

PROGRESSIVES SHOULD VOTE AGAINST HOLDING A STATE CONSTITUTIONAL CONVENTION IN NEW YORK

MICHAEL PERNICK*

On November 7, New Yorkers will have the opportunity to vote on whether to hold a state Constitutional Convention.¹ If New Yorkers vote for a Convention this November and a majority of the delegates elected to the Convention in 2018 are progressives, there may be some much-needed progress on important issues, such as healthcare, campaign finance, voting rights, and the environment. However, in light of the state's gerrymandered districts and lax campaign finance laws, the rules of the game are stacked against progressives, and the risk that right-wing delegates capture control of a Convention is simply too great. New Yorkers have too much at stake, which is why progressives—and all New Yorkers—should vote against holding a Convention.

I.

THE NEW YORK STATE SENATE IS SEVERELY GERRYMANDERED – AS A RESULT, THE CONVENTION WOULD BE UNLIKELY TO REFLECT THE WILL OF NEW YORK VOTERS.

If New Yorkers vote to hold a Convention, voters would then elect delegates during the November 2018 election. There would be three delegates from each of the 63 State Senate districts in New York and an additional 15 delegates elected at-large statewide.² There is a big problem with this approach: The New York State Senate is one of the most gerrymandered legislative bodies in the country. One analysis showed that the New York State Senate map was gerrymandered to give Republicans a

* Michael Pernick is a litigation associate at Paul, Weiss, Rifkind, Wharton and Garrison LLP. He has done legal work on gerrymandering and voting rights, and he has studied and published on campaign finance reform. In addition, Michael, who was born with a congenital heart defect, serves on the Board of Directors of the Adult Congenital Heart Association and is a spokesperson and leader in the congenital heart defect community. He is a graduate of Wesleyan University and New York University School of Law, and lives in Rockville Centre, New York. This article reflects Michael's views and does not reflect the views of his employer.

¹ Lisa Foderaro, *A Constitutional Convention for New York? This May Be the Year*, The New York Times, July 5, 2017, available at https://www.nytimes.com/2017/07/05/nyregion/constitutional-convention-voting-new-york.html?_r=0.

² N.Y.S. Const., Art. 19, § 2.

13-seat surplus over a non-biased map.³ Those are the same districts that would be used to select delegates to the Constitutional Convention. As a result, there is a substantial risk that the delegates would not reflect the will of New York voters. Consider what happened in Wisconsin in 2012, which was similarly gerrymandered: A majority of voters cast their ballots in favor of Democratic candidates for the Wisconsin State Assembly, but Republicans still won 60 out of 99 seats.⁴ The same thing could happen here—even if a majority of New Yorkers vote for Democratic candidates for delegate, right-wing delegates could win a majority of the seats.

II.

COMPETITIVE DELEGATE CAMPAIGNS WOULD BE EXPENSIVE AND WEALTHY SPECIAL INTERESTS WOULD TAKE ADVANTAGE OF NEW YORK'S LAX CAMPAIGN FINANCE LAWS.

Each candidate for delegate will have to campaign in a large district containing over three hundred thousand residents.⁵ My district on Long Island, for example, includes not only my community of Rockville Centre, but also dozens of other communities, and covers nearly the entire South Shore of Nassau County. Many districts in upstate New York are geographically massive—for example, the 58th district covers five counties and takes hours to drive from end to end.

Running effective campaigns in districts this large is very expensive, and can cost hundreds of thousands, or in some cases, millions of dollars. The only candidates who will be successful are those who can raise the money. Candidates for delegate will be able to raise money under the same lax campaign finance laws as candidates for the New York State Senate. This means that candidates will be able to raise money in massive chunks of up to \$18,000 from a single donor.⁶ Only wealthy special interests regularly donate at this level. As a result, any Constitutional Convention will be full of people who represent those special interests—and not ordinary New Yorkers.

In addition, independent expenditures will likely play a major role in

³ Fred Mogul, *A Vote Is a Terrible Thing to Waste*, WNYC News, Sept. 5, 2017, available at <http://www.wnyc.org/story/vote-terrible-thing-waste/>.

⁴ *Whitford v. Gill*, 218 F.Supp.3d 837, 853 (E.D. Wis. 2016).

⁵ 2010 Census Population for NYS Legislative Districts and Congress, Center for Urban Research, available at <https://www.gc.cuny.edu/Page-Elements/Academics-Research-Centers-Initiatives/Centers-and-Institutes/Center-for-Urban-Research/CUR-research-initiatives/2010-Census-population-for-NYS-legislative-district>

⁶ Contribution Limits, New York State Board of Elections, available at <https://www.elections.ny.gov/CFContributionLimits.html>

delegate races. Republican donors like the Koch brothers are increasingly frustrated with Donald Trump and the Republican leadership in Washington, and they will be looking for other ways to implement their agenda.⁷ Our Convention would be a prime target for these types of wealthy right-wing groups—they would see this as a golden opportunity to seize control of the lawmaking process in New York.

III.

PROGRESSIVES HAVE A LOT TO LOSE.

If right-wing delegates take control of our Convention, progressives would have a lot to lose.

After right-wing policymakers took control of the lawmaking process in dozens of states, such as Wisconsin, Pennsylvania, and Indiana, they passed laws severely restricting collective bargaining rights.⁸ New York has been protected from this for at least two reasons. First, right-wing policymakers do not control the lawmaking process in New York. Second, collective bargaining rights are enshrined in our Constitution.⁹ All of this could change with a Convention controlled by right-wing delegates, who would place our Constitutional protections for collective bargaining rights in jeopardy.

Collective bargaining rights are not all that is at stake. The New York State Constitution protects public pensions, workers' compensation rights, environmental conservation, and the right to a free public education, among many other protections. A Convention controlled by right-wing delegates could jeopardize these important protections as well.

A right-wing Convention could also propose new Constitutional provisions that would do a lot of harm. For example, we might see provisions that have the effect of limiting taxation on the extremely wealthy or on corporations, forcing middle class New Yorkers to foot the bill. We might see provisions that roll back ethics laws or restrict voting rights. We might even see anti-choice or anti-LGBT provisions introduced.

⁷ Lisa Mascaro, *Republican lawmakers' troubles deepen as Koch donors and Bannon take aim*, Los Angeles Times, October 16, 2017, available at <http://www.latimes.com/politics/la-na-pol-koch-bannon-gop-20171016-story.html>

⁸ Niraj Choksi, *These 5 maps show unions are losing ground in the states*, The Washington Post, January 27, 2014, available at https://www.washingtonpost.com/blogs/govbeat/wp/2014/01/27/these-5-maps-show-unions-are-losing-ground-in-the-states/?utm_term=.d9bab6bcc7bc

⁹ N.Y.S. Const., Article I, § 17.

New Yorkers would have an opportunity to vote on any Constitutional changes before they take effect. But these reforms would likely be on the ballot in November 2019, when Democratic turnout will be lower than it would be in a federal election year like 2020. There is a risk that something dangerous could slip through.

Our State Constitution is not perfect. And we can fix it without a Constitutional Convention by taking back control of the State Senate and passing Constitutional amendments through our legislature. We have successfully amended our State Constitution over 200 times and we will likely continue to do so many times in the future.

If New York votes to hold a Convention, progressives will need to work hard to elect delegates who will fight to preserve our Constitutional protections and use the Convention as an opportunity to help ordinary people. However, regardless of how hard progressives work to elect progressive delegates, there remains a substantial risk that these efforts will not be successful and that ring-wing delegates will take control of the Convention. That is why all progressives—and all New Yorkers—should vote no on November 7.