

Whether to Call a Constitutional Convention? — A Brief Primer on the Process

by

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On November 7, 2017, New Yorkers will go to their polling places and receive ballots containing 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.

However we individually choose to cast our ballots, this much I can say without fear of contradiction — the coming vote presents a constitutional choice of profound importance. A Constitutional Convention is a rare chance for direct democracy; a once in a generation opportunity for New Yorkers to reinvent their State government.

The mandatory referendum embodies Thomas Jefferson’s vision — some say radical — that every generation the People should revise their basic law. It is only fitting, therefore, that we have come together here, in the Great Hall of the City Bar, to debate whether New Yorkers should vote “yes” or “no” on a Constitutional Convention. For, when it comes to Constitutions, the organized Bar bears 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.” It’s not a coincidence

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that 34 of the 55 delegates that produced the U.S. Constitution were lawyers, or that the principal authors of New York's first State Constitution (John Jay, Robert R. Livingston and Gouverneur Morris) were lawyers. Nor is it a coincidence that lawyers fill all nine seats on the U.S. Supreme Court and all seven seats of the New York Court of Appeals. By training, disposition and solemn oath, judges and the lawyers that appear before them are the primary guardians of our constitutional rights.

Let us reflect a moment on the current New York State Constitution. Sad, but true, it's a document that most members of the public, even government officials, know anything about or ever read. Like every state, though, New York enjoys the dual blessing (to borrow Judith Kaye's phrase) of having two separate constitutions. Indeed, the framers of the Federal Constitution drew inspiration from New York's First Constitution, which was adopted a decade earlier in 1777, in the midst of the Revolutionary War.

But the differences between the two documents are more striking than their similarities. For example, the State Constitution is more than six times longer than the Federal Constitution. The provisions of the State Constitution cover a vast range of subjects: from criminal procedure to the basic structure of government; from voting to conservation, canals, and the width of ski hills. The Constitution even addresses "the maintenance and regulation of an organized militia."

Also, unlike our Federal Constitution, which has been infrequently amended, the State Constitution underwent three wholesale revisions in the 19th Century (1821, 1846 and 1894); an extensive rewriting in 1938; and more than 200 piecemeal revisions over the last 100 years.

The net result is a baroque charter containing both cherished rights and unreadable miscellanea. On the one hand, the Constitution protects profoundly important values: aid for the needy; a right to a sound public school education; keeping the Catskill and Adirondacks parks “forever wild.” On the other hand, the document reads more like a poorly drafted municipal code than the supreme law of New York State.

How do we fix that which is broken in the Constitution? For most of our history, the State has relied on two methods of amendment. The first is legislatively initiated — the Legislature must pass an identical proposed constitutional amendment in two consecutive legislative sessions. The amendment then goes on a statewide ballot for final approval or rejection by the electorate.

The second method of amendment is through a Constitutional Convention. At a Convention, popularly elected delegates propose amendments to the Constitution. Importantly, a Convention opens up the entire Constitution for potential revision — even the creation of a new Constitution. In fact, New York has had four Constitutions, each written by Constitutional Conventions. But all amendments proposed by a Convention must ultimately be approved by the voters.

Historically, Constitutional Conventions were the primary mechanism to make significant changes to our Constitution. Virtually every State Constitutional right that we cherish was written into the document by a Constitutional Convention. From 1777 through 1967, the State convened nine Constitutional Conventions. However, we have not had a Convention in a half-century. Mandatory referendums were held in 1977 and 1997, and both times the voters resoundingly voted against calling a Convention.

So once again, this coming November, “We the People of the State of New York” will be called upon to decide whether to have a Convention. If the voters say yes, they will trigger a three-year process marked by three separate votes. The first vote is the automatic referendum this November.

The second vote will take place a year later at the next general election, November 6, 2018, when the People will elect 204 delegates. 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.

By operation of the Constitution, the Convention will convene on the first Tuesday in April, which would be April 2, 2019. The Convention will meet in Albany in the State Capitol for so long as it takes the delegates to present their recommendations to the People. Past Conventions, however, 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.

Thus, if past is prologue, a 2019 Constitutional Convention’s proposed amendments to the State Constitution would go before the voters’ for approval or disapproval on November 5, 2019.

Is this lengthy path one New York State should follow? Should New Yorkers vote “yes” or “no” on a Constitutional Convention? That is the question we have gathered this evening to consider. As we will see, there are strong arguments on both sides, and the stakes are high.

So, let the debate begin.