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**NEW YORK
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**REPORT OF THE
NEW YORK CITY BAR ASSOCIATION
TASK FORCE ON THE NEW YORK STATE
CONSTITUTIONAL CONVENTION**

JUNE 14, 2017

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REPORT OF THE NEW YORK CITY BAR ASSOCIATION TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION¹

EXECUTIVE SUMMARY

Twenty years ago, the predecessor to the current New York City Bar Association (“City Bar”) Task Force on the New York State Constitutional Convention (the “Task Force”) studied the question of whether to support the call for a constitutional convention, which appeared on the November 1997 ballot. The 1997 Task Force found that the Constitution was genuinely in need of significant reform, particularly in the areas of State and local finance, home rule and court reform. Nevertheless, the 1997 Task Force recommended that the City Bar not support a convention because of its concern with defects in the delegate selection process that, it feared, might lead to weakening of important constitutional provisions regarding social welfare, the environment, and restrictions on the use of public money. It was also concerned that single issue politics, PAC money and special interests could derail a convention or lead to detrimental results.² In reaching its conclusion, the 1997 Task Force had no illusions regarding the Legislature’s lack of interest in reforming the Constitution, but saw no particular momentum for reform, no consensus of what reforms were needed, and no substantive preparation for constitutional revision.

Twenty years later, there is significantly more momentum for reform than there was in 1997, and there appears to be broader agreement that reforms are particularly needed in the areas of suffrage, government ethics, and the judiciary. At the same time, holding a convention still presents risks. The delegate selection process is still flawed, the risks of large expenditures of money for single-issues or in support of candidates for election have, if anything, increased, and important constitutional provisions could be placed at risk. We are especially concerned that the mandate to support the needy, contained in Article XVII, and the direction that the Legislature provides for the maintenance and support of free public education, contained in Article XI—both of which are core values in our democracy—could be subject to attack.

Moreover, there has been no substantive preparation for constitutional revision: Governor Cuomo proposed budgeting \$1 million for a study commission, but the Legislature stripped it from the budget and the Governor has not proposed it again or sought other means to fund it.³

¹ This Task Force report has been approved by the New York City Bar Association’s President, John S. Kiernan, and by its Executive Committee, Sarah L. Cave, Chair, and represents the position of the City Bar. The Executive Committee also invited City Bar committees which had expressed opposition to the Task Force report (the “Objecting Committees”) to summarize their objections in a report that is annexed hereto.

² N.Y.C. BAR, REPORT OF THE TASK FORCE ON THE N.Y.S. CONST. CONVENTION, 52 REC. OF N.Y.C. B. ASS’N 522 (June 1997) (“1997 Task Force Report”), <http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>.

³ Rachel Silberstein, *Constitutional Convention Absent from Cuomo’s 2017 Agenda*, GOTHAM GAZETTE (Jan. 19, 2017), <http://www.gothamgazette.com/state/6720-constitutional-convention-absent-from-cuomo-s-2017-agenda>.

But what has changed is the realization that the legislative and executive branches appear collectively unable or unwilling to sufficiently address public concerns that our elective processes need to be updated and fixed, that corruption continues to be a serious problem in State government and that reform of our judicial system is long overdue.

Voter participation levels in New York are among the lowest in the nation⁴ due to frustration with elections that are effectively uncontested and election rules (some constitutionally mandated) that discourage exercise of the franchise. While changes in voting procedures and voter registration laws in other states have fostered voter participation, New York has retained its restrictive rules regarding changes to party registration, which effectively limit participation in party primaries, has failed to adopt early voting, and has maintained a constitutional provision that limits absentee voting to those ill, physically disabled, or absent from the jurisdiction. Although the Constitution was amended in 2014 to provide for an “independent redistricting commission,” its members are selected by legislative leaders or others appointed by them and, if its product fails to satisfy the Legislature, the responsibility to draw district lines reverts to the Legislature itself.

Meanwhile, in the 13-year period from 2003 to 2016, 29 state legislators, former legislators, and other elected state officials were convicted of a crime or violation, with 21 being sentenced to prison or house arrest; in total, 32 state legislators left office due to criminal or ethical issues that arose during that time period.⁵ Despite this, the legislative and executive branches have not achieved meaningful ethics reform. Billions of dollars in state monies remain in the control of legislative leaders with little oversight or accountability.⁶

Long overdue judicial reform also remains unaddressed. We continue to maintain a judicial system with eleven different trial-level courts (more than any other state), a judiciary article that comprises almost one-third of the entire Constitution, and a court system so byzantine that most lawyers are unable to describe it accurately.

We acknowledge that a significant portion of the changes we think are necessary and appropriate could be accomplished by statute, and that even constitutional change can be accomplished through the ordinary constitutional amendment process without a convention. Our training as lawyers makes us uncomfortable in suggesting that what could be legislatively enacted should, instead, be constitutionally mandated, as changes and corrections to the

⁴ Matthew Hamilton, *Report: New York Ranks 41st in Voter Turnout in 2016*, TIMESUNION (Mar. 19, 2017, 8:05PM), <http://www.timesunion.com/local/article/Report-New-York-ranks-41st-in-voter-turnout-in-11009879.php>.

⁵ Mike McAndrew, *29 New York State Officials Convicted, 0 Ethics Reform Laws Passed in 2016*, Syracuse.com (May 13, 2016, 4:30 PM), http://www.syracuse.com/state/index.ssf/2016/05/ethics_reform_in_albany.html; Albany Corruption Tracker, CITIZENS UNION, http://www.citizensunion.org/albany_corruption_tracker.

⁶ Citizens Union, *Nonspecific Funding in the FY 2018 New York State Enacted Budget* (May 2017); http://www.citizensunion.org/spending_in_the_shadows_nonspecific_lump_sum_funding_in_the_fy_2018_new_york_state_enacted_budget.

Constitution are much more difficult to accomplish. But changes that need to take place have not been made, and there appears to be no substantial legislative will to make them going forward.

We know that there is no guarantee that a convention whose delegate selection processes are flawed will address and correct the endemic problems of our State government. We also recognize that any risk to cherished constitutional protections is deeply concerning to members of the bar who work tirelessly on behalf of low-income individuals, and those concerns should be given significant weight. But, upon hearing, considering, and deliberating the overall pros and cons of holding a convention, and taking into account longstanding City Bar positions, we have ultimately concluded that the potential benefits – primarily in the areas of government ethics, suffrage and judiciary reform – outweigh the potential risks.

We believe that, with appropriate education before this November's vote and next November's delegate election, voters will be motivated to elect delegates determined to protect – and possibly enhance – constitutional rights and mandates that protect vulnerable New Yorkers, ease voting restrictions and ballot access, improve the functioning and ethics of New York State government, and reform the judiciary so as to increase efficiencies and access to justice. We further believe that with proper attention, the risk of weakening important protections as a result of a convention will be very low. And, as a final check, voters will have the opportunity to either accept or reject any proposed amendments that emerge from a convention, an important backstop against undesired results.

For all of these reasons, and as further described below, the Task Force supports the convening of a constitutional convention in New York.

In the City Bar's tradition of stimulating discussion of important issues, there is an objection attached to this report from nine Committees as well as the Council on Judicial Administration (the "Objecting Committees"). During its almost two-year deliberations, the Task Force considered the issues raised in the objection and has acknowledged the concerns in this report.⁷ As indicated in this report, the Task Force recognized that the Constitution contains many important protections that we all agree need to be safeguarded. Yet, the Task Force parts company with the Objecting Committees in two main areas:

First, the Objecting Committees have not performed a rigorous assessment of the likelihood that the protections they deem to be in jeopardy would actually be diminished either by the delegates at the convention or by the popular vote. The Task Force disagrees that simply recognizing that the political climate is unstable and that risk exists is reason enough to oppose the calling of a convention. The Task Force also understands that there are single-issue constituencies – such as those concerned with protecting the Adirondack and Catskill Park Preserves – that may be unwilling to risk any change to their protected interest. The Task Force was asked a broader question: taking all of the interests into consideration, are the positive changes that may be achieved in the areas of ethics reform, a reorganized judiciary, and

⁷ The Task Force did not consider any potential risk to public employee pensions, as it did not consider that to be a core issue within the City Bar's mandate.

expanded voting rights reason enough to support calling a convention? It is the Task Force's assessment that New Yorkers will continue to stand behind the important provisions of our State Constitution and that we should not forego the opportunity to better our State government merely because we can identify potential risks.

Second, the Objecting Committees have not recognized the unique characteristics of a convention and what it would bring to issues of reforming our State government. The issues that the Task Force identified as in need of reform are not partisan issues that divide the Legislature. Rather they are hard issues that require serious focus. Though the objection encourages efforts to achieve needed reforms through the Legislature, decades of experience shows that will not happen. A constitutional convention will, we hope, bring a single-minded focus to the task of bettering New York's government.

The Task Force concluded, and the President and the Executive Committee agreed, that a constitutional convention is necessary in order to enact important judiciary, voting, and ethics reforms in our State. We believe it is time for New Yorkers to exercise the authority that was carefully inserted into the Constitution and convene a body to create a more responsive and effective State government.

I. INTRODUCTION

Every twenty years, New York voters go to the polls to decide whether to call a constitutional convention to revise the New York State Constitution and amend the same. New York voters most recently answered no in 1997. In November 2017, as provided by the State's constitution, New York voters will once again face the question of whether to call a constitutional convention. If the electorate decides to call a convention, delegates will be elected in November 2018, and the convention will convene in April 2019.

Over the past year and a half, the Task Force has been considering whether it should recommend that the City Bar support or oppose the calling of a convention. In April 2017, the Task Force voted overwhelmingly in support of a convention.⁸ This report reflects the issues considered and the reasons for this recommendation, divided into four categories: (i) Courts, Criminal Justice and Government Structure; (ii) Home Rule, the Environment and Private Economy; (iii) Education, Bill of Rights and Social Services; and (iv) Finance and Taxation. In each category, we identify the potential positive changes that support the call for a constitutional convention, changes that should be considered if a convention is called, and risks to which attention must be paid.

II. DELEGATE SELECTION

The Task Force began its work by considering the procedure for selecting delegates to the convention and determining whether to recommend changes to that procedure. The Constitution requires that there be three delegates elected from each State Senate district (there are 63 Senate districts) and an additional fifteen delegates elected at-large (statewide). The election would be conducted under existing provisions of the State's Election Law. Regardless of how long the convention lasts, each delegate will receive compensation equivalent to the full annual salary of a member of the State Assembly.

The Task Force considered a number of aspects of this process and developed the following set of recommendations⁹ to make the process more open, less subject to the control of political leaders, and more likely to result in a convention reflective of the will of the State's population:

- Judges, legislators and other State and local government officials should have the opportunity to run for constitutional convention delegate.
- Despite concerns from the Task Force regarding current constitutional provisions assuring that legislators and judges who serve as delegates receive salaries for both

⁸ For a summary description of the work of the Task Force, please refer to the Addendum.

⁹ N.Y.C. BAR, TASK FORCE ON THE N.Y.S. CONST. CONVENTION, REPORT ON DELEGATE SELECTION PROCEDURES (Feb. 2016), <http://www2.nycbar.org/pdf/report/uploads/20073044-DelegateSelectionProceduresConConReportFINAL2.9.16.pdf>.

roles, all public officials should be entitled to collect delegate salaries in addition to their other salaries, as has been done at past conventions.

- Service as a constitutional convention delegate should not count as “credited time” under any public pension system.
- Voters should be able to cast votes for up to three candidates in the election of district delegates.
- There should be no slate voting for the 15 at-large delegates; delegates’ names should appear on the ballot. Voters should be able to cast votes for up to 15 of the at-large candidates, with no more than one vote cast for a particular delegate.
- Petition signature requirements should be reduced for convention delegates; the requirement that at-large delegates collect at least 100 signatures from half of the congressional districts in the State should be eliminated. Petitioning requirements should be further eased.
- There should not be a shift to nonpartisan elections for convention delegates.
- There should be a system for public financing of all State elections, including the election of convention delegates, and such a system has been proposed by the Governor; however, if there is no such State public financing system, the Task Force does not recommend the creation of a one-time program solely for delegate election.
- If the voters vote in support of a constitutional convention, a voter guide should be issued for the delegate selection election of 2018, and a supplemental voter guide should be prepared for the ballot questions that are submitted to the voters by the constitutional convention.

In developing these recommendations, the Task Force focused on changes to the delegate selection process that could be accomplished by statute. While the Task Force recognized the deficiencies in the current delegate selection process, that recognition did not deter us from believing that a constitutional convention should be called. Statutory revisions to the delegate selection process can be made this year. And, should the electorate call for a convention in November 2017, statutory changes can be enacted in 2018, prior to the election of delegates.

III. COURTS, CRIMINAL JUSTICE, AND GOVERNMENT STRUCTURE: THE NEED FOR A CONSTITUTIONAL CONVENTION

A. Voting

Voter participation in New York State has declined dramatically over the past half century and now stands near the bottom as compared to other states. Much of the reason for this state of affairs is attributable to the fact that New York has failed to take actions undertaken by other states to increase participation by making it easier to register to vote and to cast a ballot.

Indeed, when other states have cut back on some of these measures, critics have characterized such acts as voter suppression. New York's inaction might, therefore, be fairly characterized as passive voter suppression.

The Task Force believes that a constitutional convention represents the best chance of bringing about the following reforms:

- Allow party registration up to 30 days before a primary election;
- Provide election day registration;
- Permit “no excuse” absentee voting;
- Provide for early voting;
- Make Election Day a work holiday; and
- Provide for felony re-enfranchisement.

B. Election Reform

The low rate of voter participation is also the result of an electoral system that heavily favors incumbents—giving them legislative control of the redistricting process, party control of the election mechanism, and restrictive ballot access for candidates, coupled with weak campaign finance regulation and an opaque budget process that allows billions of dollars to be spent in ways that favor incumbent officials. In 2016, only five of the 202 incumbents seeking re-election were defeated. Indeed, it is exceptionally rare for an un-indicted legislator to fail to get re-elected; many run without opposition in both the primary and general election.

The following reforms support the call for a convention and should be enacted:

1. Redistricting

New York State took a meaningful but incomplete step toward reforming the redistricting process when it adopted a constitutional amendment on this subject, which voters approved in 2014. That provision, however, reserved to the Legislature the power to select members of the redistricting commission and to override its recommendations. The Task Force recommends tightening the existing provisions on redistricting by establishing a fully independent and non-partisan redistricting commission.

2. Board of Elections

The current Board of Elections consists of four members, two Democrats and two Republicans, and most Board employees involved in the registration and election process are chosen by those two parties. That structure was the result of a previous reform that has had the unfortunate result of creating a body that is virtually always at an impasse and, therefore, unable

to act effectively. The Task Force recommends abolishing the two-party system for Board members and employees and making the Board a five-member, non-partisan board. In addition, the Board should be provided with professional enforcement staff with appropriate powers.

3. Public Campaign Financing

The Task Force recommends establishing a system for public financing of elections, including public matching funds, to curb the influence of money in elections and help level the playing field for candidates. The Task Force further recommends that campaign contribution limits be significantly lowered, that the LLC¹⁰ and soft money loopholes be closed, and that full public disclosure of sources for all campaign spending be required.

C. Ethics

Despite the indictments and convictions of a significant number of legislators and executive officials in recent decades, only limited, modest reforms have been enacted. New York State must implement tougher ethics reforms aimed not only at investigating and prosecuting ethics violations, but also at preventing them. The following reforms support the call for a convention:

1. Limitations on Legislators' Outside Employment

The Task Force recommends a cap on income earned by legislators from outside employment, accompanied by a significant salary increase. In addition, the Task Force recommends that additional limits be placed on the personal use of campaign funds, including a prohibition on the use of campaign funds to pay attorneys' fees and costs associated with defending against investigations or prosecutions alleging violations of law that are not related to the candidate's campaign, and a prohibition on the use of campaign funds for *any* household expenditures (such as clothing).

2. Reform of the Joint Commission on Public Ethics

The Task Force recommends making the Joint Commission on Public Ethics ("JCOPE") into a truly independent and transparent ethics commission to oversee executive and legislative conduct.¹¹ Changes would include eliminating the ability of three commissioners of the same party and same branch as a person being investigated to block an investigation or issuance of findings, and requiring legislative ethics hearings to be conducted in public.

¹⁰ Campaign contributions from a limited liability corporation are treated as contributions from an individual rather than from a corporation, which faces a much lower contribution limit. Donors often create multiple LLCs to further circumvent contribution limits.

¹¹ See, e.g., REPORT OF N.Y. COMMON CAUSE & N.Y. CITY BAR ASS'N, HOPE FOR JCOPE (Mar. 2014), <http://www2.nycbar.org/pdf/report/uploads/Hope-for-JCOPE-Report.pdf>.

D. Courts

Similar to government ethics and voting reform, a constitutional convention represents the best opportunity to undertake much needed reforms in the State judiciary. The Task Force recommends the following amendments:

1. The Constitutional Limit on the Number of Justices in the Supreme Court

The Task Force recommends that Article VI, section 6(d) of the Constitution be amended to authorize the Legislature to regulate the apportionment of judges by appropriate legislation without limitation and to increase the number of justices of the Supreme Court to an amount it deems necessary to effectively and expeditiously handle the judicial business in the respective districts. Article VI, section 6(d) of the Constitution provides for the total number of justices of the Supreme Court in each district, including justices designated to the Appellate Divisions of the Supreme Court. The Legislature, once every ten years, may increase the number of justices of the Supreme Court in any judicial district, “except that the number in any district shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration.” This population-based formula limiting the number of Supreme Courts justices significantly undermines the court system’s ability to deal with New York’s large and complex case load. This constitutional cap should be eliminated by constitutional amendment.

2. Merger of Trial Courts

The Task Force recommends that the trial courts be merged to create a two-tiered structure comprised of a statewide Supreme Court of general jurisdiction and a statewide District Court with inferior jurisdiction (as well as separate appeals courts for each lower court). If the delegates adopt a constitutional amendment to bring about such a merger but no changes are made with respect to how judges are selected, the concept of “merger in place” should be adopted, whereby the current selection process for justices and judges would continue.

3. Appellate Division – Creation of a Fifth Department and Constitutional Limits on the Number of Justices on the Appellate Division

The Task Force recommends that the Constitution be amended to permit the Legislature to establish a Fifth Department, given the current overwhelming and imbalanced case load among the existing four Departments. The boundaries of a new Department are properly a matter of political concern best left to the Legislature.

Furthermore, the Constitution should be amended to allow a change in the number of justices on the Appellate Division. Currently, the Constitution limits the number of Justices serving on the Appellate Divisions as follows: 7 in the 1st and 2nd Departments and 5 in the 3rd and 4th Departments. Although the Constitution currently provides a means for adding Appellate Division Justices, the Constitution should be amended to increase the number of Appellate Divisions *or* to provide for a mechanism that allows more flexibility by granting the Legislature authority to regulate matters of structure through appropriate legislation.

4. Selection of Judges

The Task Force recommends that the Constitution be amended to provide for the appointment of all judges of courts of record by means of a “qualification commission based appointive system” that provides for the nomination of a limited number of well-qualified individuals for every judicial vacancy by a diverse, broad-based committee composed of lawyers and non-lawyers, and whose members are appointed by executive, legislative and judicial officials. The list of nominees would be presented to a responsible and accountable public official and/or body responsible for making an appointment from the list within a limited time period. The choice should be subjected to a confirmation process.

5. Recommendation to Preserve Existing Sections of Article VI

The following provisions should be preserved in the Constitution because they ensure a fair and effective court system:

- Section 2, which provides for the appointment of judges to the Court of Appeals and establishes the Commission on Judicial Nomination;
- Section 13(a), which establishes that judges of the Family Court within the City of New York shall be appointed by the Mayor of the City of New York;
- Section 15(a), which provides that the judges of the court of city-wide criminal jurisdiction shall be appointed by the Mayor of the City of New York;
- Section 22, which provides for a commission on judicial conduct to receive, initiate, investigate, and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and
- Section 28, which provides for a unified court system administered by the Chief Judge of the Court of Appeals, who shall appoint a Chief Administrative Judge, and with the advice and consent of the Administrative Board of the Courts, establishes standards and administrative policies for general application throughout the State.

IV. HOME RULE, THE ENVIRONMENT, AND PRIVATE ECONOMY: RECOMMENDATIONS IN THE EVENT OF A CONSTITUTIONAL CONVENTION

A. Home Rule

Article IX, the so-called “Home Rule Amendment,” became part of the State Constitution in 1964. Unchanged since its adoption, Article IX establishes the basic constitutional framework for addressing questions of local government power and organization and state-local and inter-governmental relations. While Article IX has bolstered local control over local government

organization and personnel, and provided a firmer foundation for local law-making, it does little to protect localities from State government interference.

A number of issues regarding Article IX have arisen in the past half-century:

- The provisions granting legislative powers to local governments are inordinately complex and difficult to comprehend.
- Article IX provides little guidance as to when to treat legislation as preemptive of local initiative. Although the case law is inconsistent, the net result has been to erode the grant of authority to enact local legislation, and local governments have found it difficult to determine when they are free to act.
- Article IX purports to prevent “special” state laws¹² that affect the “property, affairs or government”¹³ of a particular locality without the consent of the affected localities. However, the Court of Appeals has continued to apply the pre-Article IX “doctrine of state concern,” and has repeatedly upheld special state laws in the absence of home rule messages from the affected locality.¹⁴ As a result, the protection against “special” state laws has been considerably eroded.
- The Constitution provides local governments with no protection from state laws that burden those governments with costly obligations without providing for funds to cover those costs – so-called “unfunded mandates.”
- Local governments are not provided with adequate fiscal autonomy. Local taxing decisions remain in Albany’s hands.¹⁵
- The Constitution effectively locks in place our complex eighteenth century local government structure, with multiple, often overlapping and difficult to coordinate counties, cities, towns, and villages throughout the State.¹⁶

¹² “Special” state laws are laws targeting one or a small number of local governments.

¹³ N.Y. Const. art. IX, § 2(b)(2).

¹⁴ The “state concern” doctrine was first articulated in *Adler v. Deegan*, 251 N.Y. 467, 491 (1929) – more than three decades before Article IX was adopted – but the Court of Appeals continues to invoke it. See, e.g., *Empire State Chapter of Associated Builders & Contractors, Inc. v. Smith*, 21 N.Y.3d 309, 316-17 (2013); *Patrolmen’s Benevolent Ass’n of City of N.Y. Inc. v. City of New York*, 97 N.Y.2d 378, 386 (2001); *City of New York v. State*, 94 N.Y.2d 577, 590 (2000); *Town of Islip v. Cuomo*, 64 N.Y.2d 50, 56-58 (1984); *Uniformed Firefighters Ass’n v. City of New York*, 50 N.Y.2d 85, 90 (1980).

¹⁵ Article IX, section 2(c)(8) provides only for “[t]he levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature.” In addition, Article VII places limits on local powers to borrow and tax property.

¹⁶ Cf. Office of N.Y.S. Comptroller, Div. of Local Gov’t Servs. & Econ. Dev., *Outdated Municipal Structures: Cities, Towns and Villages – 18th Century Designations for 21st Century Communities* (Oct. 2006), <https://www.osc.state.ny.us/localgov/pubs/research/munistructures.pdf>.

These are complex issues that deserve a balanced, comprehensive review. While they might not of themselves justify calling a constitutional convention – as many of these issues can be addressed by statute and legislatively-proposed constitutional amendments, which was how Article IX became part of the Constitution – a convention would enable consideration of Article IX and its impacts and possible approaches to provide local governments with more autonomy.

B. Environment

The “forever wild” clause of the conservation article of the Constitution, Article XIV, has proven to be an important and effective mechanism for maintaining the Adirondack and Catskill parks as a priceless heritage for all New Yorkers. Added to the Constitution by the 1894 Convention, the “forever wild” provision has led to legislation that preserves the parks’ wilderness, beauty, and ecological values by limiting excessive development and unnecessary despoliation. The Task Force urges that this provision be retained in the Constitution.

We believe that the remaining provisions of Article XIV should be preserved as well. The Legislature has utilized its constitutional mandate to protect the environment by enacting the Environmental Conservation Law, the Public Health Law, the Navigation Law and other environmentally protective legislation, including statutes addressing air and water pollution, fish and wildlife, mineral resources, pesticides, wetlands, waste disposal, aquifer protection, and environmental quality reviews. While a few gaps remain in the statutory scheme, the Legislature can fill them under its existing authority.

There has been discussion of whether a right to a clean environment should be added to the Constitution.¹⁷ This would have the effect of transferring much decision-making power over environmental matters from the legislative and executive branches to the judiciary, and would empower judges to make decisions about the appropriate levels of pollution and other forms of environmental degradation. The United States Supreme Court has decided that this is not an appropriate role for the federal courts,¹⁸ and we believe that reasoning applies to State judges. Moreover, giving judges the authority to determine appropriate levels of pollution or other kinds

¹⁷ Several states do have some form of environmental rights in their constitutions. Most of these provisions have had relatively little effect. The most notable recent exception arose in the Pennsylvania Supreme Court’s decision in *Robinson Township v. Pennsylvania*, 83 A.3d 901 (Pa. 2013), which found that a statute that barred municipalities from regulating hydraulic fracturing violated the state’s previously unused Environmental Rights Amendment of 1971. The Court was highly fractured – three judges signed a plurality opinion, a fourth wrote a concurring opinion based on different grounds, and two other judges wrote separate dissenting opinions. Subsequent cases have shown considerable confusion among judges and lawyers in interpreting the current significance of the Amendment.

¹⁸ *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (Ginsburg, J.) (finding that the federal Clean Air Act displaces the common law of nuisance with respect to greenhouse gasses: “The expert agency is surely better equipped to do the job [of regulating pollution] than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order . . . Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located.”)

of environmental impacts would create uncertainty as to whether compliance with a permit issued by a government agency would satisfy all applicable requirements, or whether additional restrictions could be imposed before or during construction, or even after operations have begun. The common law doctrines of nuisance and trespass are still available to the courts to remedy egregious impacts, and additional constitutional authority seems neither necessary nor wise.

C. Private Economy

1. Land Use and Housing

The “takings” clause. Article I, Section 7(a) of the Constitution provides that “[p]rivate property shall not be taken for public use without just compensation.” The 1997 Task Force was concerned with then-recent decisions of the New York Court of Appeals which indicated a trend toward greater protection of private property rights at the expense of land use protection, including environmental protection. However, since 1997 there have been a number of decisions by the United States Supreme Court and the Court of Appeals confirming that a local government retains broad powers to protect public health and safety. In its 2005 decision, *Lingle v. Chevron U.S.A. Inc.*,¹⁹ the Supreme Court made clear that the “substantially advances a legitimate government interest” formula announced in *Agins* is not an appropriate test for determining whether a regulation effects a Fifth Amendment taking.²⁰ That formula had been a basis for two of the Court of Appeals decisions that concerned the 1997 Task Force.²¹ In addition, the Court of Appeals has confirmed that the State takings clause is not narrowly defined to include only property taken for public use, but is broad enough to include takings for a public purpose.²² We believe no change to the takings clause is needed.

Housing. Article XVIII sets forth detailed provisions for the State and localities to develop low rent housing and nursing homes for people of low income, and provides authority for clearance and reconstruction of substandard and unsanitary areas. At the time of its passage in 1938, this Article provided the State with important tools to address the State’s depressed economy and became widely used during the post-World War II housing boom.

While much of Article XVIII remains important today, some aspects are worth revisiting should a convention be called. For example, while the housing provisions are limited to low rent housing, given the enormous increase in the cost of housing in many areas of the State, that limitation no longer reflects economic reality. Consideration should be given to expanding the category to housing for people with moderate incomes, and perhaps other types of housing as well. In addition, several of the Article’s provisions do not include counties among the covered

¹⁹ 544 U.S. 528, 548 (2005).

²⁰ The test had initially been set forth in *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

²¹ *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385 (1994); *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (1989).

²² *Goldstein v. NYS Urban Dev. Corp.*, 13 N.Y.3d 511, 526 (2009). This is consistent with the broad definition of public use that the U.S. Supreme Court upheld in *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

local governments, and other provisions do not include towns. The rationale for these exclusions should be reviewed. Moreover, the emphasis on physical renewal overlooks the social and economic factors considered integral to neighborhood revival. Finally, several sections of the Article create uncertainties or may not be necessary given the current state of the law.²³ It is not clear that the above issues have inhibited the use of Article XVIII to promote development, but addressing those issues would bring greater clarity to the scope of the Article.

2. Labor

Article I, Section 17 of the Constitution declares that labor is not a commodity, insures the right to collectively bargain, and provides an eight-hour day and five-day work week for public work and payment of wages for public work equivalent to the wages prevailing in the same trade or occupation in the locality where the public work is being performed. The right to bargain collectively is an important right. While currently that right is preempted by federal collective bargaining protections, that and the other provisions of Section 17 are safeguards that should remain part of the New York Constitution to protect State workers if there should be a change in federal law.

3. Games of Chance

Article I, Section 9 bars games of chance, with certain exceptions. Those exceptions have grown over the years including, most recently, a 2013 amendment to the Constitution that allowed the construction of seven casinos authorized by the Legislature. The 1997 Task Force concluded that the gaming provisions are not of constitutional dimension and should be removed from the Constitution, and we agree.

V. **EDUCATION, BILL OF RIGHTS, AND SOCIAL SERVICES: RECOMMENDATIONS IN THE EVENT OF A CONSTITUTIONAL CONVENTION**

In conjunction with the Task Force's recommendation that a constitutional convention be held, we highlight below certain provisions in the area of Education, Bill of Rights and Social Services that should be preserved. In addition, a constitutional convention may present an opportunity to enhance these important protections.

A. **Social Welfare, Article XVII Aid to the Needy**

With regard to aid to the needy generally, there is no comparable language in the United States Constitution, and it exists in few, if any, other state constitutions.²⁴ The State Constitution provides a clear and unavoidable obligation to ensure that needy New Yorkers receive care.

²³ See Peter J. Galie & Christopher Bopst, *Constitutional "Stuff": House Cleaning the New York Constitution – Part II*, 78 ALB. L. REV. 1513, 1552-53 (2014-2015).

²⁴ Article XVII, Section 1 provides, "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." The language of Article XVII, Section 3 (the public health provision) mirrors the language in Article XVII, section 1, which the courts have interpreted to create an

While judicial interpretation of this provision acknowledges this obligation, the courts have been less clear about the scope of the Legislature's discretion in determining how to allocate funds.²⁵ The courts have found that systems that are ineffective or leave large numbers of needy New Yorkers behind cannot pass constitutional muster.²⁶ For example, in *Hope v. Perales*, the court noted that women eligible for challenged Prenatal Care Assistance Program (PCAP), by definition, "have income above the poverty level and need not exhaust other resources to establish eligibility," as well as that "New York has consistently included all medically necessary abortions in its State Medicaid program."²⁷ However, the court looked to the actual eligibility requirements of PCAP and to the case record to conclude that the Legislature's determination of need was reasonable.²⁸

Notwithstanding such limitations, the constitutional mandate to help the needy is a bulwark against constraints by federal action. For example, Congress limited federal welfare grants in 1996, when President Clinton signed legislation that would end some Federal welfare grants, deny some benefits to legal immigrants, and impose five-year limits on assistance to adults.²⁹ Lawyers who practice in this area are deeply concerned that the Trump Administration will reduce the social safety net, including SNAP (food stamps), federal TANF funds (which fund welfare and child care), health insurance programs (including not only the Affordable Care Act, but Medicaid and Medicare), and Social Security programs, especially Supplemental Security Income. If the federal government undertakes such action, the burden of meeting the subsistence needs of New Yorkers will fall on the State and local governments. Many programs—from housing subsidies to avert eviction, to basic welfare, and Medicaid for many lawfully residing immigrants—are premised on Article XVII, section 1. The Task Force

affirmative and enforceable obligation on the State. Section 3 provides: "The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine." Cases involving Article XVII, Section 3 have been recently decided with reference to Article XVII, Section 1, as the two Sections are closely related. Most notably, in *Aliessa v. Novello*, 96 N.Y.2d 418, 428-29 (2001), the Court of Appeals found that a statute denying State Medicaid benefits to plaintiffs based on their status as legal aliens violated Section 1; the Court disposed of the case without having to consider plaintiffs' related arguments as to Section 3. See also Alan Jenkins & Sabrineh Ardalan, *Positive Health: The Human Right to Health Care Under The New York State Constitution*, 35 FORDHAM URB. L.J. 479, 496 (2008).

²⁵ *Id.* at 500.

²⁶ *Id.* at 504.

²⁷ *Id.* (quoting *Hope v. Perales*, 83 N.Y.2d 563, 571, 575 (1994)).

²⁸ See also, *Aliessa*, 96 N.Y.2d at 429 (concluding that Social Services Law § 122 violates the United States and New York Constitutions by denying State Medicaid benefits to plaintiffs based on their status as legal aliens in that it imposes an overly burdensome eligibility condition having nothing to do with need, depriving them of an entire category of otherwise available basic necessity benefits).

²⁹ David Stout, *Federal Welfare Shift Spotlights Unusual Amendment to State Constitution*, N.Y. TIMES, Sept. 18, 1996, <http://www.nytimes.com/1996/09/08/nyregion/federal-welfare-shift-spotlights-unusual-amendment-to-state-constitution.html?pagewanted=all>.

strongly supports the goals and mandates of Article XVII, section 1. Any efforts to weaken that provision via a constitutional convention should be opposed.

In furtherance of the goals of Article XVII, the Task Force supports the inclusion of a constitutional provision that would provide an express right to counsel in certain civil disputes involving the essentials of life. There has been a considerable effort made by the New York State Judiciary, affirmed by a concurrent resolution of the New York State Legislature in 2015, to bring attention to and address the critical need for counsel in civil matters involving the essentials of life: housing, access to health care and education, and subsistence income. And the City Bar has supported a right to counsel in housing court in New York City; a right to counsel for immigrants in detention; the inclusion of civil legal services funding in the Judiciary budget; and an ABA resolution endorsing a right to counsel for low-income persons whose basic human necessities are put in jeopardy. In light of the critical importance of legal representation in matters concerning family integrity and the fundamental necessities of life, the Task Force recommends, if a convention is called, that the Constitution establish a right to the assistance of counsel in such matters.

B. Education

Article XI, Section 1 of the New York State Constitution, referred to as the “Education Clause,” provides that “[t]he legislature shall provide for the maintenance and support of a system of free commons schools, wherein all the children of this state may be educated.” The Education Clause should be viewed in the context of the school finance reform movement, which has been the impetus for litigation and legislative action throughout the country.

In *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307 (1995) (“CFE-I”), the Court of Appeals held that children of New York have the right to a basic education and defined basic education as “the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.”³⁰ The Court of Appeals held that plaintiff’s claim that State funding for New York City’s schoolchildren was so inadequate as to violate the Education Clause should proceed to trial. At trial, plaintiffs succeeded in establishing a causal link between the current funding system and the proven failure to provide a basic education to New York City school children.

Litigation ensued after the trial, and in *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 918-19 (2003) (“CFE-II”), the Court of Appeals held that based on the trial record demonstrating inadequate funding, New York City school children were not receiving the constitutionally-mandated opportunity for a basic education. In the third appeal, *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14 (2006) (“CFE-III”), the Court of Appeals addressed the cost of providing New York City school children with a sound basic education and concluded that the State’s estimate of \$1.93 billion was a reasonable estimate to provide basic education for school children.³¹ Courts have interpreted the Court of Appeals decision as establishing the floor

³⁰ *Id.* at 316.

³¹ *Id.* at 31.

of the sum that must be expended for a basic education for New York City public school children.

A convention provides an opportunity to strengthen these educational guarantees and such amendments are worthy of consideration and passage. Efforts to weaken such guarantees should be opposed. The results of the related CFE litigation, of course, will be relevant.

C. Bill of Rights, Freedom of Speech and Press

1. Article I, Section 8: Freedom of speech and press

According to a recent law review article, this section bears no relationship to the current state of the law and has been largely superseded by federal and state jurisprudence. The article recommends that consideration be given to “whether the language of the state constitution should replicate the free speech and press clause of the First Amendment or whether the state wishes to provide protections to the press and speech beyond those provided by the First Amendment.”³²

For example, Article 1, Section 8 refers to truth only in a criminal context, with no mention of it being an absolute defense in civil suits. In addition, the section’s limitation of the truth defense only to statements published with “good motives” and “justifiable ends” is no longer constitutionally permissible.³³ At a minimum, this provision should be amended to reflect the current state of the law.

2. Article I, Section 11: Equal Protection of Laws

Section 11 of the Bill of Rights provides that “[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof.” In addition, Section 11 prohibits discrimination based upon “race, color, creed or religion.” The United States Constitution does not contain any such explicit prohibition. This section should be reviewed at a constitutional convention to ensure that it reflects current thinking and the current understanding of the full range of human rights. For instance, amendments might be considered to include prohibiting discrimination based upon ethnicity, national origin, gender, physical and mental disability, age, sexual orientation, gender identity and expression, and/or marital status.

³² Peter J. Galie & Christopher Bopst, *Constitutional “Stuff”: House Cleaning The New York Constitution – Part I*, 77 ALB. L. REV. 1385, 1401 n.91 (2013-2014).

³³ *Id.* at 1401 n.90 (See, e.g., *James v. DeGrandis*, 138 F. Supp. 2d 402, 416 (W.D.N.Y. 2001) (“Proof of the truth of defamatory words constitutes a complete and absolute defense to an action for libel or slander, regardless of the harm done by the statement and regardless of the malicious or evil motives that may have prompted its publication.”)).

VI. FINANCE AND TAXATION: RECOMMENDATIONS IN THE EVENT OF A CONSTITUTIONAL CONVENTION

With respect to constitutional issues relating to Finance and Taxation, there are several areas that delegates to a constitutional convention should address, including, reforming the State budget process and reassessing 19th Century prescriptions in light of 21st Century realities.

A. Reforming the State Budget Process

Recent history demonstrates that proposing, negotiating, adopting, and managing what is now a more than \$150 billion State budget is a process full of uncertainty and unforeseen challenges. Over time, many ideas and potential solutions have been put forward to improve the process. Although we believe that the problems associated with the budget process should be addressed by statutes rather than by constitutional provisions, discussion at a constitutional convention could spark a statutory response.³⁴

The first issue is whether to change the State's fiscal year, which is currently set by State law to begin on April 1. Changing the date could allow the State to calculate personal income tax revenue estimates with more accuracy and could prevent shortfalls in locality budgets, including school board budgets. On the other hand, a later State budget could disrupt school budget scheduling and substantially decrease voter turnout for school board elections, especially if such elections are held in late summer.

The second issue to consider is whether to require the State to engage in long-range financial planning in conjunction with the annual budget process. Long-term financial planning is considered a best practice in public budgeting and has served New York City well, providing early warnings of future negative budget trends with sufficient time to correct course. Such planning would also have the potential to improve consistency among State agency plans and provide a comprehensive look at current needs, allowing for more effective priority-setting.

Third, the question of whether to move New York from cash-based to accrual-based accounting under the Generally Accepted Accounting Principles, or GAAP, should be considered. Some argue that requiring GAAP-compliant budgeting would increase budget process rigor and could result in a more realistic statement of the State's financial position. Others argue against setting in stone any particular accounting method, as the Governmental Accounting Standards Board could change aspects of GAAP over time.

Fourth, a convention could address the current constitutional provision that permits the Legislature only to "strike out or reduce" items of appropriation in the Executive budget proposal, but not to alter any items. The Court of Appeals addressed this issue in *Pataki v. New York State Assembly*, 4 N.Y.3d 75 (2004), which allowed the Governor considerable leeway to include language in the Executive budget that alters substantive law without authorizing the

³⁴ Additional issues considered relate to revenue forecasting and balancing the budget at adoption and at specified times throughout the fiscal year.

Legislature to change any such language. The balance of power between the Governor and the Legislature is a hotly contested issue and could be debated at a constitutional convention.

Finally, delegates to a constitutional convention could address increasing transparency and accountability in the expenditure of discretionary funds initiated either by the Legislative or Executive branches. The current budget process provides significant discretion to the Executive to allocate lump sums of capital and tax expenditures available for economic development to private parties. Some argue that broad discretion is needed to incentivize projects as they develop and to allow the flexibility needed to “fast-track” projects. Others are concerned that discretion without transparency creates the potential for favoritism.

B. Reassessing 19th Century Prescriptions in Light of 21st Century Realities

The state and local finances sections of the New York Constitution are needlessly long and complex, and many provisions are obsolete. Some provisions are 19th Century solutions to 19th Century finance problems and, over time, have been reduced to virtual obsolescence. In order to properly address the issues raised here and propose changes (if any), experts across many disciplines would need to undertake a comprehensive and deliberative process.

One area that could be addressed is State debt referenda and public authority debt. Calling a convention would give delegates the opportunity to address the concern that state-funded debt is overwhelmingly issued by public authorities without voter approval. On the other hand, for over 90 years, essential capital infrastructure projects involving ports, airports, roads, bridges, tunnels, housing, water and sewer systems, power plants and transmission systems, to name a few, have been successfully financed by tax exempt revenue bonds issued by public authorities without a referendum at a general election. A constitutional convention, if called, should recognize the historic constructive role of public authorities, but also consider measures to limit the issuance of additional State or local government supported or related debt, potentially by imposing certain affordability criteria such as income growth, existing total State debt, and debt-raising capacity.

Another important area to consider is local debt limits. The Constitution places a limit on the maximum amount of debt that may be incurred by a local government in a fiscal year, but this limit has done little to control the growth of debt.³⁵ Some commentators have argued that the specific debt limits should be adjusted to reflect current capital needs and revenue-raising capacities. The State essentially took a step in this direction with the creation in 1998 of the New York City Transitional Finance Authority, which issues debt backed by income tax revenues.³⁶

³⁵ Between 1995 and 2005, excluding New York City, total outstanding debt for all classes of local government debt increased by 94 percent, from \$16.9 billion to \$32.8 billion. In 2012, total outstanding debt for New York City surpassed \$100 billion.

³⁶ Initially such debt was not subject to the constitutional debt limit, but it is now counted against the debt limit only to the extent it exceeds a statutory cap.

Finally, a constitutional convention could address constitutional provisions prohibiting state and local governments from providing gifts or loans to private entities. In *Bordeleau v. State*, 18 N.Y.3d 305, 313, 318 (2011), the Court of Appeals upheld appropriations made to a public benefit corporation, which used the funds to pay private entities for public development purposes. Indeed, the Court required that unconstitutionality be established beyond a reasonable doubt and held that public funding programs will be sustained unless they are patently illegal. Considering this highly deferential standard and the increased use of public-private partnerships, a review of the “gift and loan” provisions may be appropriate.

C. Addressing Potential Constitutional Issues in New York Tax Law

The Task Force received some comments that the State Constitution should be amended to deal with a variety of problems or potential problems with current New York tax law. Those comments referred to, for example, retroactively imposed taxes, duplicative taxation by states (especially when based on income from intangibles), and the absence of provisions explicitly providing due process protection against certain tax collection practices. It was the prevailing opinion of the Task Force that such problems should be addressed by statute rather than by constitutional provision; however, should there be discussion of these issues at a constitutional convention, such discussion could spark a statutory response.

VII. CONCLUSION

In making its recommendation, the Task Force is not without concerns. The Task Force does not take lightly the risk to and importance of preserving, in particular, the aid to the needy and public health provisions in Article XVII, the maintenance and support of free public education in Article XI, the sections of Article VI that provide a fair and effective court system, and the “forever wild” clause of Article XIV. We must continue to advocate for maintaining and expanding strong protections for vulnerable New Yorkers and we believe there would be a strong constituency in support of this effort. The Task Force is also aware of significant flaws in the delegate selection process, the role of money in politics, and the difficulty of ensuring that convention delegates accurately reflect the will of New York State residents. Should there be a convention, educating the public will be critical to a successful outcome. Uneducated voters may vote blindly, or not vote at all, leaving an opportunity for motivated special interests.

However, even with these significant concerns in mind, the Task Force believes that reform is needed in the areas of government ethics, voting, and the structure of the judiciary, and that without a convention there is little hope for change. It is for these reasons that the Task Force supports the calling of a constitutional convention in 2019.

* * *

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Task Force on the New York State Constitutional Convention**

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** The Task Force members are serving in their individual, personal capacities. They are not representing any organization or employer and nothing in this report should be attributed to an organization or employer with which a Task Force member was or is affiliated. Further, although the Task Force voted overwhelmingly to support a constitutional convention, it should not be assumed that every member of the Task Force supports every recommendation as articulated in this report.

† Hon. Yates is abstaining from the report.

ADDENDUM

The Task Force was formed during the summer of 2015 under then-City Bar President Debra L. Raskin in order to examine and answer the question of whether the City Bar should support or oppose the calling of a constitutional convention in 2019. In order to undertake this work, the Task Force was divided into five sub-committees: (i) Delegate Selection; (ii) Courts, Criminal Justice, and Government Structure; (iii) Finance and Taxation; (iv) Home Rule, the Environment, and Private Economy; and (v) Education, Bill of Rights, and Social Services. The Delegate Selection sub-committee produced a report, which was approved by the Task Force and published in February 2016.³⁷

In addition to regular full-Task Force meetings and sub-committee meetings, the sub-committees solicited input from the City Bar standing committees. The Finance and Taxation sub-committee contacted the Financial Cluster and the Tax Cluster. The Home Rule, Environment, and Private Economy sub-committee contacted the Environment Cluster, Business Cluster, and Property Cluster. The Education, Bill of Rights, and Social Services sub-committee contacted the Protected Classes Cluster, the Diversity Cluster, and the Children & Family Cluster. Finally, the Courts, Criminal Justice, and Government Structure sub-committee contacted the Government Cluster, Justice System Cluster, Criminal Justice Cluster, and Litigation Cluster.³⁸

On March 15, 2017, the Task Force co-sponsored a public event, held in the Meeting Hall of the City Bar, with John Jay College of Criminal Justice and CUNY. The program featured two panels of speakers who were asked to discuss the reasons for and against calling a constitutional convention.³⁹ John Jay and CUNY hosted a companion, educational event, which the City Bar co-sponsored, on March 21, 2017. In connection with the March 15, 2017 public event, the Task Force received statements from individual City Bar members; Professor Helen Hershkoff, Professor of Constitutional Law and Civil Liberties, NYU School of Law; Adriene Holder, Attorney-in-Charge, Civil Division, Legal Aid Society; and the Association of Legal Aid Attorneys, UAW 2325 (AFL-CIO). In addition, the Task Force gratefully received input and commentary from the following City Bar standing committees:

- Children and the Law
- Civil Court of the City of New York
- Council on Judicial Administration

³⁷ N.Y.C. BAR, TASK FORCE ON THE N.Y.S. CONST. CONVENTION, REPORT ON DELEGATE SELECTION PROCEDURES (FEB. 2016), <http://www2.nycbar.org/pdf/report/uploads/20073044-DelegateSelectionProceduresConConReportFINAL2.9.16.pdf>

³⁸ Information on committee clusters can be found at <http://www2.nycbar.org/Committees/Handbook/docs/liaisonsCLUSTER1617.pdf>.

³⁹ “Yes or No in November? Discussing a Constitutional Convention for New York,” March 15, 2017. Event details and audio available at <http://www.nycbar.org/media-listing/media/detail/yes-or-no-in-november-discussing-a-constitutional-convention-for-new-york-1>.

- Family Court and Family Law
- Government Ethics
- Personal Income Taxation
- Pro Bono and Legal Services
- Social Welfare Law
- State Courts of Superior Jurisdiction
- State and Local Taxation

In April 2017, the Task Force voted overwhelmingly to recommend that the City Bar support the calling of a constitutional convention in 2019, and this report followed.

APPENDIX

OBJECTION TO THE CITY BAR'S POSITION

THE CITY BAR SHOULD NOT RECOMMEND CONVENING A CONSTITUTIONAL CONVENTION BECAUSE THE PROSPECTS FOR ACHIEVING DESIRED REFORMS ARE OUTWEIGHED BY RISKS TO EXISTING RIGHTS, AND AN ALTERNATIVE ROUTE FOR REFORM EXISTS THAT PRESENTS NO RISK TO EXISTING RIGHTS

Nine committees of the New York City Bar Association—Capital Punishment, Civil Rights, Family Court and Family Law, Immigration and Nationality Law, International Human Rights, Lesbian, Gay, Bisexual and Transgender Rights, Pro Bono and Legal Services, Social Welfare Law, and State Courts of Superior Jurisdiction—as well as the Council on Judicial Administration, urged the City Bar either to oppose a Constitutional Convention or to make no recommendation on the issue.¹ Those Committees that urged active opposition believe that a Constitutional Convention poses a greater risk to the unique protections that our State Constitution provides to all New Yorkers than it offers in the promise of beneficial reform. In their view, a Constitutional Convention poses the greatest potential harm to New Yorkers who have historically lacked political power, including low-wage workers and other low-income people, immigrants, people of color, LGBT people, and others whose interests are currently under attack on the federal level.

The City Bar determined that the views of these committees and Council (the “Objecting Committees”) are a significant and valuable contribution to the debate regarding whether New York should hold a Constitutional Convention, and therefore invited the Objecting Committees to prepare this statement so that the public would have the advantage of seeing a wider range of views on whether to support or oppose the calling of a convention.

I. SUMMARY OF THE OBJECTION

If the only issue before the voters were whether to vote for a convention to achieve a reorganized judiciary, ethics reforms and expanded voting rights—even if these reforms have a low chance of being adopted—the Task Force Report would be persuasive.² These are laudable goals that have proven difficult to change through the ordinary political process. While the same forces that have made these goals difficult to achieve through legislation would make them hard to achieve in a Convention, the chance to do so would likely be worth the energy and expense. However, the issue is more complicated. Not only is there no guarantee of achieving the desired reforms, but as the Task Force acknowledges, every provision of the State Constitution would be placed at risk of amendment or repeal if a Convention is called.

¹ The International Human Rights Committee—which urged the City Bar to make no recommendation on the issue and instead remain neutral—joins this objection to the extent that the statement opposes the City Bar’s recommendation that New Yorkers vote to hold a Constitutional Convention and identifies significant risks to existing constitutional guarantees that implement international human rights law standards to which the United States has committed and historically given its support.

² References to the “Task Force view” or “Task Force Report” are to the Report of the New York City Bar Association Task Force on the New York State Constitutional Convention, dated June 14, 2017.

New Yorkers cannot afford to take this risk. The New York State Constitution includes important provisions that have no parallel in the federal Constitution, and other provisions that establish significantly broader protections than their federal counterparts. A Convention would therefore allow the amendment or repeal of provisions that include:

- Article I, § 17, providing a bill of rights for labor
- Article V, § 7, protecting public employee pensions
- Article XI, § 1, ensuring the right to a free public education
- Article XIV, protecting the state’s natural resources
- Article XVII, § 1, guaranteeing assistance to the needy

The Objecting Committees believe that the mere possibility of achieving important reforms through a Convention is likely outweighed by the risks of diminishing existing constitutional guarantees. The existing process for electing delegates to a Convention—a process that has not changed since 1997, when its flaws persuaded the City Bar to urge a “no” vote on a Convention—is unlikely to result in a Convention that would adopt the hoped-for reforms. What is more, the combination of a volatile electorate, the projected impact of federal policies under the current administration, and the outsized influence of money in politics—including “dark money” collected and contributed by organizations from anywhere in the country who have no obligation to disclose their contributors—raises an unacceptable risk of regressive amendments that would profoundly damage the state and its people.

This is not the moment in the life of the body politic to subject the New York State Constitution to the influence of unlimited contributions on an unpredictable Convention and highly stressed electorate in the optimistic hope that they will keep what is good in our State’s foundational charter and improve what is not. The risks to precious constitutional rights are too high. Indeed, a diverse array of organizations and individuals from across the political spectrum have gone on record opposing a Convention. The energies of the City Bar and the many proponents of reform to the state’s voting laws, its ethics rules, and its judiciary should instead unite behind a sustained campaign to achieve these goals through ordinary legislation and, where needed, the legislative constitutional amendment process.³

³ Pursuant to Article XIX, § 1 of the State Constitution, the Constitution can be amended by a majority vote of two successive Legislatures followed by ratification by a majority of voters in a referendum. The State Constitution has been amended more than 200 times using this method, and campaigns to see it amended through this less risky route are underway today. For example, Environmental Advocates of New York is supporting a constitutional amendment now in the legislature to establish a right to clean air and water and a healthy environment. See Environmental Advocates of New York, Final Push for Senate Passage of Constitutional Right to Clean Air, Water, <http://www.eany.org/our-work/press-release/final-push-senate-passage-constitutional-right-clean-air-water>.

II. A CONSTITUTIONAL CONVENTION WOULD PLACE PRECIOUS RIGHTS AT RISK

Were the only downside of a Constitutional Convention the possibility that judicial, voting and ethics reforms would not pass despite the effort and expense of mounting a Convention, there would be no objection. The chance to achieve these reforms would be worth it. However, the downside is far greater. Existing rights under the State Constitution would be placed at risk by holding a Convention.

A. The State's Obligation to Care for the Needy - Article XVII, § 1

One of the most important rights that a Constitutional Convention would put at risk is the right every New Yorker can now claim to the State's help when needed to avoid destitution. This right is established by Article XVII, § 1, which establishes the State's duty to care for the needy.⁴ Adopted in the aftermath of the Great Depression,⁵ Article XVII makes it a duty of the State to meet basic needs even when the political branches are indifferent or opposed. The federal Constitution contains no similar right, and the Supreme Court of the United States is not likely to recognize such a right in the foreseeable future. "When it comes to constitutional protection, the poor of New York do not have the luxury of a belt and suspenders. For the poor, it's Article XVII or nothing at all."⁶

Article XVII serves as a bulwark of hope when New Yorkers fall on hard times.⁷ Helen Hershkoff is a Professor at the New York University School of Law who is perhaps the leading authority on the role that Article XVII has played in the well-being of the people of our state. In

⁴ 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.").

⁵ See Helen Hershkoff, Rights and Freedoms under the State Constitution: A New Deal for Welfare Rights, 13 Touro L. Rev 631, 643–44 (1997) (recounting history).

⁶ Helen Hershkoff, Statement in Opposition to a Constitutional Convention at 2 (submitted to City Bar March 22, 2017) (citations omitted) (hereinafter "Hershkoff"), <http://documents.nycbar.org/files/HershkoffConConStatement.pdf>.

⁷ Article XVII also contains provisions consistent with international human rights norms, such as a right to income, health care, and housing. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3 (signed by the United States on Oct. 5, 1977); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc/A/810 (Dec. 12, 1948); see generally Martha Davis, The Spirit of Our Times: State Constitutions and International Human Rights, 20 N.Y.U. L. & Soc. Change 359 (2006) (discussing importance of state constitutional provisions like Article XVII as tools to implement international human rights law standards). Retrogressive measures that eliminate or curtail the guarantees in Article XVII and elsewhere in the State Constitution could run afoul of human rights principles that the U.S. has historically supported. See Michael H. Posner, Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, Address to the American Society of International Law, "The Four Freedoms Turn 70" (Mar. 24, 2011), <https://2009-2017.state.gov/j/drl/rls/rm/2011/159195.htm>; U.N. High Comm'r for Human Rights, Report on Progressive Realization of Economic, Social, and Cultural Rights, U.N. Doc. E/2007/82, ¶ 19 (June 25, 2007), <http://undocs.org/E/2007/82>.

testimony opposing a Constitutional Convention at this time, Professor Hershkoff wrote, “Make no mistake: Article XVII has protected thousands of New Yorkers from destitution, disease, and death. The courts have power to enforce Article XVII—the welfare right is judicially enforceable—and the Court of Appeals repeatedly has held that the duty to provide assistance is mandatory and that assistance cannot be withheld for reasons unrelated to need”⁸ The Legal Aid Society, which relies on Article XVII to protect the rights of low-income people, agrees.⁹

Article XVII also protects low-wage and even middle class New Yorkers, many of whom qualify for food assistance and assistance with their mortgage or rent and cannot afford health care.¹⁰ The Task Force Report acknowledges the importance of Article XVII, recognizing, for example, that it has secured State-funded Medicaid for immigrants’ health care at a time when federal welfare reform made many immigrants ineligible for federally-funded Medicaid, SNAP (Food Stamps) and Cash Assistance.¹¹ Less clear in the Task Force Report, but of even wider impact, are the landmark decisions holding that Article XVII establishes a state constitutional right to shelter, which now keeps nearly 60,000 residents of New York City alone off the streets every night.¹² Courts continue to apply Article XVII to protect the people of our state.¹³ Finally, Article XVII serves as a powerful deterrent when the State considers cutting subsistence benefits and/or imposing draconian conditions on their receipt.¹⁴

⁸ Hershkoff at 6.

⁹ Adriene Holder, Attorney-in-Charge of The Legal Aid Society, Civil Practice, Statement in Opposition to a Constitutional Convention (submitted to City Bar March 22, 2017), <http://documents.nycbar.org/files/HolderConConStatement.pdf>.

¹⁰ Hershkoff at 3, n.10 (citing The United Way of New York, ALICE: Asset Limited, Income Constrained, Employed — New York at 6, http://unitedwayalice.org/documents/16UW%20ALICE%20Report_NY_Lowres_11.11.16.pdf; CEO Poverty Measure 2005-2014: An Annual Report from the Office of the Mayor at 3 (April 2016), <http://www.nyc.gov/html/ceo/downloads/pdf/CEO-Poverty-Measure-2016.pdf>).

¹¹ Task Force Report at 24 n.29, citing *Aliessa v. Novello*, 96 N.Y.2d 418, 428-29 (2001).

¹² *See, e.g., Eldredge v. Koch*, 98 A.D.2d 675, 676 (1983); *see also McCain v. Koch*, 117 A.D.2d 198, 214 (1986).

¹³ Just last year, for example, a State Supreme Court judge in Buffalo held that denying state-funded cash assistance to New York residents with Temporary Protected Status would violate their rights under Article XVII, § 1. *See Karamalla v. Devine*, slip op. at 8, Index # 107-2015 (Sup. Ct. Erie County, Feb. 23, 2016). After initially appealing the decision, the State withdrew the appeal and conformed its policies to the ruling, making thousands of immigrants potentially eligible for cash assistance and the benefits that flow from it, including child care, eligibility for housing subsidies that prevent evictions and homelessness and access to education and training.

¹⁴ For example, at times when proposals were made for imposing “full family sanctions” for welfare rule infractions—that is, cutting off benefits to both parents and their children as a penalty for the parents’ rule violations—the prospect of litigation under Article XVII was enough to dissuade proponents from moving forward. Likewise, were New York State to consider or enact a lifetime limit on how long New Yorkers could receive subsistence benefits, as Congress has for federal welfare benefits, Article XVII, § 1 could be used to block it.

Article XVII, § 1 is essential to the fabric of New York State. The Task Force Report expresses confidence that “appropriate education” and “proper attention” during delegate elections and the Convention itself will mitigate the recognized risk to this provision and others.¹⁵ But the historical record offers no basis for this confidence. In fact, Article XVII, § 1 has already come under repeated attack, including by the last Constitutional Convention, held in 1967. That convention proposed an amendment that would have stripped the state’s obligation to care for the needy out of the Constitution and replaced it with aspirational but unenforceable language calling on the state to “foster and promote the general welfare and to establish a firm basis of economic security.”¹⁶ The voters ultimately rejected all of the changes that came out of the 1967 convention. Then, in 1993, Assembly members introduced a resolution to change the word “shall” to “may” in Article XVII, which would have significantly weakened the rights that have evolved under it.¹⁷ Legislators continue to make proposals every year to weaken this provision.¹⁸

The wisdom of holding a Constitutional Convention must also take into account national politics. In the past, the Legislature has been able to count on federal financial support in the cooperative effort of providing social welfare assistance. However, the President’s recent budget proposal, characterized by the National Center for Law and Economic Justice as a “savage attack” on the populace, would make \$610 million cuts to Medicaid and the Children’s Health Program; slash SNAP and TANF by \$272 billion; and cut Social Security Disability and Supplemental Security Income for poor seniors and people with disabilities.¹⁹ Tax changes, such as those proposed by the President, are likely to decrease federal revenues, causing additional budgetary pressures on the state. These short-term budgetary pressures could generate extreme pressure by the spring of 2019, when the Convention delegates would meet, to modify or eliminate the rights Article XVII protects, especially if outside interests who are ideologically opposed to public support for the needy were to train their sights on Article XVII. Thus, not only is a convention unlikely to improve upon Article XVII, it could generate a rollback of its protections.

To quote Professor Hershkoff: “Concerns about cutting back our Constitution’s welfare

¹⁵ Task Force Report at 5.

¹⁶ Hershkoff at 8 (citing Gerald Benjamin & Melissa Cusa, Social Policy, in *Decision 1997: Constitutional Change in New York* 302, 303 (Gerald Benjamin & Henrik N. Dullea, eds., 1997) (quoting the Proposed New York State Constitution, 1967, art. I, § 10).

¹⁷ Assembly Bill A.6787-A, 1993 Legislative Session (same as S.3426).

¹⁸ The Assembly and Senate have repeatedly introduced identical bills which would authorize the legislature to impose a residency period on needy persons applying for certain social services. *See, e.g.*, Senate Bill S.5365, 2005-2006 Legislative Session (same as A.7952); Senate Bill S.3290, 2007-2008 Legislative Session (same as A.5909); Senate Bill S.2991, 2009-2010 Legislative Session (same as A.6644); Senate Bill S.2494, 2011-2012 Legislative Session (same as A.2281); Senate Bill S.1124, 2013-2014 Legislative Session (same as A.2028); Senate Bill S.2493, 2015-2016 Legislative Session (same as A.6358).

¹⁹ *See* National Center for Law and Economic Justice, *Trump’s Budget: Savage Attack on Ordinary Folks in Favor of Tax Breaks for the Rich*, May 24, 2017, <http://nclej.org/news/trump-budget-savage-attack>.

right do not reflect a politics of fear—they reflect a politics of realism. As lawyers we should act with humility before recommending a course of action that imposes a risk of harm on others but not on ourselves.”²⁰

B. Other Constitutional Rights

The State Constitution also offers strong protection for other vital rights that are under substantial and sustained attack on the national level, making their protection of vital importance.

Article XI, § 1, titled “Education,” provides for free public schools and is the foundation for the right to a “sound basic education,” as recognized by the state’s highest court in the education funding litigation brought by the Campaign for Fiscal Equity.²¹ A Convention would risk exposing this right to the powerful forces that are attempting to undermine and discredit public education across the country, forces that include a federal Secretary of Education who has championed transferring public funds to private schools through vouchers and other programs. Indeed, the 1967 Constitutional Convention proposed eliminating Article XI, § 3, which prohibits state funding of religious schools. It is no surprise, then, that public school teachers in New York State have taken a strong stance against a Constitutional Convention, fearing that this article will be weakened, such that basic educational standards in New York State will be reduced or lost.²²

Article XIV, titled “Conservation,” includes what is known as the “forever wild” clause, which protects the three million acres of state forest preserve in the Adirondack and Catskill mountain regions from development and depletion. Article XIV also commits the state to “conserve and protect” its forests, wildlife and natural resources.²³ As the Task Force Report recognizes, courts have consistently enforced Article XIV to protect New York’s natural resources. And while the voters have approved some limited intrusions into the forest preserve through the legislative constitutional convention process,²⁴ a Convention would risk the wholesale rewriting of these critical protections. Many advocates for the environment oppose a convention for this reason.²⁵

The State Constitution contains strong protections for labor in Article I, § 17, often

²⁰ Hershkoff at 11.

²¹ *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 317 (1995) (quoting *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48 (1982)).

²² See New York State United Teachers, Why we must say NO to a constitutional convention, <https://www.nysut.org/news/nysut-united/issues/2016/february-2016/why-we-must-say-no-to-a-state-Constitutional-Convention>.

²³ N.Y. Const. art. XIV.

²⁴ See Adirondack Wild: Friends of the Forest Preserve, Forever Wild, Article XIV, New York State Constitution at 5-6, http://www.adirondackwild.org/pdf/pdf_article-XIV-booklet/Article%20XIV%20Booklet.pdf.

²⁵ Adirondack Council, Adirondack Wild: Friends of the Forest Preserve, and the Adirondack Mountain Club, are among the organizations opposed to a Constitutional Convention.

referred to as the “bill of rights” for labor. This section provides that labor is not a commodity, sets wage-and-hours standards, and guarantees employees the right to organize and bargain collectively. These protections for working people are considered some of the strongest in the nation.²⁶ Article V, section 7, protects public employee pensions.²⁷ The federal government’s increasing hostility to collective bargaining rights and the decimation of public employee pensions in multiple jurisdictions hint at the vulnerability of these rights in a Convention. This is a primary reason that labor groups comprise some of the most well organized and vocal opponents of a Convention.²⁸

This list is far from exhaustive. The New York State Constitution has evolved many unique rights over its 200 plus years of life. The New York Civil Liberties Union (NYCLU) opposes a Constitutional Convention in part because it risks changing constitutional guarantees that give New Yorkers stronger protection than those afforded by the federal Bill of Rights in areas that include free expression and the rights of criminal suspects and defendants.²⁹ These are all critical and contentious rights that a Convention would throw open to debate and alteration.

²⁶ Deborah Wright, President of the Association of Legal Aid Attorneys, UAW Local 2325 (AFL-CIO), Comments for Consideration by the Association of the Bar of the City of New York at 1 (submitted to the City Bar March 22, 2017), <http://documents.nycbar.org/files/ALAAUAW2325ConConTestimony.pdf>.

²⁷ Opinions differ on whether pension rights are also protected by the federal contract clause. *Compare* Evan Davis, N.Y.’s democracy needs an overhaul, Daily News (Feb. 25, 2017) (asserting that federal contract clause protects pensions) *with* Hershkoff at 4, n.11 (opining that the contracts clause prevents states from impairing contracts, not rescinding them, so does not protect pension rights). The Task Force “did not consider any potential risk to public employee pensions, as it did not consider that to be a core issue within the City Bar’s mandate.” *See* Task Force Report at 3 n.7.

²⁸ *See, e.g.*, New York State AFL-CIO, Vote NO on the NYS Constitutional Convention, <http://nysaflcio.org/noconcon/>; *see also* Public Employees Federation, NYS Constitutional Convention Vote NO Toolkit, <http://www.pef.org/Constitutional-Convention-toolkit/ConstitutionalConventiontoolkit-2/>.

²⁹ *See* Preliminary Draft Memorandum on NYCLU Opposition to a New York State Constitutional Convention, June 13, 2017 (hereinafter “Draft NYCLU Memo”), appended hereto. The NYCLU memo explains that under current case law, the State Constitution extends greater protection for opinions in defamation claims than does the First Amendment. Draft NYCLU Memo at 3 (citing *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 521 (1991)). New York law also provides journalists a qualified right to withhold sources, even where not gained with an assurance of confidentiality. Draft NYCLU Memo at 3 (citing *O’Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521 (1988)). New York law is also more protective than federal law with regard to searches and seizures. Draft NYCLU Memo at 4 (citing *e.g.*, *People v. Bigelow*, 66 N.Y.2d 417 (1985) (exceptions to the exclusionary rule); *People v. Marsh*, 20 N.Y.2d 98 (1967) (searches incident to traffic violation arrests); *People v. Scott*, 79 N.Y.2d 474 (1992) (warrantless administrative searches to uncover evidence of criminality); *People v. Johnson*, 66 N.Y.2d 398 (1985) (informant-information standard for probable cause); *People v. Diaz*, 81 N.Y.2d 106 (1993) (the “plain touch” doctrine in pat-downs); *People v. Dunn*, 77 N.Y.2d 19 (1990) (warrantless canine sniffs); *People v. Torres*, 74 N.Y.2d 224 (1989) (automobile searches); *People v. De Bour*, 40 N.Y.2d 210 (1976); *People v. Howard*, 50 N.Y.2d 583 (1980) (questioning and ordinary inquiries by the police)). Moreover, the New York Constitution specifies stringent requirements for waiver of a criminal jury trial and requires a 12-member jury in a felony case. Draft NYCLU Memo at 4 (citing, *e.g.*, N.Y.S. Const., Art. I, § 2 (waivers); *People v. DeCillis*, 14 N.Y. 203 (1964) (12-person jury)). New York courts also treat the right to counsel as being unwaivable in counsel’s absence once the right has attached, and apply the

C. The Risk of New Amendments

A Constitutional Convention would not only allow revisions to existing constitutional protections, but also proposals for new amendments. The convention process is, to some extent, analogous to a referendum process, in which a short-term campaign can stir the public to adopt a lasting policy without sufficient deliberation or debate about its potential consequences. For example, opponents of immigrants' rights could mount a campaign to require local enforcement of federal immigration law, forcing cities such as New York to expend local resources for federal purposes and to compromise public safety. Or, proponents of a death penalty could seek a constitutional amendment to authorize it; New York lacks a death penalty only because it was held unconstitutional. Nuanced consideration of weighty issues is extremely difficult in a campaign-style setting, such as New York's convention process would be, in contrast to the lengthy deliberations inherent in the legislative constitutional amendment process. Particularly because of the rising influence of money in politics, a Convention could give rise to well-funded drives to arouse public passion in favor of constitutional amendments that would threaten precious civil rights and civil liberties.

II. STRUCTURAL DEFICITS IN THE CONVENTION PROCESS MAKE PROGRESSIVE REFORM UNLIKELY AND RAISE THE RISK TO EXISTING RIGHTS

The Objecting Committees cannot share the Task Force's optimism about the likelihood of achieving progressive reform through a Constitutional Convention because of structural deficits in the Convention process. These deficits include the flawed delegate selection process, the inability to control the rules the Convention adopts, the timing of the votes pertaining to the Convention, and the vulnerability of delegate elections and constitutional proposals to be backed by massive spending that originates outside the state. Not only do these flaws reduce the likelihood of achieving judicial, ethics or voting reform through a Convention, but they also heighten the risk to the rights outlined above upon which New Yorkers depend.

A. The Delegate Selection Process Is Flawed

If the Constitutional Convention receives a "yes" vote in November 2017, the next step will be an election of delegates to the Convention in November 2018. Current law directs that three delegates will be elected from every State Senate district, and that an additional fifteen delegates will be elected statewide.

Twenty years ago, the City Bar Task Force on a Constitutional Convention opened its report to the public by stating that the legislature's failure to "improve fairness" in the delegate

right to post-conviction proceedings and to questioning on unrelated charges. Draft NYCLU Memo at 4 (citing, e.g., *People v. Arthur*, 22 N.Y.2d 325 (1968) (right to counsel); *People ex rel. Donohoe v. Montayne*, 35 N.Y.2d 221 (1974) (post-conviction proceedings); *People v. Rodgers*, 48 N.Y.2d 167 (1979) (questioning for unrelated charges)). The Court of Appeals has also been arguably more protective of a defendant's right to effective assistance of counsel than the Supreme Court. Draft NYCLU Memo at 4 (citing, e.g., *People v. Benevento*, 91 N.Y.2d 708 (1998)).

selection process “weigh[ed] heavily against calling a constitutional convention”³⁰ The 1997 Task Force concluded that the existing delegate selection process “dilutes minority representation and favors political incumbents,” and that “[a] convention organized under current delegate selection procedures would likely be controlled by the same forces that now control the political status quo.”³¹ The delegate selection process has not changed since the City Bar issued that assessment in 1997.

In 2016, the current City Bar Task Force on a Constitutional Convention again endorsed changes in the delegate selection process, changes that it asserted were necessary to “make the process more open, less subject to the control of political leaders and more likely to result in a Convention reflective of the will of the State’s population.”³² The recent recommendations repeat the call from 1997 to reduce the number of petition signatures that delegate candidates are required to collect, noting that “[c]ollecting such a large number of signatures can be a particular burden on individuals not backed by a party’s establishment.”³³ They also repeat the 1997 recommendation that the fifteen at-large delegates be elected individually, not by slates identified by party, in an apparent bid to open the delegate selection process to people who would not owe a debt to vote the party line.³⁴

In a break from the 1997 report, the City Bar Task Force in 2016 dropped its stance against district-wide voting for delegates, despite the recognized tendency of district-wide voting to dilute the ability of minority groups to elect delegates of their choice, stating, “the Task Force believes that the greatly increased influence of money in the political process during the past 20 years, bolstered by the U.S. Supreme Court’s *Citizens United* decision, creates a greater risk of well-financed single issue candidates.”³⁵

As of today, the Legislature has taken no action to change the delegate selection rules. While the Task Force Report expresses hope that the Legislature will reform the delegate selection process before an election for delegates, it does not suggest how that will be achieved

³⁰ New York City Bar Association, Report of the Task Force on the New York State Constitutional Convention, 52 The Record 523, 540 (June 1, 1997), <http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>.

³¹ *Id.* at 535.

³² New York City Bar Association, Task Force on the State Constitutional Convention, Report on Delegate Selection Procedures (hereinafter “Delegate Selection Report”) 1-2 (Feb. 11, 2016), <http://www2.nycbar.org/pdf/report/uploads/20073044-DelegateSelectionProceduresConConReportFINAL2.9.16.pdf>.

³³ *Id.* at 4.

³⁴ *Id.* at 3-4. The Delegate Selection Report noted that in the past, the names of at-large delegates did not even appear on the ballot. *Id.* at 4. This left voters no option but to blindly choose a party-identified slate or forego any voting on at-large delegates.

³⁵ *Id.* at 3.

by the same Legislature whose inaction on ethics, judicial and voting reform motivates the call for a Constitutional Convention.³⁶

For some, the failure to change the delegate selection rules is, in itself, sufficient reason not to support a Constitutional Convention today. Noted election law expert Jerry H. Goldfeder supported a convention in 1997, but now does not. He concludes that “a Constitutional Convention under the current delegate selection process would either fail to enact change or, worse, undermine if not eviscerate existing protections in the constitution.”³⁷ Instead, he predicts that “the realities of the inherently flawed delegate procedures outweigh any hoped-for reform.” Mr. Goldfeder reasons that there is no evidence that concerns about single issue politics, PAC money and special interests that motivated the City Bar to recommend against a convention in 1997 have diminished in the last 20 years; rather, they have become “more dominant.”

B. Voters May Not Be Permitted to Choose Among a Convention’s Proposals

The Task Force Report concludes its discussion of the risks to existing constitutional guarantees by stating, “[a]s a final check, voters will have the opportunity to either accept or reject any proposed amendments that emerge from a convention, an important backstop against undesired results.”³⁸

While it is true that a Convention’s proposals would be put to a popular vote, there is no certainty that voters would have the option of choosing among the constitutional changes that a Convention would recommend. The Convention itself determines the rules of its proceedings, and prior Conventions have generally presented groups of amendments for approval, without individualized voting on each. Thus if unwanted amendments are part of a package recommended by a Convention, voters may well face an up or down vote on the entire package—hardly the “backstop” that the Task Force envisions. This sets the stage for considerable mischief—for example, the possibility that special interests that, for reasons described below, are likely to be a significant force in the Convention process may find it to their perceived advantage for the Convention to (a) combine in one ballot vote an otherwise unpopular amendment that the special interests favor with other provisions that are popular or (b) support a regressive amendment to the state constitution (such as a “tough on crime” measure), not because the special interests really care about it but in order to gain support for some other less popular measure.

³⁶ Compare Task Force Report at 10 (opining that the current legislature can be counted on to enact “[s]tatutory revisions to the delegate selection process And, should the electorate call for a Convention in November 2017, statutory changes can be enacted in 2018, prior to the election of delegates.”) with *id.* at 2 (“the legislative and executive branches appear collectively unable or unwilling to sufficiently address public concerns that our elective processes need to be updated and fixed, that corruption continues to be a serious problem in State government and that reform of our judicial system is long overdue”).

³⁷ See Letter of Jerry H. Goldfeder dated May 29, 2017 submitted to the City Bar Executive Committee.

³⁸ Task Force Report at 5.

C. The Predictably Low Turnout for a Vote on a Convention’s Proposals Could Sway Results in Unpredictable Directions

An assessment of probable voter turnout should be paramount in any prediction related to the outcome of a popular vote. If there is a Convention, the delegates who are elected in the fall of 2018 will meet in the spring of 2019, with the expectation that the Convention’s proposals will be on the ballot for a statewide vote in the fall of 2019. The possibility of achieving reform through a Constitutional Convention depends on an electorate that cares enough about those changes to actually go to the polls in the fall of 2019 and vote for them. However, as an off-year for presidential and statewide elections, 2019 is likely to draw few voters to the polls, especially in New York City where it will also be an off-year for the mayoral election. Areas with hotly contested county or local elections outside of New York City may have higher turnout. Concerted drives for what some would consider regressive constitutional changes could augment this effect, as the motivation to reach the polls would be considerably stronger for proponents of, say, a state constitutional right to bear arms than for proponents of court reform.

D. *Citizens United* and the Rise of “Dark Money” in Elections Threaten the Integrity of the Convention Process

Aside from a few brief mentions of the increasing influence of money in politics, the Task Force Report fails to grapple with the overwhelming role of uncontrolled contributions in today’s electoral politics. The Report points to voter education as the antidote to delegate elections’ vulnerability to outside forces, stating that “with appropriate education before this November’s vote and next November’s delegate election, voters will be motivated to elect delegates determined to protect—and possibly enhance—constitutional rights and mandates”³⁹ Yet “voter education” most often takes the form of paid political advertising. Esoteric subjects like court, voting, and ethics reform are hardly amenable to ad campaigns, especially when compared to potential voter “education” on topics like immigration, the benefits of fracking, and pitting the needs of homeless families against everyone who pays rent or a mortgage.

Recognizing this hazard does not reflect distrust of New York voters. To the contrary, it reflects the reality of today’s state elections—captured in this headline from 2014: “Mega-Donors Give Big in State Elections.”⁴⁰ It would be imprudent to ignore the danger that “outside money” will target a Convention as an opportunity to roll back constitutional protection and change the legal infrastructure of the state.⁴¹ Even with small-donor matching, outside money

³⁹ Task Force Report at 5.

⁴⁰ Rachel Baye et al., Mega-Donors Give Big in State Elections, Time (Oct. 30, 2014), <http://time.com/3548313/mega-donors-give-big-in-state-elections/> (“In New York, wealthy individuals can donate through multiple limited liability corporations to dodge the state’s \$60,800 per cycle contribution limit for such businesses.”).

⁴¹ See Brennan Center for Justice, New Analysis: 2016 Judicial Elections See Secret Money and Heightened Outside Spending (Sept. 14, 2016), <https://www.brennancenter.org/press-release/new-analysis-2016-judicial-elections-see-secret-money-and-heightened-outside-spending> (reporting that “secret spenders predominated” and “outside spending dominated” in 2016 state supreme court elections).

could easily eclipse other available funding and dominate public discourse.⁴² It is hard to imagine how good-government groups and bar associations could counter well-funded campaigns by individuals or organizations that are now effectively free to spend without limits on whatever causes they adopt.

It is also impossible to predict what issues might attract attention and influence, including from outside the state. Consider, for example, last fall's election in Maine, in which wealthy individuals outside the state and organizations outside the state that were not required to disclose their donors (so-called "dark money"), contributed almost all the funds spent on a successful referendum campaign to adopt "ranked choice" voting for all state and federal candidates.⁴³ The point here is not the merits of ranked choice as a voting method. Instead, the fact that this critical issue for Maine voters attracted huge funding from both identified and unidentified donors outside the state drives home the point that current election law would allow anyone in the country with money to spend and an agenda to pursue to wield an outsized influence on delegate elections as well as the ultimate constitutional amendment vote.⁴⁴ Such contributions can neither be predicted nor controlled.

IV. CONCLUSION

A Constitutional Convention could achieve worthy goals, including the judicial, ethics and voting reforms that the Task Force Report endorses. It could also destroy crucial protections for the people of New York State—protections for the environment, for the public welfare, for education and labor and others—protections that in some respects already have been lost at the federal level and are certain to come under tremendous threat in the months between now and 2019. We live at a time of great volatility in the electorate, which is fed by unending and sometimes untraceable streams of money that have made elections of all kinds into virtual playgrounds for special interests. There is no reason to put the State Constitution up for grabs in this environment, particularly when each of the reforms the Task Force Report endorses can be achieved through ordinary legislation or the legislative amendment process. For these reasons,

nationwide). *See also* Brentin Mock, The Damaging Influence of Outside Money on Local Elections, The Atlantic CityLab (June 9, 2016), <http://www.citylab.com/politics/2016/06/the-damaging-influence-of-outside-money-on-local-elections/486407/>.

⁴² *See* Brennan Center for Justice, The Faces of Small Donor Public Financing (June 9, 2016), <https://www.brennancenter.org/video/breaking-down-barriers-faces-public-financing>; *see also* Jane Mayer, The Reclusive Hedge-Fund Tycoon Behind the Trump Presidency (March 27, 2017), <http://www.newyorker.com/magazine/2017/03/27/the-reclusive-hedge-fund-tycoon-behind-the-trump-presidency> (reporting extraordinary sums of money donated to "neutralize" the mainstream media).

⁴³ Darren Fishell, "Bloomberg, NRA and other 'dark money' groups fueling Maine's referendum campaigns," Bangor Daily News (Nov. 2, 2016), <http://bangordailynews.com/2016/11/02/the-point/bloomberg-nra-and-other-dark-money-groups-fueling-maines-referendum-campaigns/>.

⁴⁴ Interestingly, the Supreme Judicial Court of Maine issued an advisory opinion last month concluding that ranked choice voting conflicts with the Maine Constitution. Questions Propounded by the Maine Senate in a Communication Dated Feb. 2, 2017, No. OJ-17-1, 2017 ME 100, slip op. at 45 (May 23, 2017).

the committees listed above object to the City Bar's support for a Constitutional Convention at this time.

June 14, 2017

Appendix
Objection to the City Bar's Position
June 14, 2017

Exhibit: Draft NYCLU Memo dated June 13, 2017

In 1995, the NYCLU Board adopted a policy in opposition to the 1997 state constitutional convention question.¹ That opposition rested upon a pair of key ideals:

- Core civil liberties principles embodied in the state constitution could be subject to great risk if the text were to be amended through a “transient majority” process that is “not sufficiently deliberative to protect adequately individual freedom and rights of the minority.”
- There is much to preserve, in that the state constitution offers protections beyond those contained in the federal Bill of Rights, and in light of any potential weakening of federal constitutional protections.

With regard to process, the Board’s opposition focused on the rushed and transitory character of the convention, and on the tendency of such a process to crystallize the “public passions” of the political moment, rather than to produce appropriately balanced amendments that maintain enduring “constitutional equilibrium” in the government. The Board stated a strong preference for the legislative amendment process, which contains more inherent opportunities for debate and deliberation, without “excessively insulating constitutional change from the democratic process.” The Board also expressed concern that amendments could impair the ability of future courts to interpret the state constitution as more protective than federal constitutional provisions.

The Board’s final articulated position was opposition to the delegate selection process set forth in the state constitution itself.² Then as now, that process positioned each Senate district as a three-delegate district, with at-large elections for district delegates. The 1995 Board expressed concern that this may amount to unconstitutional minority vote dilution, in violation of Section 2 of the federal Voting Rights Act (VRA); this concern remains and current observers also note the probability of litigation.³

The analysis and positions in that policy are still sound in 2017. There have been no changes to the processes critiqued in that policy, and there is no cause to suspect that a convention held in the immediate future would be any more deliberative or any more representative than a convention held at that time. In fact, one might expect this convention-question cycle to be even less deliberative, as there has been no advance commission considering the merits or best practices of a convention – a departure from past cycles. It is also likely that moneyed special interests from across the political spectrum could exert more influence than a generation ago. Finally, while intervening case law has addressed remedies for vote dilution under VRA Section 2, unmodified multimember voting districts - like those used to elect convention delegates - are frequently found in violation.

This memo offers a brief analysis of the potential impact of a 2019 convention on civil liberties, and provides a current summary of protections in the state constitution that have been interpreted by our highest court to exceed those in the U.S. Constitution. An attached overview document supplies basic information on the mechanics and history of the state constitutional convention.

¹ Policy of the NYCLU Board of Directors, *New York State Constitutional Convention* (approved Dec. 5, 1975).

² See N.Y.S. Const. Art. XIX, § 2. “[T]he 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.”

³ See, e.g., N.Y. S.B. 5609 of 2017, Sponsor’s Memo in Support (“Currently, Article XIX, section 2 is more than likely in violation of the Federal Voting Rights Act.”), available at <https://www.nysenate.gov/legislation/bills/2017/s5609>; J.H. Snider, *The Best Delegate Election Process for a New York Constitutional Convention*, Gotham Gazette (Nov. 17, 2016) (“...[F]ederal courts could rule that the delegate election system approved by the Legislature for the three-member districts violates the proportional requirements under Section 2 of the Voting Rights Act... If the Legislature doesn’t change the type of system it approved in early 1966, it is likely to be sued under that law.”), available at <http://www.gothamgazette.com/opinion/6628-the-best-delegate-election-process-for-a-new-york-constitutional-convention>.

ACLU policy on the wisdom of a national constitutional convention is brief, but provides some guiding principles for a civil liberties analysis of the merits of a state constitutional convention.⁴

- The principal question is whether a convention would be likely to weaken or advance civil liberties.
- The rules governing convening and conduct of a convention must be fair – assuming that such rules are predetermined and subject to analysis.
- It is preferred that a convention call be limited in scope; at minimum, a convention should be confined to the scope of its call.
- Delegate selection should be fair and proportionate, such that it will yield a body capable of representing the interests of the entire state.

As the NYCLU likewise determines and evaluate all factors relevant to a state convention in light of the principal question – what is to be gained and what is at risk in the realm of civil liberties, should a convention be held – it makes sense to address the remaining principles in light of New York's established convention process.

The state constitution provides that the convention "shall determine the rules of its own proceedings."⁵ These rules would, along with selection of leadership and division of committees, naturally be among the first matters settled by the convention body. In the democratic spirit conveyed by the constitution's wholesale delegation of such broad power to the convention itself, one would hope, and might presume, that a body accountable to its electors should produce rules that are fair. However, there is no mechanism for containment or oversight of the convention's rules, and thus no means beyond a presumption of democratic fiat to determine whether they are likely to be drawn in a way that promotes the advancement of civil liberties.

Likewise, the state constitution provides for an inherently unlimited call: "Shall there be a convention to revise the constitution and amend the same?"⁶ The convening body could conceivably limit itself to one question or one area of inquiry, but past conventions have instead tackled an extremely broad array of issues. While a legislative constitutional amendment is limited to its text, and a legislative call for a convention may be limited in scope, there is no means to limit the call of the constitutional convention popular referendum at its outset.

The remaining principle for consideration is the need for a fair and representative body of delegates to the convention. Much has been said and written on the issues with delegate selection as set forth in the state constitution, including the NYCLU Board's 1995 statement of opposition. In addition to concerns about at-large voting articulated both in that policy and above, the analysis rests upon a simple question: how fair and representative are the state Senate districts that serve as the delegate selection districts?

Unfortunately, New York's state Senate districts cannot be described as representative and fair. One key change has been made since 1995: for the purpose of state Senate districts, New York's prisoners must now be counted at their address of residence prior to incarceration rather than at the facility where they are held.⁷ Despite this improvement - and even without regard to partisan makeup of districts - upstate, suburban, and rural interests

⁴ The ACLU recognizes the right to amend the Constitution by convention under Article V, but opposes the calling of any constitutional convention when it will result in weakening civil liberties. Regarding a national convention, the ACLU cautions that no standards exist to govern how a constitutional convention should be convened and conducted; and in the absence of such standards, there are no ways to assure, among other things, that delegates are fairly representative; that rules governing conduct of a convention will be fair; that a convention would confine itself to the subject or subjects of the call; and that a convention does not otherwise infringe on civil liberties.

⁵ N.Y.S. Const. Art. XIX, § 2.

⁶ *Id.*

⁷ Ch. 57, L. 2010, Part XX.

remain over-represented through the gerrymandered drawing of district lines, and downstate and urban interests remain under-represented.

While this poses difficulties with regard to the fundamental fairness of state Senate representation, it might not necessarily be unfair in itself for state constitutional convention purposes. One might even argue that amplifying interests that are in fact minority interests when viewed through a statewide lens is a wise balance when the final product of a convention's deliberation is to be put to a statewide popular vote. However, at-large voting compounds the problem of unfair representation: where particular factions have outsize influence *among* Senate districts, and at-large voting prevents minorities *within* those districts from obtaining representation at the convention, that already-outsize influence becomes further amplified on the convention stage. This has become a special concern for those who fear that moneyed interests, proxies for the powerful and single-issue delegates will run the day at a constitutional convention.

In summary, absent any constraints upon either the scope or rules of a convention, the built-in protections of democratic structures must carry even more weight in contemplating a convention's potential civil liberties outcomes. The current delegate selection process in New York ought not be viewed as so inherently fair and representative that it would adequately assure fair and representative outcomes – especially with regard to the protection of important minority interests and civil liberties, and in light of the absence of other checks.

The scope of what is to be protected in the New York State constitution is vast enough to warrant an inquiry in itself. In such crucial areas as free expression, religious liberty and the rights of criminal suspects and defendants, the state constitution has been consistently interpreted to outpace the Bill of Rights. In addition, the state constitution provides for some rights that the U.S. constitution never contemplates.

The following are some areas in which the state constitution has been interpreted more protectively than the Bill of Rights.⁸ This summary is comprehensive but far from exhaustive.

Free Expression: The New York Court of Appeals requires more protection in defamation lawsuits for “opinion” than the U.S. Supreme Court provides under the First Amendment.⁹ New York law provides journalists a qualified right to withhold sources, even where not obtained with an assurance of confidentiality.¹⁰ The obscenity standard under the New York Constitution is a statewide standard, rather than the local standard permitted by federal law.¹¹ In addition, the Court of Appeals has given greater protections under the state constitution to materials deemed obscene than those afforded by the U.S. Constitution.¹² The New York Court of Appeals has also protected topless dancing as a form of expression.¹³

Religious Education and Public Funds: Unlike the U.S. Constitution, New York's constitution explicitly bars spending public dollars on religious education, which in turn impacts how and what children are taught about civic matters including civil rights and civil liberties.

⁸ Scott N. Fein & Andrew B. Ayers, Eds., *Protections in the New York State Constitution Beyond the Federal Bill of Rights* (Apr. 18, 2017), available at <https://www.albanylaw.edu/centers/government-law-center/publications/Documents/Protections-in-the-New%20York-State-Constitution.pdf>.

⁹ *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 521 (1991).

¹⁰ *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521 (1988).

¹¹ *People v. Calbud, Inc.*, 49 N.Y.2d 389 (1980).

¹² *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553 (1986); *People v. P. J. Video, Inc.*, 68 N.Y.2d 296 (1986).

¹³ *Bellanca v. N.Y.S. Liquor Authority*, 54 N.Y.2d 228 (1981).

Search and Seizure: New York law is more protective than federal law on exceptions to the exclusionary rule;¹⁴ searches of persons incident to arrests for traffic violations;¹⁵ warrantless administrative searches of businesses to uncover evidence of criminality;¹⁶ the informant-information standard for probable cause;¹⁷ the “plain touch doctrine” in pat-downs;¹⁸ warrantless canine sniffs;¹⁹ automobile searches;²⁰ questioning and ordinary inquiries by police;²¹ and inventory searches²², among others.

Criminal Jury Trials: The New York Constitution specifies stringent requirements for waiver of a criminal jury trial.²³ It also requires a 12-member jury in a felony case, while the U.S. Constitution allows felony juries of as few as six members.²⁴ The New York Constitution has been interpreted to require unanimous juries in criminal cases; the U.S. Constitution does not require this of the states.²⁵

Right to Counsel: New York courts treat the right to counsel as “indelible;” once the right attaches, it cannot be waived except in the presence of counsel.²⁶ In New York, the filing of a felony complaint signals the commencement of criminal proceedings; at that point, the indelible right attaches.²⁷ New York also extends the right by prohibiting questioning of suspects beyond the federal limitation.²⁸ The right extends to post-conviction proceedings,²⁹ and to questioning for unrelated charges.³⁰ The Court of Appeals has also been more protective of a defendant’s right to effective assistance of counsel than the U.S. Supreme Court.³¹

Finally, there are also areas in which the state constitution affirms rights unaddressed in the U.S. Constitution, such as education,³² social welfare,³³ public health,³⁴ immigrants’ rights,³⁵ and environmental conservation³⁶.

¹⁴ *People v. Bigelow*, 66 N.Y.2d 417 (1985); *People v. Stith*, 69 N.Y.2d 313 (1987).

¹⁵ *People v. Marsh*, 20 N.Y.2d 98 (1967); *People v. Adams*, 32 N.Y.2d 451 (1973).

¹⁶ *People v. Scott*, 79 N.Y.2d 474 (1992).

¹⁷ *People v. Johnson*, 66 N.Y.2d 398 (1985).

¹⁸ *People v. Diaz*, 81 N.Y.2d 106 (1993).

¹⁹ *People v. Dunn*, 77 N.Y.2d 19 (1990).

²⁰ *People v. Torres*, 74 N.Y.2d 224 (1989).

²¹ *People v. De Bour*, 40 N.Y.2d 210 (1976); *People v. Howard*, 50 N.Y.2d 583 (1980).

²² *People v. Johnson*, 1 N.Y.3d 252 (2003).

²³ N.Y.S. Const. Art. I, § 2.

²⁴ N.Y.S. Const. Art. VI, § 18(a); *Williams v. Florida*, 399 U.S. 78 (1970).

²⁵ *People v. DeCillis*, 14 N.Y. 203 (1964); *Johnson v. La.*, 406 U.S. 356 (1972); *Apodaca v. Or.*, 406 U.S. 404 (1972).

²⁶ *People v. Arthur*, 22 N.Y.2d 325 (1968).

²⁷ *People v. Settles*, 46 N.Y.2d 154 (1978); *People v. Samuels*, 49 N.Y.2d 218 (1980).

²⁸ *People v. Cunningham*, 49 N.Y.2d 203 (1980); *People v. Skinner*, 52 N.Y.2d 24 (1980); *Arthur*, note 29 *supra*.

²⁹ *People ex rel. Donohoe v. Montanye*, 35 N.Y.2d 221 (1974).

³⁰ *People v. Rogers*, 48 N.Y.2d 167 (1979).

³¹ *People v. Benevento*, 91 N.Y.2d 708 (1998); cf. *Strickland v. Washington*, 466 U.S. 668 (1984).

³² *Fein & Ayers*, note 8 *supra*, at 25-27.

³³ *Id.* at 27-28; see also N.Y.S. Const. Art. XVII.

³⁴ N.Y.S. Const. Art. XVII, §§ 3-4.

³⁵ *Fein & Ayers*, note 8 *supra*, at 21-24.

³⁶ *Id.* at 29-32.