional rights.

Let us reflect, then, on the current state of New York's Constitution. Sad, but true, it's a document that most members of the public, even government officials, have never heard of, let alone read.⁹ Like every state, though, New York enjoys the double blessing (to borrow Judith Kaye's phrase)¹⁰ of having two separate constitutions. Indeed, the framers of the United States Constitution drew inspiration from New York's First Constitution,¹¹ which was adopted a decade earlier in 1777, in the midst of the Revolutionary War.¹²

Viewed through the lens of world history, the New York State Constitution, like the United States Constitution, is a

8. The New York State Constitution expressly specifies as a qualification for a Judge of the Court of Appeals that he or she be "admitted to the practice of law in this state for at least ten years." N.Y. CONST. art. VI, § 2(e). The United States Constitution, by contrast, does not specify qualifications for Justices of the United States Supreme Court. *See Frequently Asked Questions, SUPREME COURT OF THE UNITED STATES*, https://www.supremecourt.gov/about/faq_general.aspx (last visited on Sept. 19, 2017). Thus, a Justice does not have to be a lawyer or a law school graduate. However, all Justices have been trained in the law. *Id.*

9. *See* Henrik N. Dullea, *We the People: A Constitutional Convention Opens the Door to Reform*, 89 N.Y. ST. B. ASS'N J. 32, 32 (2017) [hereinafter Dullea, *We the People*] ("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.").

10. Judith S. Kaye, *A Double Blessing: Our State and Federal Constitutions*, 30 PACE L. REV. 844, 847 (2010) ("[t]hat we have had, from our nation's beginnings, two Constitutions, and parallel state and federal court systems to safeguard them, is a double blessing.").

11. *See, e.g.*, Kaminski, *supra* note 7, at 16-17 (describing influence on James Madison of the Structure of New York's First Constitution and the New York Bill of Rights of 1787).

12. *See* ORDERED LIBERTY, *supra* note 3, at 37 ("The constitution was created in an atmosphere charged with gunpowder. The convention was forced to move from New York City to White Plains, then to Fishkill, and finally to Kingston to keep ahead of the British. Benjamin Butler, in one of the earliest surveys of New York's constitutional history, reports that the delegates, while at Fishkill, were compelled to arm themselves against the possibility of attack by the British or their adherents.").

radical instrument.¹³ Arguably, its most profound words are the declaration in the preamble that, “We the People of the state of New York . . . Do Establish This Constitution.”¹⁴ The United States Constitution likewise begins: “We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”¹⁵ Both charters thus affirm that government is, in Lincoln’s timeless words, “of the people, by the people, for the people.”¹⁶

But the differences between the New York State Constitution and the United States Constitution are more striking than their similarities. The state constitution is a “bloated, disorganized, 52,500-word behemoth,”¹⁷ more than six times longer than its compact federal analog. The provisions of the state constitution cover a vast number subjects—profound and pedestrian—ranging from the basic structure of government¹⁸ to the width of ski hills.¹⁹ Also, in contrast to the United States Constitution, which is rarely amended,²⁰ the state

13. See Dullea, *We the People*, *supra* note 9, at 32 (stating that the State Constitution, in its own way, “is a radical document.”).

14. N.Y. CONST. pmb.

15. U.S. CONST. pmb.

16. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN* 184 (William E. Gienapp ed., 2002).

17. Peter J. Galie & Christopher Bopst, *Cleaning the New York Constitution Part I: Institutions and Rights*, in *NEW YORK’S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS* 33, 34 (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016).

18. See N.Y. CONST. art. III (the legislature); *id.* art. IV (the executive); *id.* art. VI (the judiciary); *id.* art. IX (local governments).

19. See N.Y. CONST. art. XIV, § 1 (“Nothing herein contained shall prevent the state . . . from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than five miles of such trails shall be in excess of one hundred twenty feet wide, on the north, east and northwest slopes of Whiteface Mountain in Essex county, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than two miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Belleayre Mountain in Ulster and Delaware counties and not more than forty miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than eight miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Gore and Pete Gay mountains in Warren county . . .”).

20. The United States Constitution has been amended only twenty-seven

constitution has been a work in progress from the inception. It underwent wholesale revisions in the nineteenth century; an extensive rewriting in the twentieth century; and more than two hundred piecemeal revisions over the last one hundred years.²¹

In fact, over New York's 240-year history, it has not had one state constitution, but four: those of 1777, 1821, 1846, and 1894.²² What that has left us with today is a baroque charter,²³ containing "both immortal ideals and outdated verbiage."²⁴ On the one hand, the state constitution protects fundamental rights that are not addressed in the United States Constitution, such as aid for the needy,²⁵ a right to a sound public school education,²⁶ and keeping the Catskill and Adirondacks parks "forever wild."²⁷ On the other hand, the state constitution reads more like a poorly drafted municipal code than the supreme law of the land.

In significant ways, the state constitution is broken.²⁸ Many of its provisions are ignored or honored in the breach, and

times since it was ratified in 1788, and the first ten of those amendments were adopted almost immediately as the Bill of Rights. See U.S. CONST. amends. I-XXVII.

21. See COMM. ON THE N.Y. STATE CONST., N.Y. STATE BAR ASS'N, WHETHER NEW YORKERS SHOULD APPROVE THE 2017 BALLOT QUESTION CALLING FOR A CONSTITUTIONAL CONVENTION 7 (2017) [hereinafter 2017 BALLOT QUESTION]; Judith S. Kaye, *Dual Constitutionalism in Practice and Principal*, 61 ST. JOHN'S L. REV. 399, 408 n.38 (2012).

22. See Kaye, *supra* note 21, at 408 n.38.

23. See J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's a Constitution For?*, 56 DUKE L.J. 545, 573 (2006) ("[M]any state constitutions [are] baroque collections of essentially statutory material.").

24. Opinion, *Call a Constitutional Convention*, N.Y. TIMES (Oct. 28, 1997) [hereinafter *Call a Convention*], <http://www.nytimes.com/1997/10/28/opinion/call-a-constitutional-convention.html>.

25. 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.").

26. See *id.* 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.").

27. See *id.* 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.").

28. For a thoughtful discussion and analysis of problems with different parts of the New York State Constitution, see Galie, *supra* note 17.

virtually everyone who has studied the document agrees it is in need of an overhaul.²⁹ The Framers embraced Jefferson's vision of generational revision. They assumed the Constitution would periodically be brought up to date, and their successors acted on that assumption for the first two centuries of Statehood.

State constitution-making in New York may be accomplished through one of two methods.³⁰ The first is legislatively initiated—the legislature can pass an identical proposed constitutional amendment in two consecutive legislative sessions.³¹ The proposed amendment then goes on a statewide ballot for final approval or rejection by the electorate.³²

The second method is through a constitutional convention.³³ There, popularly elected delegates propose amendments to the constitution.³⁴ Importantly, a convention opens up the entire

29. See 2017 BALLOT QUESTION, *supra* note 21, at 7-8 (“Many of the provisions in the 52,500 word Constitution are: (1) outdated or obsolete; (2) unconstitutional in the wake of subsequent decisions by the United States Supreme Court; (3) wholly legislative in character; and/or (4) inconsistent with the demands of the modern state.”) (footnotes omitted)).

30. 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, 79 (Rose Mary Bailly & Scott N. Fein eds., 2016) [hereinafter Galie & Bopst, *Constitutional Revision*] (“From its inception, New York State has relied on two methods of amending its constitution: the legislatively initiated amendment and the constitutional convention. For the first 200 years of statehood, these methods worked reasonably well.”).

31. See N.Y. CONST. art. XIX, § 1 (“Any amendment or amendments to this constitution may be proposed in the senate and assembly [I]f 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 . . . such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house . . .”).

32. See *id.* art. XIX, § 1 (“[I]t 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.”).

33. See Galie & Bopst, *Constitutional Revision*, *supra* note 30, at 79.

34. N.Y. CONST. art. XIX, § 2.

constitution for potential revision—even the creation of a new constitution.³⁵ But all amendments proposed by the delegates must ultimately be approved by the voters.³⁶

Historically, constitutional conventions were the primary mechanism to make significant changes to the state constitution. From 1777 through 1967, the state convened nine constitutional conventions, and some of them produced momentous changes.³⁷ All four of New York’s Constitutions were the product of constitutional conventions.³⁸ Virtually every state constitutional right that the citizenry cherishes was written into the document by a constitutional convention.³⁹

The extraordinary men that penned the 1777 constitution established the “enduring structural framework of our State and national government—three discrete branches of government, with a bicameral legislature, an executive branch headed by a popularly elected Governor, and an independent judicial branch.”⁴⁰ That convention also added fundamental

35. See Gerald Benjamin, *Constitutional Change in New York State: Process and Issues*, in *MAKING A MODERN CONSTITUTION: THE PROSPECTS FOR CONSTITUTIONAL REFORM IN NEW YORK* 55, 60 (Rose Mary Bailly & Scott N. Fein eds., 2016) [hereinafter Benjamin, *Constitutional Change*] (“The required referendum question for calling a constitutional convention—‘Shall there be a convention to revise the constitution or amend the same’—makes no provision for a limited agenda. If a convention is called, every provision in the current Constitution may be revised, or removed.”).

36. N.Y. CONST. art. XIV, § 2 (“Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the state at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendment, shall go into effect on the first day of January next after such approval.”).

37. See Galie & Bopst, *Constitutional Revision*, *supra* note 30, at 79 (“The state [has] convened nine constitutional conventions, six of which proposed revisions that ultimately became the law of the land.”). The nine Constitutional Conventions in New York history were held in 1777, 1801, 1821, 1846, 1867, 1894, 1915, 1938, and 1967. Kaye, *supra* note 10, at 845 n.2.

38. Galie & Bopst, *Constitutional Revision*, *supra* note 30, at 86-87.

39. See 2017 BALLOT QUESTION, *supra* note 21, at 26 (“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.”).

40. Kaye, *supra* note 10, at 849. See also Edward Countryman, *New York’s First Constitution: Sketching A Map for Becoming American*, in *THE*

constitutional guarantees of religious freedom, trial by jury, right to vote, and right to counsel.⁴¹

Subsequent conventions were also impactful. The 1821 Convention extended the right to vote.⁴² The 1846 Convention provided for popular election of the attorney general and the state comptroller and established our highest court, the New York Court of Appeals.⁴³ The 1894 Convention provided, for the first time, the maintenance and support of a system of free common schools, and wrote the “forever wild” clause that protects the forest preserve.⁴⁴ The 1915 Convention proposed the consolidation of state departments and an executive budget system.⁴⁵ The 1938 Convention wrote into the constitution a moral obligation of society to care for and assist the needy and a labor bill of rights.⁴⁶

Yet, despite this proud history, we have not had a constitutional convention in New York State in a half-century. The last convention was held in 1967.⁴⁷ Mandatory referendums to call a convention were placed before the voters in 1977 and 1997 and both times they were defeated at the polls.⁴⁸ For decades the state has suffered from “Constitutional Conventionphobia,”⁴⁹ averse to debating fundamental questions

BEST OF NEW YORK’S ARCHIVES: SELECTIONS FROM THE MAGAZINE, 2001-2011 at 3, 6 (2017); Bruce W. Dearstyne, *New York State Begins: The First State Constitution, 1777*, in MAKING A MODERN CONSTITUTION: THE PROSPECTS FOR CONSTITUTIONAL REFORM IN NEW YORK 1, 3-14 (Rose Mary Bailly & Scott N. Fein eds., 2016); ORDERED LIBERTY, *supra* note 3, at 36-51.

41. Kaye, *supra* note 10, at 849.

42. See ORDERED LIBERTY, *supra* note 3, at 76-77.

43. See *id.* at 105, 112.

44. See *id.* at 171-73.

45. See *id.* at 191-92, 194-95.

46. See *id.* at 234, 238.

47. See generally HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK’S 1967 CONSTITUTIONAL CONVENTION 390 (1997).

48. On November 8, 1977, the electorate voted against a constitutional convention by a margin of 1,668,137 to 1,126,902. COMM. ON THE N.Y. STATE CONST., N.Y. STATE BAR ASS’N, THE ESTABLISHMENT OF A PREPARATORY STATE COMMISSION ON A CONSTITUTIONAL CONVENTION 15-16 (2015). On November 4, 1997, the electorate voted against a constitutional convention by a margin of 1,579,390 to 929,415. Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, 65 ALB. L. REV. 1017, 1041 (2002).

49. See Gerald Benjamin & Thomas Gais, *Constitutional*

of governance.⁵⁰ At the same time, the legislatively initiated amendments since 1978 have affected few changes on issues of moment.⁵¹ As a result, New York has a partially obsolete state constitution, with too much detritus and miscellanea, gripping us by the dead hand of history.⁵²

Which brings us to the upcoming November ballot proposition. Once again, “We the People of the State of New York” will be called on to decide whether to have a constitutional convention. If a majority of the electorate answers “Yes,” it will trigger a two-year process marked by two other separate votes.⁵³ The second vote will take place a year later at the next general election, November 6, 2018, when the People will elect 204 delegates.⁵⁴ 189 of the delegates will be elected from New York’s 63 senate districts (three delegates from each district), and 15 delegates will be elected on a statewide basis.⁵⁵

Conventionphobia, 1 HOFSTRA L. & POL’Y SYMP. 53, 69 (1996).

50. See Peter J. Galie & Gerald Benjamin, *Introduction*, in NEW YORK’S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS 1, 2 (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016) (“Notwithstanding [the] proud history [of New York’s state constitutions], over the most recent decades, and though there has been ample incentive to do so, we New Yorkers have shown no willingness to comprehensively reconsider the fundamentals of the governance arrangements set out in our current state constitution.”).

51. Galie & Bopst, *Constitutional Revision*, *supra* note 30, at 79.

52. *Call a Convention*, *supra* note 24. See also 2017 BALLOT QUESTION, *supra* note 21, at 25-26 (“[W]ith respect to significant structural issues of governance, the Constitutional amendment process has long been dysfunctional. 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 timeless values and storied provisions, contains simply too much detritus and unreadable verbiage and does not meet the ever-changing problems of our time.”).

53. See N.Y. CONST. art. XIX, § 2.

54. See *id.*

55. *Id.* (“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.”) (emphasis added).

By operation of the constitution, the convention will convene in the state capitol on the first Tuesday in April, which would be April 2, 2019,⁵⁶ and remain in session for so long as it takes the delegates to present their recommendations to the people.⁵⁷ Past conventions have typically lasted four to five months, in time for the delegates' proposed amendments to go on the ballot the same year at the general election in November. So, if past is prologue, a 2019 convention's proposed amendments to the constitution will go before the voters for approval or disapproval on November 5, 2019.

Is this a path upon which New York State should embark? Should New Yorkers vote "Yes" or "No" on a constitutional convention? To be sure, there are strong, principled arguments on both sides of the question. And over the next few months, in the run-up to the November ballot proposition, you will hear opponents and proponents of a convention make their case.⁵⁸

Convention advocates argue that a convention is needed to streamline and modernize the constitution, clean-up corruption and remedy government dysfunction.⁵⁹ The broken constitution needs repair goes the argument, because it is inextricably tied to the basic structural problems that impair the performance of government and discourage voter participation.⁶⁰ For example, New York has the most complex and byzantine court system in the nation.⁶¹ The law-making process is controlled by a "three men in a room" system that relegates rank and file members to

56. *Id.* ("The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed.") (emphasis added).

57. *Id.* ("The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed.") (emphasis added).

58. See 2017 BALLOT QUESTION, *supra* note 21, at 7-21 (summarizing principal arguments supporting and opposing a call for a Constitutional Convention).

59. See *id.* at 7-8.

60. See *id.* at 9-11.

61. See COMM. ON THE N.Y. STATE CONST., N.Y. STATE BAR ASS'N, THE JUDICIARY ARTICLE OF THE NEW YORK STATE CONSTITUTION - OPPORTUNITIES TO RESTRUCTURE AND MODERNIZE THE NEW YORK COURTS 2, 9, 32-37 (2017).

playing bit roles.⁶² And, New York's local government system is not the product of rational design, but rather, sheer historical accumulation, resulting in almost sixteen hundred general purpose (i.e., county, city, town, or village) local governments.⁶³

Supporters argue that the constitution omits positive rights that should be explicitly guaranteed, such as equal rights for women, a bill of rights for the environment, and a civil right to counsel.⁶⁴ They also maintain that a convention is the only realistic way for the citizenry to take control of their political destiny and effect significant constitutional reform.⁶⁵ As one prominent supporter puts it, a convention is "New York's Last, Best Hope for Real Reform."⁶⁶

In reply, opponents of a convention deploy several arguments: (1) a convention will open a Pandora's Box of potential constitutional mischief, (a) placing at risk of elimination or alteration cherished rights, and (b) permitting new amendments that may be harmful to responsible governance;⁶⁷ (2) a convention is unnecessary, because the State already has available to it a legislatively initiated process to amend the constitution;⁶⁸ (3) the current selection process for

62. See generally SEYMOUR P. LACHMAN WITH ROBERT POLNER, *THREE MEN IN A ROOM: THE INSIDE STORY OF POWER AND BETRAYAL IN AN AMERICAN STATEHOUSE* (2006).

63. Richard Briffault, "Mind the Gap" *The Promise and Limits of Home Rule in New York*, in *NEW YORK'S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS* 161, 179 (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016). See also COMM. ON THE N.Y. STATE CONST., N.Y. STATE BAR ASS'N, *CONSTITUTIONAL HOME RULE 33* (2016) ("Constitutional Home Rule is a subject ripe for consideration and debate by all concerned. There is a need to weigh the benefits and costs of amendments to Article IX that would restore local autonomy through greater certainty and clarity.").

64. See 2017 BALLOT QUESTION, *supra* note 21, at 11-12.

65. See *id.* at 12-13.

66. See generally 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, 601 (2011).

67. See 2017 BALLOT QUESTION, *supra* note 21, at 14-15; see also ARTHUR "JERRY" KREMER, ANTHONY M. FIGLIOLA & MARIA DONOVAN, *PATRONAGE, WASTE, AND FAVORITISM: A DARK HISTORY OF CONSTITUTIONAL CONVENTIONS 1* (2015) ("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.").

68. See 2017 BALLOT QUESTION, *supra* note 21, at 20.

delegates will result in a convention dominated by sitting legislators and special interests, and thus be a carbon copy of a typical legislative session;⁶⁹ (4) legislators and judges that serve as convention delegates will receive two public salaries;⁷⁰ and (5) the cost of staging a convention—paying for the salaries and expenses of delegates and staff, among other things—will be enormous.⁷¹

The debate over a constitutional convention can be distilled to three words: “hope versus fear.” A vote for a convention is an expression of hope. The case against a convention appeals to our fears.

More broadly what’s on the ballot this November is the question whether New Yorkers as a polity still believe in the idea of progress. The Founding Fathers, steeped in enlightenment philosophy, believed that the people could reorganize the government and political system to the benefit of the human condition.⁷² This same belief animated the history of the Empire State, too. You can see it in the official state motto—an inspiring, single Latin word, “excelsior,” meaning “ever upward.”⁷³

But does the public, today, still believe that fixing the machinery of government will improve its capacity to cure social ills? Will a majority of the electorate conclude that progress can come from a convention? We shall see in just a few short months.

In the meantime, it behooves lawyers to lead and elevate the debate. We have at hand a teachable moment for New York

69. *See id.* at 16-17; *see also* KREMER, *supra* note 67, at 1.

70. *See* 2017 BALLOT QUESTION, *supra* note 21, at 17-19.

71. *See id.* at 19-21.

72. *See* GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 1789-1815* at 37 (2009) (At the time the United States Constitution was ratified, “[a]lthough [George] Washington did not believe that the people of the United States had become a nation, and indeed believed that they were far from it, he abandoned his earlier pessimism and looked forward to better days, indulging a ‘fond, perhaps an enthusiastic idea, that as the world is much less barbarous than it has been, its melioration must still be progressive.’ Everywhere Americans saw their ‘rising empire’ at long last fulfilling the promises of the Enlightenment.”). *See also* RUSSELL BLAINE NYE, *THE CULTURAL LIFE OF THE NEW NATION 1776-1830* at 30 (1960).

73. *See* N.Y. STATE LAW § 70 (McKinney 2016) (describing for the arms of the State and State flag the motto, “[o]n a scroll below the shield argent, in sable, Excelsior”).

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HOPE VS. FEAR

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State—an opportunity to educate the public about the importance of the New York Constitution. We should seize this opportunity. Reasonable minds can disagree whether or not to call a constitutional convention. But those of us who have made the law our life's work can all agree that what is broken in the state constitution should be fixed—someway, somehow. That important work cannot begin too soon.