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"The Path to a Constitutional Convention"

May 2, 2017

ALBANY LAW SCHOOL

THE 2017 WARREN M. ANDERSON BREAKFAST SERIES

The Path to a Constitutional Convention

MAY 2, 2017

Table of Contents

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Biographies

HENRY M. GREENBERG is a Shareholder at the law firm of Greenberg Traurig, LLP. A former Counsel to the New York State Attorney General, General Counsel to a major New York State agency, and federal prosecutor, Mr. Greenberg has handled numerous high-profile matters. He concentrates his practice on civil litigation, criminal and civil investigations, health law matters, and regulatory and administrative law. From 2007 to 2010, Mr. Greenberg served as Counsel to then New York State Attorney General (now Governor) Andrew M. Cuomo. In that capacity, he worked on some of the agency's most significant litigation and public policy initiatives. He also served as General Counsel for the New York State Department of Health from 1995 to 2000, where he was the chief legal advisor to the Commissioner of Health and administered an office of more than 100 attorneys engaged in virtually all aspects of administrative law. Previously, he served as Counsel to the Lieutenant Governor of New York State (1995); as Assistant United States Attorney for the Northern District of New York (1990 to 1995); and as law clerk to then Associate Judge (later Chief Judge) Judith S. Kaye of the New York Court of Appeals (1988-1990). Mr. Greenberg is chair of the New York State Bar Association Committee on the New York State Constitution, Member, Board of Overseers, Nelson A. Rockefeller Institute of Government, 2015-present, and a member of the Executive Committee and House of Delegates. He is counsel to the New York State Commission on Judicial Nomination, which nominates New York's Court of Appeals Judges; chairs the Third Department Judicial Screening Committee and the New York State Fair Advisory Board; and is a member of the State Judicial Screening Committee, Judicial Task Force on the New York State Constitution and the State Commission on the Restoration of the Capitol. He is a frequent lecturer and has been published numerous times on a wide range of legal subjects, including constitutional law, administrative law, criminal procedure, trial and appellate practice, health law, legal history and judicial philosophy. Mr. Greenberg received a JD, cum laude, from Syracuse University College of Law and a BA, with honors, from the University of Chicago.

RICHARD RIFKIN serves as Special Counsel to the New York State Bar Association, a position he has held since June 2008. He was admitted to the Bar and entered into the private practice of law in 1966. From 1970 to 1973, Mr. Rifkin served during the session as staff counsel to Assemblyman Leonard Stavinsky. He was appointed Counsel to the Bronx Borough President in 1973. In 1979, Attorney General Abrams appointed Mr. Rifkin Deputy First Assistant Attorney General; and in 1984, Counsel to the Attorney General; and in 1991, First Assistant Attorney General. From 1994 to 1999, Mr. Rifkin served as Executive Director of the State Ethics Commission. He was appointed in 1999 by Attorney General Spitzer as Deputy Attorney General for the office's State Counsel Division. In 2007, he was appointed Special Counsel to the governor, where he remained until June 2008, when

he assumed his current position. Since 1984, Mr. Rifkin has served as a member of the Chief Administrative Judge's Advisory Committee on Civil Practice. He has served on various committees of the New York City Bar Association and New York State Bar Association, and was, for two terms, a member of the House of Delegates of the latter. Mr. Rifkin received a BA degree, magna cum laude, from Washington and Jefferson College, having been elected to Phi Beta Kappa. He received an LLB degree from Yale Law School.

STEPHEN P. YOUNGER, Past President of the New York State Bar Association, is a leading commercial litigator who is also well-known for his alternative dispute resolution (ADR) work. Having been with Patterson Belknap since 1985, Mr. Younger has more than thirty years of experience as a commercial litigator. As a seasoned trial lawyer, he has tried many cases in federal and state court and before arbitration panels. He also frequently argues appeals, particularly in the appellate courts of New York. He is often called on to serve as an arbitrator or mediator in high-stakes matters. Mr. Younger's clients include financial institutions, mutual funds, hedge funds, pension funds, and venture capital firms involved in commercial, securities, and real estate disputes. He has also developed an extensive practice representing Latin American companies in U.S.-related matters. Mr. Younger was appointed to Governor Andrew M. Cuomo's Transition Committee and was also the Transition Director for Mr. Cuomo when he was the New York State Attorney General. He was also appointed to the Transition Committee for Attorney General Eric Schneiderman. Mr. Younger was counsel to the New York State Commission on Judicial Nomination, which nominates New York's Court of Appeals Judges, and is a member of the Governor's First Department Judicial Screening Committee. Mr. Younger serves on the Board of Directors for the CPR Institute for Dispute Resolution, and previously served as the Chair of its Executive Advisory Committee for seven years. He is also a founding board member of the New York International Arbitration Center. Mr. Younger has spoken written extensively in the fields of securities litigation, commercial arbitration and international dispute resolution. Prior to joining Patterson Belknap, Mr. Younger served as Law Clerk to the Hon. Hugh R. Jones, Associate Judge for the New York Court of Appeals.

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

by

Henry M. Greenberg*

On November 7, 2017, New Yorkers will go to their polling places and receive ballots containing a 13-word referendum question: "Shall there be a convention to revise the constitution and amend the same?" That question appears on the ballot because the New York State Constitution commands that at least once every 20 years voters are asked whether or not to call a Constitutional Convention.

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

The mandatory referendum embodies Thomas Jefferson's vision — some say radical — that every generation the People should revise their basic law. It is only fitting, therefore, that we have come together here, in the Great Hall of the City Bar, to debate whether New Yorkers should vote "yes" or "no" on a Constitutional Convention. For, when it comes to Constitutions, the organized Bar bears a singular responsibility.

Every lawyer takes an oath of office in which they pledge to "support the constitution of the United States, and the constitution of the State of New York." It's not a coincidence

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

Let us reflect a moment on the current New York State Constitution. Sad, but true, it's a document that most members of the public, even government officials, know nothing about or have ever read. Like every state, though, New York enjoys the dual blessing (to borrow Judith Kaye's phrase) of having two separate constitutions. Indeed, the framers of the Federal Constitution drew inspiration from New York's First Constitution, which was adopted a decade earlier in 1777, in the midst of the Revolutionary War.

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

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

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

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

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

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

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

The second vote will take place a year later at the next general election, November 6, 2018, when the People will elect 204 delegates. 189 of the delegates will be elected from New York's 63 senate districts (three delegates from each district); and 15 delegates will be elected on a statewide basis.

By operation of the Constitution, the Convention will convene on the first Tuesday in April, which would be April 2, 2019. The Convention will meet in Albany in the State Capitol for so long as it takes the delegates to present their recommendations to the People. Past Conventions, however, have typically lasted four to five months, in time for the delegates' proposed amendments to go on the ballot the same year at the general election in November.

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

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

So, let the debate begin.

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

THE ESTABLISHMENT OF A PREPARATORY STATE COMMISSION ON A CONSTITUTIONAL CONVENTION

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

NYSBA

Approved by the House of Delegates on November 7, 2015

Membership of the New York State Bar Association's Committee on the New York State Constitution

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TABLE OF CONTENTS

Page

INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20 years New Yorkers are asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such mandatory referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning the establishment of a non-partisan preparatory commission in advance of the upcoming vote on a Constitutional Convention.

The State Constitution is the governing charter for the State of New York. More than six times longer than the U.S. Constitution, the State Constitution establishes the structure of State government and enumerates fundamental rights and liberties. It governs our courts, schools, local government structure, State finance, and development in the Adirondacks — to name only a few of the countless ways it affects the lives of New Yorkers.

The State Legislature can propose amendments to the State Constitution, subject to voter approval. However, the framers of the Constitution wanted to make sure that there was an even more direct way for the citizenry to review fundamental principles of governance. That is why at least once every 20 years New Yorkers get to decide for themselves whether to hold a Constitutional Convention.

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[1] N.Y. CONST. art. XIX, § 2 ("At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . .").

The Convention vote in 2017 presents the electorate with a constitutional choice of profound importance. Absent a legislative initiative, we will not have this opportunity for another twenty years. So, the State should properly prepare for this referendum, regardless of the outcome.

In the Twentieth Century, every Constitutional Convention in New York was (and two mandatory Convention votes were) preceded by a preparatory commission created and supported by the State government. Conventional wisdom was that if a referendum vote approved a Constitutional Convention, expert, non-partisan preparations were required well in advance of the Convention delegates' assembly.[2] Indeed, most delegates to a Convention had insufficient time or resources to plan or carry out factual investigations or legal research on their own initiative. To a significant degree, the delegates had to rely on research and materials developed by others.[3]

Thus, since 1914, the State has vested in temporary constitutional commissions the important — indeed indispensable — responsibility of doing the research, data-collection and other preparations necessary to conduct a Constitutional Convention. "Some [commissions] were appointed by the governor; others were established by the legislature. Some were created in anticipation of a vote on the mandatory Convention question;

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[2] *See, e.g.,* Robert Moses, *Another New York State Constitutional Convention,* 31 ST. JOHN'S L. REV. 201, 207 (1957) ("Today here in New York much depends on the preliminary work of the Constitutional Convention Commission if there is to be a Constitutional Convention at all. The importance of a genuinely expert, non-partisan approach cannot be overstated.").

[3] *See* Samuel McCune Lindsay, *Constitution Making in New York,* THE SURVEY, July 31, 1915, at 391, 392 ("What a convention can attempt in the study of new problems depends largely upon the preparation made in advance of the assembly of the convention. There is not time for the committees to plan or carry out investigations of their own initiative, and in a constitutional convention there is not the accumulated experience and tradition of special subjects that are often carried over from session to session in a legislative committee through the hold-over members who serve several terms. The constitutional convention can do little more than study the materials put in their hands by interested parties.").

others resulted from the need to prepare quickly after the question passed."[4] And some produced bodies of research and work product useful not only to Convention delegates, but also policymakers, courts and scholars decades after.[5]

The State's extensive history with preparatory commissions makes clear that the formation of such an entity — with adequate funding, top-notch staff, and support from all branches of government — is necessary to properly plan and prepare for the mandatory Convention vote and a Convention, if the voters approve the call for one. Accordingly, this Committee recommends as follows:

First, the State should establish a non-partisan preparatory commission as soon as possible.

Second, the commission should be tasked with, among other duties: (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

Third, the commission should have an expert, non-partisan staff.

Fourth, the commission and its staff should be supported by adequate appropriations from the State government.

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[4] Robert F. Williams, *The Role of the Constitutional Commission in State Constitutional Change* [hereinafter *Constitutional Commission*], *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 49 (Gerald Benjamin & Hendrik N. Dullea eds., 1997) [hereinafter DECISION 1997].

[5] *Id.*

This report is divided into four sections. Part I summarizes the background of the Committee on the New York State Constitution and the issuance of this report. Part II provides a historical overview of past preparatory commissions for Constitutional Conventions. Part III presents the Committee's recommendations and discusses various lessons from past preparatory commissions and Conventions. Part IV concludes that the importance of the mandatory referendum in 2017 and a potential Convention obliges the State to appropriately plan and prepare, and recommends that the establishment of a preparatory commission is the best way to do so.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and promote initiatives designed to educate the legal community and public about the State Constitution.

At the Committee's first meeting on August 27, 2015, President Miranda requested that the members study and make recommendations on whether the State should establish a preparatory commission to plan and prepare for a Constitutional Convention. The Committee then heard from Professor Gerald Benjamin, Associate Vice President for Regional Engagement and Director of the Benjamin Center for Public Policy Initiatives at SUNY New Paltz, a nationally respected political scientist and commentator on state and local government. Professor Benjamin presented an overview of issues relating to the 2017 mandatory referendum and the conduct of a Constitutional Convention, and spoke about his service as Research Director of the Temporary Commission on Constitutional Revision from 1993 to 1995. Next, the Committee reviewed and discussed a research memorandum that surveyed the history of past preparatory commissions for

Constitutional Conventions, described the work product created by them, and identified key issues that must be considered in creating such a commission today.

After further discussion and review, the Committee concluded that the State government should establish, in advance of the mandatory Convention referendum in 2017, a non-partisan preparatory commission, as it has done in the past. This position is set forth and elaborated on in this report, which was unanimously approved by the Committee at a meeting held on September 30, 2015.

II. HISTORICAL OVERVIEW OF PREPARATORY COMMISSIONS AND CONVENTIONS

In the Twentieth Century, the question of whether to hold a Constitutional Convention was placed before the voters on six occasions (1914, 1936, 1957, 1965, 1977 and 1997) and was answered in the affirmative three times, resulting in Constitutional Conventions held in 1915, 1938 and 1967. Preparatory commissions were established by the State in advance of these Conventions as well as the mandatory Convention votes in 1957 and 1997. Each of these commissions is discussed in turn, highlighting the circumstances leading to their establishment, composition, work product, staff support and funding.

A. Constitutional Convention Commission (1914-1915)

On April 7, 1914, the voters approved the call for a Constitutional Convention by a slim majority (153,322 to 151,969).[6] Shortly thereafter, the Governor signed into law a bill establishing the "New York State Constitutional Convention Commission" with full power and authority to "collect, compile and print such information and data as it may deem useful for the delegates to the constitutional convention . . . in their deliberations at

[6] PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 193 (1996) [hereinafter ORDERED LIBERTY].

such convention."[7] The Commission was specifically tasked to supply research materials to the Convention delegates before the Convention was to convene in April 1915.[8]

The Commission consisted of the Majority Leader of the Senate, the Speaker of the Assembly, and three citizens of the State appointed by the Governor.[9] The Commission's enabling legislation provided for no compensation to the members, but provided expenses, and also provided for the employment of paid "clerical, expert and other assistance."[10] For this purpose, the Legislature initially appropriated $5,000.[11]

The Commission's Chair was Morgan J. O'Brien, a former Justice of the State Supreme Court. The Commission selected its staff and fixed their compensation.[12] The State agency responsible for providing assistance to the Commission, the Department of Efficiency and Economy, relied heavily on a newly formed private organization dedicated to producing research of government organizations, the New York Bureau of Municipal Research.[13] The Bureau assigned 20 people to this project, including Charles A. Beard,

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[7] L. 1914, ch. 443. *See also* THOMAS SCHICK, THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1915 AND THE MODERN STATE GOVERNMENT 42 (1978) [hereinafter CONSTITUTIONAL CONVENTION OF 1915].

[8] *Id.*

[9] L. 1914, ch. 261, § 1; *see* Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 12-13 (1996) (discussing constitutional commissions established in 1872, 1875, 1890, 1915, 1921, 1936, 1956, 1958, 1965 and 1993).

[10] L. 1914, ch. 261, § 1.

[11] *Id.* § 2.

[12] *Id.* § 1.

[13] GALIE, ORDERED LIBERTY, *supra* note 6, at 193.

later to become one of the most influential historians and political scientists in American history.[14]

The Commission produced a 768-page report for the 1915 Convention delegates that contained a comprehensive and detailed description of the organization and functions of the State government.[15] The Commission also produced a 246-page appraisal of the State Constitution and government.[16] The comprehensiveness and quality of these materials established New York as the first state in the nation to lay a solid research foundation for a Constitutional Convention.[17] In fact, "[t]he report of the commission was the first comprehensive description of a state government ever prepared."[18] These materials ensured that the delegates to the Convention arrived well-prepared[19] and established a precedent of detailed preparation for two future mandatory Convention referenda (1957 and 1997) and Constitutional Conventions (1938 and 1967).[20]

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[14] *Id.*; SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 43-44.

[15] NEW YORK STATE DEPARTMENT OF EFFICIENCY AND ECONOMY, GOVERNMENT OF THE STATE OF NEW YORK: A SURVEY OF ITS ORGANIZATION AND FUNCTIONS (1915).

[16] NEW YORK BUREAU OF MUNICIPAL RESEARCH, THE CONSTITUTION AND GOVERNMENT OF THE STATE OF NEW: AN APPRAISAL (1915). *See* SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 44-49 (discussing the appraisal).

[17] GALIE, ORDERED LIBERTY, *supra* note 6, at 193. *See also* SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 43.

[18] Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1299 (2001) [hereinafter *A Worthy Tradition*].

[19] *Id.* at 1299. The 1915 Constitutional Convention convened on April 4, 1915 and adjourned on September 4, 1915.

[20] *Id.* at 1300.

B. Constitutional Convention Committee (1937-1938)

On November 3, 1936, the voters approved the call for a Constitutional Convention by a vote of 1,413,604 to 1,190,275.[21] In response, Governor Herbert H. Lehman recommended in his annual message to the Legislature that past practice be followed by establishing a non-partisan committee to assemble and collate data for the use of the Convention.[22] "It seems to be extremely short-sighted," he observed, "for us to do nothing until the day the convention assembles." The two Houses of the Legislature, however, did not adopt the Governor's recommendation.[23]

In the face of the Legislature's inaction, on July 7, 1937, Governor Lehman announced the appointment of the "New York State Constitutional Committee."[24] Consisting of 42 members, the Committee was "non-partisan and non-political in character and in motive," and responsible for undertaking and directing "the preparation and publication of accurate, thorough, and above all, impartial studies on the important phases of government, certain to be considered at the Constitutional Convention."[25] Governor Lehman made clear that the Committee's purpose was not "to

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[21] *Id.* at 1304.

[22] VERNON A. O'ROURKE & DOUGLAS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE 67 (1915) [hereinafter CONSTITUTION-MAKING]; Franklin Feldman, *A Constitutional Convention in New York: Fundamental Law and Basic Politics,* 2 CORNELL L. REV. 329, 336 (1957) [hereinafter *A Constitutional Convention*].

[23] O'ROURKE & CAMPBELL, CONSTITUTION-MAKING, *supra* note 22, at 67 ("[Governor Lehman's] . . . recommendation . . . was unable to scale the heights of partisanship. A bill was passed by the Senate, but the legislature adjourned without authorizing such a fact-finding committee, despite Governor Lehman's assurance that the committee would be restricted to fact-finding, with no power over the order or the character of business to be handled by the convention.").

[24] 1937 PUBLIC PAPERS OF GOVERNOR LEHMAN 664 [hereinafter LEHMAN PAPERS].

[25] *Id.*

determine an agenda for the Convention . . . Its functions will be confined to fact-finding studies and to the collection of data."[26] Although all of the Committee's members were appointed by the Governor, the Legislature appropriated money in support of its work.[27]

The Committee's Chair was then-State Supreme Court Justice (later Lieutenant Governor and Governor) Charles Poletti. He and the other Committee members were supported by a substantial staff of at least 16 people. In addition, at Governor Lehman's direction, 15 people were assigned from the State Law Revision Commission to work with the Committee. More than 100 others, including leading academics, government officials, and private citizens, also provided assistance, advice and counsel.[28]

The Committee produced 12 reports: five reference volumes, along with volumes devoted to problems related to the bill of rights, taxation and finance, and issues of home rule and local government. As constitutional historian Peter J. Galie has observed, "despite the haste in gathering this material, the Poletti Committee, as it became known, produced one of the most comprehensive and reliable source[s] of information on the New York Constitution."[29]

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[26] *Id.*

[27] Feldman, *A Constitutional Convention, supra* note 22, at 337.

[28] Information regarding the Poletti Committee's staff and other support was gleaned from introductory notes at the front of each of the 12 reports produced by the Committee. The reports are accessible online from the New York State Library: http://128.121.13.244/awweb/main.jsp?flag=collection&smd=1&cl=library1_lib&field11=1301505&tm=1442777021299&itype=advs&menu=on (last visited on Sept 20, 2015).

[29] GALIE, ORDERED LIBERTY, *supra* note 6, at 233; Williams, *Constitutional Commissions, supra* note 4, at 50 (the "Committee produced a body of work extraordinary for its depth, breath, and quality"). The Poletti Committee's reports are often cited by New York courts. *See, e.g., People v. Peque*, 22 N.Y.3d 168, 187 (2013) ("As noted in the Poletti Committee's report in preparation for the State's constitutional convention of 1938 . . . ."); *Bordeleau v. State*, 18 N.Y.3d 305, 317 (2011) ("Such

C. Temporary Commission on the Constitutional Convention (1956-1958)

In 1956, more than a year before the mandatory referendum on a Constitutional Convention, the Legislature established the "New York State Temporary Constitution Convention Commission."[30] The Commission was given three responsibilities: (1) to study proposals for change and simplification of the Constitution; (2) to collect and present information and data useful for the delegates and electorate prior to and during the convention; and (3) to issue reports to the Governor and the Legislature. The interim reports were due not later than March 1, 1957, and from time to time thereafter until March 1, 1959, provided, however, that if the voters decided against the Convention the Commission would terminate on February 1, 1958.[31]

The Commission was composed of 15 members, five named by the Governor, five by the Majority Leader of the Senate, and five by the Speaker

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concerns were the subject of debate during the 1938 Constitutional Convention. But the Convention and subsequent ratification of the amendments by the electorate demonstrated the approval for the ability of public benefit corporations to receive and expend public monies, enable the development and performance of public projects and be independent of the State [*see Problems Relating to Executive Administration and Powers,* 1938 Rep. of N.Y. Constitutional Convention Comm., vol. 8, at 325–326 . . . .") (citing the Poletti Report)].

[30] L. 1956, ch. 814; Feldman, *A Constitutional Convention, supra* note 22, at 337-338. As the future Chair of the Commission observed: "The action taken by the Legislature in passing the bill creating the Temporary State Commission on the Constitutional Convention and the Governor's signing of it marked the first time in our State's history, or in that of any other state so far as we can ascertain, that a Commission has been established prior to the referendum on the calling of a convention." Nelson A. Rockefeller, *The Work of the State Constitutional Convention Commission*, 29 N.Y. St. B. Bull. 314, 315 (July 1957) [hereinafter *Work of the State Constitutional Convention Commission*].

[31] GALIE, ORDERED LIBERTY, *supra* note 6, at 262-63; Moses, *Another State Constitutional Convention, supra* note 2, at 205-206.

of the Assembly.[32] When a dispute developed between Republican leaders and Governor W. Averell Harriman over who would serve as the Commission's chair, Harriman appointed Nelson A. Rockefeller (who later became Governor).[33]

The Commission had an outstanding staff, with nearly 70 expert consultants to conduct policy reviews.[34] On September 26, 1956, the Commission held its first organizational meeting,[35] and issued its First Interim Report on February 19, 1957.[36] The report provided a brief outline of the State's constitutional history, a description of methods of amending the Constitution, and staff studies that updated the compilation of state constitutions that had served the 1938 Convention and presented an outline of proposed background studies in local government. The Commission indicated that it would look for opportunities to simplify the existing Constitution in non-controversial ways.[37]

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[32] L. 1956, ch. 814, § 2.

[33] GALIE, ORDERED LIBERTY, *supra* note 6, at 262. *See* RICHARD NORTON SMITH, ON HIS OWN TERMS: A LIFE OF NELSON ROCKEFELLER 267-269 (2014) [hereinafter ROCKEFELLER].

[34] Smith, ROCKEFELLER, *supra* note 33, at 270. The Commission's Executive Director was Dr. William J. Ronan, the 44-year old Dean of the New York University Graduate School of Public Administration and Social Science. The Counsel to the Commission was George L. Hinman, a highly respected 51-year-old lawyer from Binghamton. *Id.* at 270-271.

[35] HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 33 (1997) [hereinafter CHARTER REVISION].

[36] TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, FIRST INTERIM REPORT (1957), *reprinted in* N.Y. Legis. Doc. No. 8 (1958); *see* DULLEA, CHARTER REVISION, *supra* note 35, at 33 (summarizing First Interim Report).

[37] *Id.*

In June 1957, the Commission held public hearings in Buffalo, Albany and New York City to provide the public an opportunity to present suggestions and proposals for constitutional revision and simplification.[38] At the hearings more than 80 people representing their individual points of view or those of organized groups appeared before the Commission.[39]

In the spring of 1957, the Commission created an Inter-Law School Committee on Constitutional Simplification. The Committee examined 54 sections of the Constitution, recommending elimination of 23 of them as superfluous and outmoded. Other sections were deemed so cumbersome and "harmfully detailed" that they could "be rewritten and substantially shortened."[40]

At the summer meeting of the State Bar in June 1957, Chairman Rockefeller said that the two questions voters would face in November were (1) whether the state Constitution needs amending, and if so, (2) whether a convention or the alternative legislative method would be more effective. He observed that there was "no group in the state which is more interested in these questions or whose judgment and informed opinion can be more helpful to the voters in deciding these issues than the New York State Bar Association."[41]

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[38] DULLEA, CHARTER REVISION, *supra* note 35, at 34-35.

[39] Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 320.

[40] GALIE, ORDERED LIBERTY, *supra* note 6, at 263 (quoting THE INTER-LAW SCHOOL COMMITTEE, THE PROBLEM OF SIMPLIFICATION OF THE CONSTITUTION (1958), *reprinted in* N.Y. Legis. Doc. No. 57, at xiii (1958)); Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 318.

[41] Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 314.

On September 19, 1957, the Commission issued a Second Interim Report[42] that summarized the proposals gathered by the Commission from individuals and 107 organizations during public hearings. The subjects receiving the greatest attention were local governments and home rule, legislative apportionments, organization and procedure.[43]

On November 5, 1957, the electorate voted against a Constitutional Convention by a vote of 1,368,068 to 1,242,538. Nevertheless, the Commission remained in existence under the name Special Committee on the Revision and Simplification of the Constitution. Before going out of existence in 1961, this body issued a number of reports, some of which provided the basis for amendments to the Constitution subsequently proposed by the Legislature and approved by the people.[44]

D. Temporary State Commission on the Constitutional Convention (1965-1967)

As a result of legislative action calling for a referendum vote, in November 1965, the voters approved the call for a Convention by a vote of 1,681,438 to 1,468,431.[45] That same year, the Legislature established the "temporary state commission on the revision and simplification of the constitution and to prepare for a constitutional convention."[46] The Commission was charged with making "a comprehensive study of the constitution with a view to proposing simplification of the constitution," in addition to the traditional assignment of collecting and compiling useful

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[42] TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, SECOND INTERIM REPORT (1957), *reprinted in* N.Y. Legis. Doc. No. 57 (1957).

[43] *Id.*; *see* DULLEA, CHARTER REVISION, *supra* note 35, at 34-35 (summarizing Second Interim Report).

[44] Williams, *Constitutional Commission, supra* note 4, at 50.

[45] GALIE, ORDERED LIBERTY, *supra* note 6, at 307.

[46] L. 1965, Ch. 443, § 1.

information and data for the delegates and public before the convening of, and during the course of, the Constitutional Convention.[47]

The Commission was comprised of 18 members, with the Governor, the Speaker of the Assembly, and the Senate Majority Leader each appointing six members.[48] However, the Commission's work was delayed because of policy conflicts, personality clashes, and disputes over the Commission's leadership and staff.[49] The Commission's membership roster was not announced until December 20, 1965, and its first planning meeting was not held until January 20, 1966.[50]

Also, delays in appropriating money to support the Commission's work strained the relationship between the Commission's initial chair (who resigned) and the Legislature.[51] Moreover, whereas earlier Commissions had been able to pick and choose among those subjects they wished to present to the Legislature, the Commission's enabling legislation was construed to require the Commission to address every article of the Constitution.[52]

The Commission had a 28-person staff, supported by numerous consultants on a wide range of subject areas.[53] The Legislature initially

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[47] *Id.*

[48] *Id.*, at § 2.

[49] Galie & Bopst, *A Worthy Tradition, supra* note 18, at 1312-1313.

[50] DULLEA, CHARTER REVISION, *supra* note 35, at 131.

[51] The Commission's initial chair was Henry T. Heald, president of the Ford Foundation, who resigned on June 30, 1966. He was replaced by Sol Neil Corbin, a former Counsel to Governor Nelson A. Rockefeller. *Id.* at 130-132.

[52] *Id.* at 131-134; *see* L. 1965, ch. 443, § 1 (requiring the commission to undertake a comprehensive study of the Constitution).

[53] The Commission's staff and consultants are listed at the front of the Commission's 16 reports, which are accessible online from the New York State Library:

appropriated $150,000 for the Commission, although the State eventually spent over a million dollars on it.[54]

Hampered by partisan divisions, the Commission issued 16 reports relatively late in the process, with modernization, simplification and reorganization as the dominant themes.[55] The reports were "non-controversial and uneven in quality" and had little impact on the Convention.[56]

E. 1977 Referendum on a Constitutional Convention

No commission was established by the Governor or the Legislature during the run up to the mandatory Convention vote in 1977.[57] The City of New York was engulfed in a major fiscal crisis, and the legislative leaders were openly hostile to a Convention. "There are a substantial number of issues that require hefty analysis," said a key staffer to the Speaker of the Assembly. "The Legislature for the past several years has been dealing with daily crises."[58] On November 8, 1977, the electorate voted against a

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http://128.121.13.244/awweb/main.jsp?flag=collection&smd=1&cl=library1_lib&field11=4116707&tm=1442777963096 (last visited on Sept 20, 2015).

[54] William J. van den Heuvel, *Reflections on Constitutional Conventions*, 40 N.Y.S.B.J. 261 (June 1968) [hereinafter *Reflections*].

[55] GALIE, ORDERED LIBERTY, *supra* note 6, at 309; Williams, *Constitutional Commission, supra* note 4, at 50. The 1967 Constitutional Convention convened on April 4, 1967 and adjourned on September 26, 1967.

[56] DONNA E. SHALALA, THE CITY AND THE CONSTITUTION: THE 1967 CONVENTION'S RESPONSE TO THE URBAN CRISIS 134 (1972); *see* Galie & Bopst, *A Worthy Tradition, supra* note 18, at 1313 ("the reports were largely ignored by the convention . . . .").

[57] Williams, *Constitutional Commissions, supra* note 3, at 50.

[58] Gerald Benjamin, *A Convention for New York: Overcoming Our Constitutional Catch-22,* 12 GOVT. LAW & POLICY J. 13, 15 (Spring 2010) (quoting Michael DelGiudice, a key staffer to Assembly Speaker Stanley Steingut).

Constitutional Convention by a substantial margin (1,668,137 to 1,126,902). The State's failure to prepare for a Convention was used as an argument against calling it.[59]

F. Temporary Commission on Constitutional Revision (1993-1995)

In May of 1993, four years in advance of the next mandatory Convention vote, Governor Mario M. Cuomo established by executive order the "Temporary New York State Commission on Constitutional Revision."[60] The Commission had 18 members. Its chair was Peter Goldmark, Jr., President of the Rockefeller Foundation, and its work was supported by the Rockefeller Institute of Government of the State University of New York.[61]

In his executive order creating the Commission, Governor Cuomo called attention to the mandatory Convention vote to be held in 1997 and the need to prepare for and educate the public about it (or an earlier Convention if one were called).[62] Specifically, Governor Cuomo directed the Commission to:

- consider the constitutional change process and the range of constitutional issues to be considered by the people;
- study the processes for convening, staffing, holding and acting on the recommendations of a Convention;
- determine the views of New Yorkers on constitutional matters;

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[59] *Id.*

[60] Exec. Order No. 172 (May 1993).

[61] *Id.*; DECISION 1997, *supra* note 4, at viii.

[62] *See* Exec. Order No. 172 ("WHEREAS, it is important that the people be educated so that they make an informed decision on whether a convention is desirable in 1997 or earlier if the Legislature agrees to pose the question; . . . "WHEREAS, the State government must be prepared if the people decide that a convention should be held . . .").

- develop "a broad-based agenda" of constitutional issues and concerns;
- provide "an objective and non-partisan outline" of the range of constitutional issues; and
- engage in a range of activities designed to focus attention on constitutional change.[63]

The Commission lacked the approval or financial support of the Legislature.[64] It did have a distinguished (albeit small) staff of seven persons who operated on a budget of approximately $200,000 to $250,000.[65] The Commission held hearings throughout the State and in March 1994 issued an interim report that explored and made recommendations regarding the delegate selection process.[66] It also issued a periodic newsletter entitled *Constitutional Matters* and a briefing book relating to the State Constitution.[67]

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[63] *Id.* ¶¶ II-IV; GALIE, ORDERED LIBERTY, *supra* note 6, at 351 (citing TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, MISSION STATEMENT (1993)).

[64] GALIE, ORDERED LIBERTY, *supra* note 6, at 353.

[65] The Commission's Counsel and Executive Director was Professor Eric Lane of the Hofstra University Law School, and its Research Director was Dean Gerald Benjamin of the State University of New York at New Paltz. Both of their work for the Commission was on a part-time basis. They were supported by a staff of five.

[66] *Id.*; TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, THE DELEGATE SELECTION PROCESS: AN INTERIM REPORT (Mar. 1994) [hereinafter DELEGATE SELECTION PROCESS].

[67] GALIE, ORDERED LIBERTY, *supra* note 6, at 353; TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK (Mar. 1994).

The Commission's final report was published in February 1995,[68] two years and nine months before the mandated 1997 Convention vote. In particular, the Commission called on the Legislature and the Governor to create "Action Panels" to develop a coherent reform package in four important subject areas: State fiscal integrity, State and local relations, education and public safety. If policymakers failed to adequately address these issues, a majority of the Commission's members maintained that a Convention should be held.[69]

On November 4, 1997, the electorate voted against a Constitutional Convention by a substantial margin (1,579,390 to 929,415).[70]

III. RECOMMENDATIONS

The following recommendations were approved by the Committee voting at its September 30, 2015 meeting when the recommendations were discussed.

Recommendation 1: The State should establish a non-partisan preparatory Constitutional Convention commission as soon as possible.

As it has done several times in the past, the State should create a preparatory Constitutional Convention commission as soon as possible. Nearly 50 years have passed since New York last held a Constitutional Convention. Likewise, 18 years have passed since the last referendum vote in 1997. As a result, the collective memory on preparing for and organizing a Convention has waned significantly. The Commission will face not only a herculean task reviewing New York's Constitution and the numerous

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[68] TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY: A REPORT TO THE PEOPLE, THE GOVERNOR AND THE LEGISLATURE OF NEW YORK (Feb. 1995).

[69] *Id.* at 12-21.

[70] Gerald Benjamin, *Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context,* 65 ALBANY L. REV. 1017, 1041 (2001).

subjects it encompasses, but also a massive historical reclamation project to develop and provide information on the mechanics of a Convention itself.

Although past commissions have been created both before and after the referendum vote, we recommend creation of a preparatory commission as soon as possible and, in any event, well in advance of the November 2017 referendum.[71] A hastily set up commission, after an affirmative decision to hold a Convention has been made, will likely be of little use either to the public or the delegates. As Governor Lehman once observed, "[i]t seems to be extremely short-sighted for us to do nothing until the day the convention assembles."[72] "Without adequate planning," he explained, "there will inevitably be great waste of money, time and effort to the end that the very objects of the Convention will be defeated."[73]

Thus, with the 2017 referendum only two years away, there is a pressing need for a preparatory commission to begin work immediately.

The Legislature created the commissions for the 1915 Convention, the 1957 referendum and the 1967 Convention; Governors established commissions for the 1938 Convention and the 1997 referendum. History teaches that regardless how a preparatory commission is formed, it requires the support of all branches of government to produce useful and

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[71] *See* O'ROURKE & CAMPBELL, CONSTITUTION-MAKING, *supra* note 22, at 273-274 (recommending that a preparatory commission "should function, at least, during the two years prior to the submission to the voters of the question of a convention"). In 1956 and 1993, Commissions were created in advance of referendums; whereas in 1914, 1936 and 1965, Commissions were created subsequent to the electorate's call for a Constitutional Convention.

[72] LEHMAN PAPERS, *supra* note 24, at 664.

[73] *Id.*.

comprehensive work product for the benefit of New York voters, lawmakers, interested groups, and delegates if a Convention is held.[74]

Likewise, it is critical that the membership of the preparatory commission be technically proficient, experienced, and diverse in every way. More, the commission must be non-partisan in character and motive, "commanding by its impartial mandate" the confidence of the general public and the delegates if a Convention is held.[75]

> ***Recommendation 2: The commission should be tasked with (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.***

Past preparatory commissions have been given various assignments, such as investigating the entirety of the Constitution in 1967, or only selected portions in 1997. Commissions have also varied in their approach to resulting work products. The Poletti Committee reports provided comprehensive study of nearly all areas, while the 1967 Commission's work product to the delegates was primarily questions framing the issues that the Commission felt to be important.[76] However, one contemporary commentator noted that the 1967 Commission's approach of posing

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[74] A cautionary tale is the delay in funding of the Commission created for the 1967 Convention, which delay unsteadied the Commission's leadership and staff. DULLEA, CHARTER REVISION, *supra* note 35, at 132.

[75] Van den Heuvel, *Reflections*, *supra* note 54, at 263.

[76] *Id.*

questions to the delegates as opposed to providing substantive information was ineffective.[77]

The State Constitution and its ramifications "are so complex and the structure of the Government that has been erected within the framework of the constitution has so many wide and varied implications that a broad frame of reference is essential."[78] Therefore, among its other duties, the preparatory commission should:

> Make a comprehensive study of the Constitution and compile recommended proposals for change and simplification;
>
> Research the conduct of, and procedures used at, past Constitutional Conventions;
>
> Study and make recommendations regarding the selection process for Convention delegates;
>
> Undertake and direct the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held;
>
> Brief the principal constitutional questions that were debated and considered at previous Conventions;
>
> Collect data on the constitutional amendments proposed and adopted in other states on subjects of substantial interest to New Yorkers; and

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[77] *Id.*

[78] Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 317.

Collect and collate data on the important changes that have been made in the State's structure of government since the adoption of the present Constitution in 1894/1938.

Finally, the preparatory commission should recommend ways to educate the public about the State Constitution and the constitutional change process. Indeed, "[s]ome New Yorkers do not know there is a state constitution, much less how it may affect their lives."[79]

Recommendation 3: The preparatory commission should have an expert, non-partisan staff.

The preparatory commission must have a dedicated, full-time, expert staff under the direction and assistance of an executive director, a research director and a counsel. Adequate support staff will be necessary, too. The commission will face the daunting task not only of examining the substantive areas of the Constitution and related issues, but also surveying and educating the public, and helping to plan and prepare for a Convention, if one is held. The preparatory commissions created for the 1915 and 1938 Conventions, and the one created in the 1957 Convention referendum — all hailed as successful — had the support of sizable research and support staffs, state agencies, good government groups, and leading academics. Nothing less is required today for a preparatory commission to successfully plan and prepare the State for the mandatory referendum in 2017 and a potential Convention in 2019.

Recommendation 4: The preparatory commission and its staff should be supported by adequate appropriations from the State government.

A preparatory constitutional convention commission will require significant appropriations to accomplish its substantial task. As noted, the preparatory commission created for the 1967 Convention received an initial

[79] DELEGATE SELECTION PROCESS, *supra* note 66, at 36.

$150,000[80] that grew to approximately one million dollars by the time its work was completed in 1967.[81]

Based on past experience, a preparatory commission will require financial support from the State government in order to hire qualified staff and ensure a high quality work product. Given the substantial governmental expenditure that an actual Constitutional Convention would require, a significant appropriation for a commission's work is a wise investment. Should the voters approve the call for a Constitutional Convention in 2017, additional appropriations will be necessary.

IV. CONCLUSION

In the November 2017 general election, New York voters will decide whether to hold a Constitutional Convention commencing in April 2019. This will be a constitutional choice of profound importance; a rare opportunity to debate fundamental principles of governance. Absent a legislative initiative, the State will not have this opportunity for another twenty years.

Whatever the outcome of the referendum, the public should be educated about the relevant issues. The establishment of a preparatory commission is a first step in beginning the "deliberative process that could result in our later being offered either an entirely new Constitution or a series of amendments to the existing Constitution."[82] The 1957 and 1997 mandatory Convention votes were preceded by such commissions. The need for a commission today is even greater than those past cycles. There are few living delegates from the last Convention in 1967, and little, if any, institutional memory on how to hold one. The hard, complex work of preparing for a vote and Convention cannot begin too soon.

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[80] L. 1965, ch. 443 § 11.

[81] Van den Heuvel, *Reflections*, *supra* note 54, at 263.

[82] DELEGATE SELECTION PROCESS, *supra* note 66, at 1.

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

CONSTITUTIONAL HOME RULE

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

NYSBA

Approved by the House of Delegates on April 2, 2016

Membership of the New York State Bar Association's Committee on the New York State Constitution

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TABLE OF CONTENTS

Page

INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20 years voters are asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such mandatory referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning Constitutional Home Rule.

In New York State, local government has a greater impact on the day-to-day lives of the public than any tier of government. Our thousands of towns, villages, counties, cities, boroughs, school districts, special districts, authorities, commissions and the like play a vital governance role. They are responsible for drinking water, social services, sewerage, zoning, schools, roads, parks, police, courts, jails, trash disposal — and more. Without local government, public services often taken for granted would not be delivered.

Befitting its stature and importance, local government is a longstanding constitutional concern.[2] Indeed, since the 19th Century, "Home Rule" — the authority of local governments to exercise self-

[1] N.Y. CONST. art. XIX, § 2 ("At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question 'Shall there be a convention to revise the constitution and amend the same?' shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . . .").

[2] Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL'Y SYMP. 79, 79 (1996) ("A longstanding constitutional concern in New York is local government and the relations between local governments and the State.").

government — has been a matter of constitutional principle in New York.[3] The continuing dilemma has been to strike the right balance of furthering strong local governments but leaving the State strong enough to meet the problems that transcend local boundaries.[4] The competing considerations were aptly summarized by the commission tasked with preparing for the last Constitutional Convention held in New York in 1967:

> On the one hand, there is the question of how to leave a legislature free to cope with possible problems of state-wide concern and to intervene in local affairs when, in the judgment of the legislature, they reach a point of state-wide concern. On the other, is the question of how to determine the responsibilities appropriate for local governments, the powers needed for carrying out those responsibilities and the kind of protection from state legislative intervention that should be provided to permit and sustain responsive and responsible local self-government.[5]

Article IX, the so-called "Home Rule" article, contains protections for local government that are more extensive than those in many other states.[6] Constitutional Home Rule is established by granting local governments affirmative lawmaking powers, while carving out a sphere of local autonomy free from State interference.

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[3] *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 428, 548 N.Y.S.2d 144, 146, 547 N.E.2d 346, 348 (1989) (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century").

[4] *Id.* at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348.

[5] N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT 11 (Mar. 31, 1967) [hereinafter LOCAL GOVERNMENT].

[6] *See* ROBERT B. WARD, NEW YORK STATE GOVERNMENT 545 (2d ed. 2006) ("New York's constitutional and statutory provisions regarding home rule are more extensive than those in many states.").

Despite Article IX's intent to expand the authority of local governments, Home Rule in practice has produced only a modest degree of local autonomy. The powers of local governments have been significantly restricted by two legal doctrines developed through decades of litigation ("preemption" and "State concern"). Local governments must also follow mandates enacted by the State Legislature.

The preemption doctrine is a fundamental limitation on the power of local governments to adopt local laws. Under the preemption doctrine, a local law is unenforceable when it collides with a State statute; that is, the local law prohibits what a State statute allows, or the State statute prohibits what the local law allows. But even in the absence of an outright conflict between State and local law, a local government may not act where the State has acted comprehensively in the same area.

The State concern doctrine represents an exception to the constitutional limitations on the State Legislature's authority to enact special laws targeted at one or more, but not all local governments. Under this doctrine, the State Legislature is empowered to regulate local matters, yet which also relate to State concerns, such as waste disposal on Long Island, sewers in Buffalo, and taxicabs in New York City.

Home Rule is further limited by the State Legislature's imposition of mandates that compel local governments to provide specific services and meet minimum State standards, often without providing fully supporting funds necessary to comply with such mandates. New York imposes more unfunded mandates on localities than any other state in the nation.[7]

Blue ribbon panels and local government scholars have called for revisions to Article IX's Home Rule provisions. Nevertheless, a half-century has passed since the State has had a serious discussion on this subject. The time to do so again is long overdue. This is especially so, given the myriad challenges facing local government today.

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[7] PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 279 (2d ed. 2012) [hereinafter THE NEW YORK STATE CONSTITUTION].

This report is divided into four sections. Part I summarizes the background of the Committee on the New York State Constitution and the issuance of this report. Part II provides an overview of Constitutional Home Rule. Part III describes legal doctrines and laws that restrict the ambit of Home Rule. Part IV concludes that New Yorkers would benefit from a thorough consideration of Constitutional Home Rule and potential reforms that would strengthen and clarify it.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and promote initiatives designed to educate the legal community and public about the State Constitution.

On October 8, 2015, the Committee issued its first report and recommendations, entitled *"The Establishment of a Preparatory State Commission on a Constitutional Convention."*[8] The Committee recommended that, in advance of the 2017 referendum on a Constitutional Convention, the State should establish a non-partisan preparatory commission, as it has done in the past. The commission's duties should include: (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the

[8] N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMM'N ON A CONSTITUTIONAL CONVENTION (2015), *available at* http://www.nysba.org/nysconstitutionreport/ (last visited on Mar. 6, 2016).

preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

On November 7, 2015, the State Bar's House of Delegates unanimously adopted the Committee's report and recommendations.[9] Two months later, during his State of the State Address, Governor Andrew M. Cuomo proposed as part of his Executive Budget the creation of a preparatory commission on a Constitutional Convention. The Governor proposed investing $1 million to create the commission to develop a blueprint for a convention. The commission would also be authorized to recommend fixes to the current Convention delegate selection process.[10]

The Committee has now turned its attention to the subject of Constitutional Home Rule. At its meeting on December 17, 2015, the Committee heard a presentation from Professor Richard Briffault, the Joseph P. Chamberlin Professor of Legislation at Columbia Law School, and a nationally respected authority on local government. At its next meeting, on January 27, 2016, the Committee heard from another eminent authority on local government, Michael A. Cardozo, a partner at the law firm of Proskauer Rose and the former Corporation Counsel for the City of New York from 2002 through 2013. As the City's 77th and longest serving Corporation Counsel, Mr. Cardozo was the City's chief legal officer, headed the City's Law Department of more than 700 lawyers, and served as legal counsel to Mayor Michael Bloomberg, elected officials, the City and its agencies.

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[9] Press Release, N.Y. State Bar Assn., *New York State Bar Association Calls on State Government to Prepare Now for Statewide Vote on State Constitution in 2017* (Nov. 13, 2015), *available at* http://www.nysba.org/NYSConstitutionVote/ (last visited on Mar. 6, 2016).

[10] Press Release, N.Y. State Div. of Budget, *Governor Cuomo Outlines 2016 Agenda: Signature Proposals Ensuring That New York is — and Will Continue to Be Built to Lead* (Jan. 13, 2016), *available at* http://www.budget.ny.gov/pubs/press/2016/pressRelease16_eBudget.html (last visited on Mar. 6, 2016).

After further discussion and review, the Committee concluded that the public and legal profession would be well served to have a serious conversation about, and debate over, whether the Home Rule provisions in Article IX of the State Constitution should be clarified and strengthened. This position is set forth and elaborated on in this report, which was unanimously approved by the Committee at a meeting held on March 10, 2016.

II. CONSTITUTIONAL HOME RULE — GENERALLY

Home rule — the right of localities to exercise control over matters of local concern[11] — has long "been a matter of constitutional principle"[12] in New York State. Beginning in the 19th Century, the home rule movement represented a determined effort to provide local governments with autonomy over local affairs and freedom from State legislative interference.[13] The path of home rule has been "unsettled and tortuous" through the years, reflecting "the difficult problem of furthering strong local governments but leaving the

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[11] *See People ex. rel. Metropolitan St. Ry. Co. v. State Board of Tax Comm'rs*, 174 N.Y. 417, 431, 67 N.E. 69, 70 (1903), *aff'd*, 199 U.S. 1 (1905) ("The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution."); *see also* John R. Nolon, *The Erosion of Home Rule Through The Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. LAW REV. 497, 505 (1993) ("[Home Rule's] purpose is to permit local control over matters that are best handled locally and without state interference."); James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 713 n.1 (1985) ("'home rule' can be described as a method by which a state government can transfer a portion of its governmental power to a local government") [hereinafter *Ghost of Home Rule*].

[12] *See Kamhi*, 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century").

[13] Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1145 (1966).

State just as strong to meet the problems that transcend local boundaries, interests and motivations."[14]

New York's basic system of local governance is set forth in Article IX of the State Constitution. Adopted in 1963 with high hopes,[15] Article IX was intended to expand and secure the powers enjoyed by local governments.[16] Governor Nelson A. Rockefeller predicted at the time that Article IX and its implementing legislation would "strengthen the governments closest to the people so that they may meet the present and emerging needs of our times."[17]

Article IX declares "[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state";[18]

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[14] *Kamhi*, 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (internal quotation marks & citations omitted).

[15] *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 266 (Article IX was "meant to embody a new concept in state-local relationships by constitutionally recognizing that the 'expansion of powers for effective local self-government' is a purpose of the people of the state.") (citation omitted).

[16] *See Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 496, 393 N.Y.S.2d 949, 953, 362 N.E.2d 581, 585 (1977) ("Undoubtedly the 1963 home rule amendment was intended to expand and secure the powers enjoyed by local governments."); *Matter of Town of E. Hampton v. State of New York*, 263 A.D.2d 94, 96, 699 N.Y.S.2d 838, 839 (3d Dep't 1999) ("The unquestioned purpose behind the home rule amendment was to expand and secure the powers enjoyed by local governments.") (internal quotation marks omitted); James L. Magavern, *Fundamental Shifts Have Altered the Role of Local Government*, N.Y. ST. B.J., Jan. 2001, at 52, 53 (the Home Rule Amendments to the State Constitution were "presented as 'a significant new contribution to the principle that local problems can best be solved by those familiar with them and most concerned with them'") (quoting N.Y. STATE OFFICE FOR LOCAL GOVERNMENT, NEWSLETTER, No. 15, Sept. 18, 1963).

[17] WARD, THE NEW YORK STATE GOVERNMENT, *supra* note 6, at 547 (quoting Governor Rockefeller's memorandum of approval of Article IX's implementing legislation, the Municipal Home Rule Law (L. 1963, ch. 843 & 844), upon its adoption on Apr. 30, 1963).

[18] N.Y. CONST. art. IX, § 1. "Local government" is defined in Article IX to consist of counties, cities, towns, and villages. *Id.* § 3(d)(2).

creates a "Bill of Rights" for local governments to secure certain enumerated "rights, powers, privileges and immunities";[19] and vests in the State Legislature the power to create and organize local governments.[20]

Constitutional home rule is established through two assertions of local government power in Article IX.[21] One is affirmative grants of power to local governments to manage their affairs through the adoption of local laws. The other restricts the State Legislature from intruding upon matters of local, rather than State, concern, except as provided in the Constitution.[22] Each is described more fully in turn.

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[19] *Id.* § 1. The local government Bill of Rights sought to lay the groundwork for stronger and more effective local government. *See Town of Black Brook v. State of New York*, 41 N.Y.2d 486, 488-89, 393 N.Y.S.2d 946, 362 N.E.2d 579, 581 (1977). It lists various rights, amongst which are: the right to have an elective body with authority to adopt local laws; the right to elect and appoint local residents or officers; the power to agree, as authorized by the Legislature, with the federal government, a State or other government to provide cooperatively governmental services and facilities; the power of eminent domain; the power to make a fair return on the value or property used in the operation of certain utility services, and the right to use the profits therefrom for refunds or any other lawful purpose; and the power to apportion costs of governmental services of functions upon portions of local areas as authorized by the Legislature. N.Y. CONST. art. IX, §§ (1)(a)-(b), (c), (e)-(g).

[20] *Id.* § 2(a) ("The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.").

[21] *See* James D. Cole, *Local Authority to Supersede State Statutes*, N.Y. ST. B.J., Oct. 1991, 34, 34 ("Under Article IX of the State Constitution, home rule in New York has two basic components.").

[22] *See City of New York v. Patrolmen's Benevolent Assn. of City of New York*, 89 N.Y.2d 380, 385-86, 654 N.Y.S.2d 85, 87, 88, 676 N.E.2d 847, 849 (1996) ("Article IX, § 2 of the State Constitution grants significant autonomy to local governments to act with respect to local matters. Correspondingly, it limits the authority of the State Legislature to intrude in local affairs. . . ."); *Kamhi*, 74 N.Y.2d at 428-29, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 ("two-part model for home rule: limitations on State intrusion into matters of local concern and affirmative grants of power to local governments").

A. Grants of Lawmaking Authority

Section 1 of Article IX declares that "[e]very local government shall have power to adopt local laws as provided by this article."[23] Section 2(c) — the "center of home rule powers"[24] — elaborates on the lawmaking power, by providing that local governments "shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government."[25]

Section 2 also confers on local governments the power to adopt local laws regarding ten specified areas, regardless of whether or not they relate to the local government's property, affairs or government.[26] These ten areas include: membership and composition of the local legislative body;[27] powers, duties, qualifications, number, mode of selection, and removal of officers and employees;[28] transaction of the local government's business;[29]

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[23] N.Y. CONST. art. IX, § 1(a).

[24] PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 290 (1996) [hereinafter ORDERED LIBERTY].

[25] N.Y. CONST. art. IX, § 2(c)(i). The phrase "property, affairs or government" was first codified in the 1894 State Constitution, and has been at the center of the Home Rule dialogue ever since. "Although, literally construed, it might cover an extremely broad area, it has never been accorded its literal significance but has been treated as excluding all matters of state concern." N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67. *See also Adler v. Deegan*, 251 N.Y. 467, 473, 167 N.E. 705, 707 (1929) ("When the people put these words in . . . the Constitution, they put them there with a Court of Appeals' definition, not that of Webster's Dictionary.").

[26] RICHARD BRIFFAULT, *Intergovernmental Relations* [hereinafter *Intergovernmental Relations*], *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 156-57 (Gerald Benjamin & Hendrik N. Dullea eds., 1997); GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

[27] N.Y. CONST. art. IX, § 2(c)(ii)(2).

[28] *Id.* §§ 2(c)(ii)(1).

[29] *Id.* § 2(c)(ii)(3).

the incurring of obligations;[30] presentation, ascertainment and discharge of claims against the local government;[31] acquisition, care, management and use of highways, roads, streets, avenues and property;[32] acquisition of transit facilities and the ownership and operation thereof;[33] levying and collecting local taxes;[34] wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for the local government;[35] and the government, protection, order, conduct, safety, health and well-being of persons or property therein.[36]

Outside of the ten enumerated subjects, the State government retains all power otherwise delegated to it by law.[37] Unlike the State government, local governments are not sovereigns in their own right.[38] Accordingly,

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[30] *Id.* § 2(c)(ii)(4).

[31] *Id.* § 2(c)(ii)(5).

[32] *Id.* § 2(c)(ii)(6).

[33] *Id.* § 2(c)(ii)(7).

[34] *Id.* § 2(c)(ii)(8).

[35] *Id.* § 2(c)(ii)(9).

[36] *Id.* § 2(c)(ii)(10).

[37] *See id.* § 3(a)(3) ("Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to: . . . [m]atters other than the property, affairs or government of a local government.").

[38] *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 265 ("In American constitutional theory, there is no inherent right of local self-government. Local Government units are creatures of the state.").

local governments have only the lawmaking powers delegated by the State Constitution and Legislature.[39]

Article IX requires the State Legislature to enact a "statute of local governments" granting local governments additional powers "including but not limited to" matters of local legislation and administration.[40] A power granted in such statute has quasi-constitutional protection against challenge, because it can be "repealed, diminished, impaired or suspended" only by a law passed and approved by the Governor in each of two successive calendar years.[41] In 1964, the Legislature complied with the constitutional directive and enacted a Statute of Local Government,[42] as well as the Municipal Home Rule Law,[43] both of which are to be liberally construed.[44]

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[39] *See Kamhi*, 74 N.Y.2d at 427, 548 N.Y.S.2d at 145, 547 N.E.2d at 347 ("In general, towns have only the lawmaking powers the Legislature confers on them . . . . Without legislative grant, an attempt to exercise such authority is ultra vires and void.").

[40] *See* N.Y. CONST. art. IX, § 2(b)(1) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (l) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article.").

[41] *Id.* § 2(b)(1) ("A power granted in such statute [of local governments] may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year."); *see also Wambat Realty Corp.*, 41 N.Y.2d at 496, 393 N.Y.S.2d at 953-54, 362 N.E.2d at 586 ("In particular, the direction to enact a Statute of Local Government, including the innovative double enactment procedure to impede encroachment on the granted local powers, was expressly aimed at 'proving a reservoir of selected significant powers.'") (citations omitted); GALIE, ORDERED LIBERTY, *supra* note 24, at 290 ("although it was not feasible to grant the home rule powers contained in the statute constitutional status, the statute provided quasi-constitutional protection for these powers").

[42] *Wambat Realty Corp.*, 41 N.Y.2d at 490, 393 N.Y.S.2d at 951, 362 N.E.2d at 583. The powers in the Statute of Local Governments include the ability to acquire real and personal property, adopt, amend, and repeal ordinances, resolutions, etc., acquire, construct, and operate recreational facilities, and levy, impose, collect, and administer rents, charges and fees. N.Y. STAT. LOCAL GOV. § 10. The Legislature also made certain reservations, and if State legislation which impinged on a power granted to local

The Legislature may confer on local governments powers not relating to their property, affairs or government and not limited to local legislation and administration "in addition to those otherwise granted by or pursuant to this article" and may withdraw or restrict such additional powers.[45]

Other constitutional provisions authorize the Legislature to grant additional powers to local governments.[46] For example, the Legislature may grant the power to apportion the cost of a government service or function upon any portion of the area within the local government's jurisdiction and exercise of eminent domain outside local boundaries.[47] The

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governments by the statute is within the ambit created by those reservations, the change can be achieved by ordinary legislative process. *Id.* § 11. In the view of an eminent constitutional scholar, the powers granted local governments by the Legislature in the Statute of Local Governments are not significant. GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

[43] *See DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 94, 725 N.Y.S.2d 622, 625, 749 N.E.2d 186, 189 (2001) ("To implement Article IX, the Legislature enacted the Municipal Home Rule Law."). The Municipal Home Rule Law put in one place and organized, for the first time, the statutory provisions relating to Home Rule for various types of local government. This replaced Home Rule provisions previously contained in the City Home Rule Law, the Village Home Rule Law, the Town Law, the County Law and a number of other laws. N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68; *see also* N.Y. MUN. HOME RULE L. § 10 (describing general powers of local governments to adopt and amend local laws).

[44] *See* N.Y. MUN. HOME RULE LAW § 51 (providing that home rule powers "shall be liberally construed"); N.Y. STAT. LOCAL GOV. § 20(5) (same).

[45] N.Y. CONST. art. IX, § 2(b)(3) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.").

[46] Briffault, *Intergovernmental Relations*, *supra* note 26, at 158.

[47] *See* N.Y. CONST. art. IX, §§ 1(e) ("The legislature may authorize and regulate the exercise of the power of eminent domain and excess condemnation by a local government outside its boundaries."), (g) ("A local government shall have power to

Legislature is also authorized to grant various powers to cities, towns and villages for the financing of low-rent housing and nursing home accommodations for persons of low income.[48]

Article IX, Section 3(c) provides that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."[49]

B. Immunity from Legislative Interference

At the same time that Article IX authorizes local governments to adopt local laws in a wide range of fields, it also sets procedural limits on the ability of the State Legislature to impinge on local authority. Specifically, Section 2(b)(2) of Article IX — the so called "Home Rule clause" — limits the State Legislature's power to enact laws regulating matters that fall within the purview of local government. The Home Rule clause states as follows:

> [T]he legislature . . . [s]hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter

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apportion its cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature.").

[48] BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158 (citing N.Y. CONST. art. XVIII).

[49] N.Y. CONST. art. IX, § 3(c).

> case, with the concurrence of two-thirds of the members elected to each house of the legislature.[50]

Under this provision, the State Legislature may freely regulate the property, affairs or government of local governments through the enactment of a "general law" that "in its terms and in effect applies to all counties . . .[,] all cities, all towns or all villages."[51] However, if the Legislature seeks to enact a special law that would apply to one or more, but not all local governments,[52] it must follow one of two procedures intended to protect the Home Rule powers of the affected localities.[53] The State Legislature must receive either (1) a request of two-thirds of the total membership of the local legislative body or of the local chief executive officer concurred in by a majority of the membership of the local legislature; or (2) a certificate of necessity from the Governor reciting facts that constitute an emergency requiring enactment of such law and the concurrence of two-thirds of each house of the State legislature.[54] The first option's directives are commonly referred to as the "Home Rule message" requirement "because whenever a special law is enacted it should be at the locality's request."[55] "The second

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[50] CONST. art. IX, § 2(b)(2).

[51] *See id.* § 3(d)(1) ("'General law.' A law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.").

[52] *See id.* § 3(d)(4) ("'Special law.' A law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages.").

[53] *Id.* § 2(b)(2).

[54] BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158 (construing Home Rule clause).

[55] *Greater N.Y. Taxi Assn. v. State of New York,* 21 N.Y.3d 289, 301, 993 N.E.2d 970 N.Y.S.2d 907, 914, 993 N.E.2d 393, 400 (2013).

option — the Governor's emergency message and legislative super-majority — is unavailable for special laws concerning New York City."[56]

A particularly striking example of special laws enacted pursuant to either Home Rule message or Gubernatorial message of necessity are State legislative enactments establishing emergency financial control boards for distressed municipalities, which effectively allow the State government to temporarily assume control of these municipalities' finances and daily operations.[57]

III. RESTRICTIONS ON HOME RULE

While Home Rule is provided for in Article IX, it has been left to the State's judiciary to interpret the constitutional Home Rule provisions. Drawing lines between what is properly the domain of local government under Home Rule and the State's ability to legislate has been a recurring role for the courts.[58] Home rule "reflects a far-flung effort over more than a century's time" to find meaning in the ambiguous phrases "property, affairs or government" and "matters of state concern."[59] "The result of these efforts has been a highly developed, and still developing, case law . . . ."[60]

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[56] BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158-59 (citing N.Y. CONST. art. IX, § 2(b)(2)).

[57] *See, e.g.*, City of Yonkers Financial Emergency Act, L. 1975, ch. 871, § 5 (legislation passed on both message of necessity and Home Rule message establishing emergency financial control board for City of Yonkers).

[58] Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENVER L. REV. 1337, 1338 (2009) [hereinafter *Constitutional Home Rule*]; *see also* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67 ("The duty of determining whether particular matters pertain to the property, affairs or government of local governments or are matters of state concern has devolved upon the judiciary with, at least to many persons, unsatisfactory results.").

[59] Baker & Rodriguez, *Constitutional Home Rule, supra* note 58, at 1338.

[60] *Id.*

Indeed, the current status of Home Rule in New York has been largely shaped by the judicial development of two legal doctrines: (1) the State preemption doctrine and (2) the State concern doctrine. The former represents a fundamental limitation on local government's lawmaking powers; the latter carves out an exception to the constitutional limitations on the State Legislature's authority to enact special laws. The impact of each on the relationship between the State and local governments cannot be overstated. The same can be said for the stresses placed on local governments by unfunded State mandates.

A. <u>The Preemption Doctrine</u>

As noted, the State preemption doctrine is a "fundamental limitation on home rule powers."[61] Although Article IX vests local governments with substantial lawmaking powers by affirmative grant, "the overriding limitation" of the preemption doctrine embodies "the untrammeled primacy of the Legislature to act with respect to matters of State concern."[62]

In general, preemption occurs in one of two ways; first, when a local government adopts a law that directly conflicts with a State statute; and second, when a local government legislates in a field for which the State legislature has assumed full regulatory responsibility.[63] Conflict preemption

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[61] *Albany Area Builders Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d. 627, 629 546 N.E.2d 920, 922 (1989).

[62] *Id.*; *see also Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96, 524 N.Y.S.2d 8, 10, 518 N.E.2d 903, 905 (1987) ("although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State"); BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 171 ("The sources of home rule authority generally provide that local enactments must not be inconsistent with the Constitution or genera laws. In other words, although a subject may fall within the grant of home rule authority, local action may be preempted by state law.").

[63] *DJL Rest. Corp.*, 96 N.Y.2d at 95, 725 N.Y.S.2d at 625, 749 N.E.2d at 190 (internal quotations omitted).

represents an outright conflict or "head-on collision" between a local law and State statute.[64] A local law is unenforceable if it prohibits what a State statute explicitly allows, or if the State statute prohibits what the local law explicitly allows.[65]

But even in the absence of an outright conflict, a local law is preempted if the State Legislature "has evidenced its intent to occupy the field."[66] Field preemption occurs when "a local law regulating the same subject matter as a state law is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute."[67] "Such local laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns."[68]

Field preemption may be express or implied. Express field preemption occurs when a State statute explicitly provides that it preempts all local laws on the subject.[69] Field preemption is implied when "either the purpose and scope of the regulatory scheme will be so detailed or the nature of the subject of regulation will be such that the court may infer a legislative

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[64] *See Lansdown Entertainment Corp. v. N.Y.C. Dep't of Cons. Affairs*, 74 N.Y.2d 761, 764, 545 N.Y.S.2d 82, 83, 543 N.E. 2d 725, 726 (1989).

[65] *Sunrise Check Cashing & Payroll Servs., Inc.*, 91 A.D.3d 126, 134, 933 N.Y.S.2d 388, 395 (2d Dep't 2011) (internal quotation marks and citations omitted).

[66] *Albany Area Builders Assn.*, 74 N.Y.2d at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

[67] *Id.* (internal quotation marks, alteration, and citations omitted).

[68] *Id.* at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

[69] *See Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 468 N.Y.S.2d 596, 599 456 N.E.2d 487, 490 (1983).

intent to preempt, even in the absence of an express statement of preemption."[70]

Examples of local laws that have been found to be impliedly preempted include the following activities:

- Residency restrictions for sex offenders;[71]
- Minimum wage laws;[72]
- Regulating local taxation for roadway construction;[73]
- Hours of operations of taverns and bars;[74]

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[70] Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOKLYN L. REV. 321, 349 (1999) (citations omitted).

[71] *See People v. Diack*, 24 N.Y.3d 674, 681, 3 N.Y.S.3d 296, 26 N.E.3d 1151 (2015) (holding that design and purpose of State laws regulating registered sex offenders evidenced intent to preempt subject of sex offender residency restriction legislation and to "occupy the entire field" so as to prohibit local governments from doing so).

[72] *See Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 17 A.D.2d 327, 329, 234 N.Y.S.2d 862, 865 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 998, 239 N.Y.S.2d 128, 189 N.E.2d 623 (1963) (invaliding New York City minimum wage law which set a rate higher than that set in the State minimum wage law; "it is entirely clear that the state law indicates a purpose to occupy the entire field").

[73] *Albany Area Builders Assn.*, 74 N.Y.2d at 377-78, 547 N.Y.S.2d at 629, 546 N.E.2d at 922 (invalidating local law regulating taxation for roadway construction, where State's "elaborate budget system" provided for how towns were to budget for roadway improvements and repairs, and the State explicitly regulated at local level amount of taxes collectible for roadway improvements and the expenditure of such funds).

[74] *People v. DeJesus*, 54 N.Y.2d 465, 468-70, 446 N.Y.S.2d 207, 210, 430 N.E.2d 1260, 1263 (1981) (holding that State's Alcohol Beverage Control Act was "exclusive and statewide in scope, thus, no local government could legislate in field of regulation of establishments which sell alcoholic beverages"). *Cf., Vatore v. Commissioner of Consumer Affairs of City of New York*, 83 N.Y.2d 645, 650, 612 N.Y.S.2d 357, 359, 634 N.E.2d 958, 960 (1994) (upholding City of New York's ability to regulate the location of tobacco vending machines, including within taverns).

- Regulating where abortions may be performed;[75] and,
- Power plant siting.[76]

Implied preemption has provided a fertile ground for litigation. By no means are all challenges to local laws based on implied preemption successful.[77] However, because the dispositive inquiry turns on interpreting the State Legislature's intent, it is often difficult to predict whether a given local law will or will not withstand judicial scrutiny. As one commentator has explained:

> The Legislature rarely makes a clear declaration of policy. The courts therefore have no clear standard for determining whether

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[75] *See Robin v. Village of Hempstead*, 30 N.Y.2d 347, 350-351 285 N.E.2d 285, 287, 334 N.Y.S.2d 129, 132 (1972) (holding that State law preempted local law regulating where abortions may be perform because of the scope and detail of State medical and hospital regulation).

[76] *See Consolidated Edison Co.*, 60 N.Y.2d at 105, 468 N.Y.S.2d at 599, 456 N.E.2d at 490 (holding that a local zoning ordinance was preempted partially based on State law's establishment of a Siting Board that "is required to determine whether any municipal laws or regulations governing the construction or operation of a proposed generating facility are unreasonably restrictive, and has the power to waive compliance with such municipal regulations").

[77] *See, e.g.*, *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 691-92, 16 N.Y.S.3d 25, 30, 37 N.E.3d 82, 87 (2015) (finding "no express conflict between the broad authority accorded to [New York] courts to regulate attorneys under the [New York] Judiciary Law and the licensing of individuals as attorneys who are engaged in debt collection activity falling outside of the practice of law," and further finding that the "authority to regulate attorney conduct does not evince an intent to preempt the field of regulating non-legal services rendered by attorneys"); *Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.2d 1188 (2014) (holding that State Oil and Gas Law did not preempt town zoning ordinances banning hydrofracking); *New York State Club Assn. v. New York*, 69 N.Y.2d 211, 221-22, 513 N.Y.S.2d 349, 354, 505 N.E.2d 915, 920 (1987) (upholding New York City law prohibiting discrimination in private clubs; State's Human Rights Law's failure to define "distinctly private" suggested "an intent to allow local government to act"); *People v. Judiz*, 38 N.Y.2d 529, 531-32, 381 N.Y.S.2d 467, 469, 344 N.E.2d 399, 401 (1976) (upholding a local ordinance prohibiting possession of an "imitation pistol" despite a State statute covering the same subject area).

> the extent and nature of state regulation of an area is "comprehensive," and therefore preemptive, or "piecemeal," and therefore not preemptive. The result is ad hoc judicial decision making and considerable uncertainty as to when state legislation will be considered preemptive of local action.[78]

The implied preemption doctrine has drawn its share of critics. Local government scholars have cautioned that the ever-present, seemingly inchoate possibility that a court may find implied preemption "casts a shadow over local autonomy, often leading local governments to question whether they have the authority to act,"[79] and, therefore, imposing "severe constraints on local policy innovation and choice."[80]

In 2008, the New York State Commission on Local Government Efficiency and Competiveness, chaired by former Lieutenant Governor Stanley N. Lundine, noted that the implied preemption doctrine does not appear in the State Constitution,[81] and has created "confusion and uncertainty" for local governments when exercising their home rule powers.[82] The Lundine Commission called for a constitutional amendment

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[78] Briffault, *Intergovernmental Relations, supra* note 26, at 173.

[79] *See* Briffault, *Local Government and the New York State Constitution, supra* note 2, at 90. *See also* Paul Diller, *Intrastate Preemption*, 87 BOSTON UNIV. L. REV. 1113, 1133 (2007) (arguing that field preemption can be a "tool of interest groups," through which particular focused groups "seek relief from the local laws they dislike by turning to the courts, rather than — or in addition to — pursuing other options to further their interests.").

[80] *See* Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 639-40 (2001).

[81] N.Y. STATE COMM'N ON LOCAL GOVT. EFFICIENCY & COMPETITIVENESS, 21ST CENTURY LOCAL GOVERNMENT 36 (Apr. 2008), *available at* http://www.greaterohio.org/files/policy-research/new-york-final-report.pdf.

[82] *Id.* at 37.

prohibiting the judicial application of implied preemption.[83] Such an amendment, the Lundine Commission explained, "would allow local governments to act except where state law has expressly declared state authority in the area to be exclusive or has specifically limited local governments' ability to act in that area or field."[84]

In a similar vein, one local government scholar has called for the establishment in New York of a judicial presumption against preemption.[85] And, a court of last resort in another state has adopted a default rule that the state legislature has not occupied the field unless it has said so explicitly.[86]

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[83] *Id.* at 3, 36-37.

[84] *Id.* at 36. The State of Illinois is an example of a State that has followed this approach. The Home Rule provision in the Illinois State Constitution allows for preemption only when the Legislature expressly so provides in legislation. *See* ILL. CONST. 1970, art. VII, § 6(i) ("Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."). *See also* Alaska CONST. art X, § 11 ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.").

[85] *See* Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 648 (2014) ("Article IX, section 3(c) of the New York Constitution requires that the home rule powers of municipalities be 'liberally construed.' Such liberal construction, this article suggests, requires a qualified presumption against preemption: Unless statutory text manifestly and unambiguously supersedes local law, courts should presume that state law does not preempt local laws. This presumption is not irrebuttable: it can be overcome where local laws encroach on some substantial state interest that local residents are likely to ignore.").

[86] *See Municipality of Anchorage v. Repasky*, 34 P.3d 302, 311 (Alaska 2001) ("In general, for state law to preempt local authority, it is not enough for state law to occupy the field. Rather, if the legislature wishes to preempt an entire field, it must so state.') (internal quotation marks, citation & brackets omitted). *See also, e.g., City of Ocala v. Nye*, 608 So.2d 15, 17 (Fla. 1992) (implying in dicta that Florida does not recognize field preemption); *Cincinnati Bell Tel. Co. v. City of Cincinnati*, 693 N.E.2d 212, 218 (Ohio 1998) ("(T)here is no constitutional basis that supports the continued application of the doctrine of implied preemption.").

Whatever one may think of such proposals, the fact remains that implied preemption is a significant constraint on local authority, even when a local government acts well within the sphere of specific Home Rule powers.[87] It has also generated considerable litigation, with often unpredictable results, creating confusion and uncertainty for local governments.

B. <u>The State Concern Doctrine</u>

Article IX's Home Rule clause carves out a sphere of autonomy for local governments over their "property, affairs or government" by limiting the State Legislature's power to act with respect to such local matters through special legislation. However, the Home Rule clause is subject to a significant limitation — the "State concern" doctrine — derived from the case of *Adler v. Deegan*[88] in 1929.

In *Adler*, the New York Court of Appeals addressed the power of the Legislature to enact the Multiple Dwelling Law,[89] which required housing to comply with minimum standards for fire-prevention, light, air and sanitation.[90] This salutary act applied, in effect, only to New York City, but did not conform to the Home Rule requirements for special legislation.[91] Nevertheless, the Court found the subject matter of the Multiple Dwelling Law addressed a "state concern" and on that ground upheld its enactment as a valid exercise of State legislative power.[92]

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[87] *See Jancyn Mfg. Corp.*, 71 N.Y.2d at 97, 524 N.Y.S.2d at 11, 518 N.E.2d at 905.

[88] 251 N.Y. 467, 167 N.E. 705 (1929).

[89] L. 1929, ch. 713, § 3.

[90] *Adler*, 251 N.Y. at 491-92, 167 N.E. at 714 (Lehman, J., dissenting).

[91] *Adler*, 251 N.Y. at 470, 167 N.E. at 706-08 (Pound, J. concurring).

[92] *Id.* at 473-78, 167 N.E. at 706-09.

In a seminal concurring opinion, then-Chief Judge Benjamin Cardozo argued that, if a subject, like slum clearance, "be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality."[93] Thus, even if legislation relates to the property, affairs, or government of a local government, if the legislation is also a matter of substantial state concern, the Home Rule clause is inoperative and the Legislature may act through ordinary legislative processes.[94]

Although *Adler* predated the adoption of Article IX by over 30 years, the Court of Appeals has continuously and expansively interpreted the "state concern" doctrine.[95] Time and again, the Court has upheld legislation

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[93] *Id.* at 491, 167 N.E. at 714 (Cardozo, Ch. J., concurring). *See Patrolmen's Benevolent Assn. of City of New York*, 97 N.Y.2d at 386, 740 N.Y.S.2d at 663, 767 N.E.2d at 120 ("A recognized exception to the home rule message requirement exists when a special law serves a substantial State concern.").

[94] Eliot J. Kirshnitz, *Recent Developments: City of New York v. State of New York: The New York State Court of Appeals, in Declaring the Repeal of the Commuter Tax Unconstitutional, Strikes Another Blow Against Constitutional Home Rule*, 74 ST. JOHN'S L. REV. 935, 947 (2000) [hereinafter *Strikes Another Blow*]. *See also Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 970 N.Y.S.2d 724, 726, 992 N.E.2d 1067, 1069 (2013) (holding that "where the Legislature has enacted a law of state-wide impact on a matter of substantial State concern but has not treated all areas of the State alike, the Home Rule section of the State Constitution does not require an examination of the reasonableness of the distinctions the Legislature has made"). *See also Matter of Town of Islip v. Cuomo*, 64 N.Y.2d 50, 52, 484 N.Y.S.2d 528, 529, 473 N.E.2d 756, 757 (1984) (Article's IX limitations on special laws "applies only to a special law which is directly concerned with the property, affairs or government of a local government and unrelated to a matter of proper concern to State government"). *See, e.g., Osborn v. Cohen*, 272 N.Y. 55, 59-60, 4 N.E.2d 289, 290 (1936) (striking down a statute that provided for submission of issue of firemen's hours to referendum in cities of one million or more inhabitants; no "foundation in the record" that the establishment and control of fire departments are matters of state concern).

[95] *See Wambat Realty Corp.*, 41 N.Y.2d at 494, 393 N.Y.S.2d at 952, 362 N.E.2d at 584 (terming *Adler* a "decisively enlightening case"); Cole, *Ghost of Home Rule*, *supra* note 11, at 718 ("In virtually every subsequent judicial decision dealing with these matters, *Adler* has been cited for the proposition that as to matters of state concern, the legislature may act through the ordinary legislative process, unrestricted by the home rule provisions of the constitution."); GALIE, ORDERED LIBERTY, *supra* note 24, at 291 ("In

relating to local property, affairs, or governments, yet which also related to a State concern, despite the failure of those laws to conform to Home Rule requirements.

For example, the Court has found the following local matters to also be matters of state concern sufficient to sustain the Legislature's power to address them by special law, without either a Home Rule or Gubernatorial message or legislative supermajority:

- Waste disposal in Nassau and Suffolk Counties;[96]
- Municipal sewers in Buffalo;[97]
- Protection of the Adirondack Park's resources;[98]
- Salaries of District Attorneys in certain counties;[99]

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general, the Court of Appeals has followed decisions made prior to the adoption of the article, giving 'matters of state concern' an expansive reading.") (citation omitted).

[96] *See Matter of Town of Islip*, 64 N.Y.2d at 56-58, 484 N.Y.S.2d at 531-33, 473 N.E.2d at 759-61 (upholding special law regulating waste disposal in Nassau and Suffolk counties; state interest in pollution protection).

[97] *See Robertson v. Zimmerman*, 268 N.Y. 52, 61, 196 N.E. 740, 743 (1935) (upholding special law establishing a sewage authority for the City of Buffalo through an act which imposed restrictions and obligations on one particular municipality; state concern for the life and health of communities taking water supply from Lake Erie, the Niagara River and Lake Ontario).

[98] *See Wambat Realty Corp.*, 41 N.Y.2d at 494-95, 393 N.Y.S.2d at 952-53, 362 N.E.2d at 584-85 (upholding special law, the Adirondack Park Agency Act, in which State set up a zoning and planning program for all public and private lands within the park despite the zoning and planning powers of local government; statute addressed subject of state concern).

[99] *See Matter of Kelley v. McGee*, 57 N.Y.2d 522, 536-39, 457 N.Y.S.2d 434, 439-41, 443 N.E.2d 908 913-15 (1992) (holding that section in Judiciary Law which required district attorneys in counties with a certain population to be paid the same salary as county court judges did not conflict with Home Rule provisions of State Constitution; statutory classification was reasonable and related to an area of state concern).

- Local taxation;[100]
- Housing projects exempt from zoning laws;[101]
- Rent controls;[102]
- Serial bonds issued to cover pension and retirement liabilities;[103]
- Dispute-resolution mechanisms for local public employees;[104]
- Cultural institutions;[105]

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[100] *See New York Steam Corp. v. City of New York,* 268 N.Y. 137, 143, 197 N.E. 172, 173 (1935) (upholding statute authorizing cities with a population over one million to pass local tax laws for unemployment relief; state concern given law was designed to combat high unemployment during an unstable time period).

[101] *See Floyd v. New York State Urban Dev. Corp.,* 33 N.Y.2d 1, 7, 347 N.Y.S.2d 161, 164, 300 N.E.2d 704, 706 (1973) (upholding statute under which New York State Urban Development Corporation ("UDC") could acquire land in urban core areas by purchase or condemnation and undertake the development of projects, exempt from local restrictions; State interest in allowing UDC to solve housing problems).

[102] *See City of New York v State of New York,* 31 N.Y.2d 804, 805, 339 N.Y.S.2d 459, 459, 291 N.E.2d 583, 583 (1972) (affirming lower court ruling decision which held that rent control was a matter of State concern and not within New York City's "property, affairs and government" powers).

[103] *See Bugeja v. City of New York,* 24 A.D.2d 151, 152, 266 N.Y.S.2d 80, 81, *aff'd,* 17 N.Y.2d 606, 268 N.Y.S.2d 564, 215 N.E.2d 684 (finding no Home Rule impediment to State Legislature's authorization for the issuance of serial bonds to cover New York City's pension and retirement liabilities; continuance of sound civil service system matter of State concern).

[104] *See Patrolmen's Benevolent Assn. of City of New York v. City of New York,* 97 N.Y.2d at 381-389, 740 N.Y.S.2d at 660-65, 767 N.E.2d at 117-22 (2001) (upholding special law implementing dispute resolution mechanisms for disputes between New York City policemen and New York City; law addressed "substantial State concern").

[105] *See Hotel Dorset Co. v. Trust for Cultural Resources,* 46 N.Y.2d 358, 368-69, 413 N.Y.S.2d 357, 361-62, 383 N.E.2d 1284, 1288 (1978) (upholding statute that had

- Bidding requirements on public contracts;[106]
- Exempting firefighters from local residency requirements.[107]
- Taxes on New York City commuters' incomes;[108] and,
- Regulation of taxicabs in New York City.[109]

The State concern doctrine has narrowed the Home Rule clause's guarantee of a modicum of local legislative autonomy.[110] Today, the line

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specifications resulting in it being applied to only one museum, the Museum of Modern Art).

[106] *See Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 318-19, 970 N.Y.S.2d 724, 726, 729-31, 992 N.E.2d 1067, 1069, 1072-73 (2013) (upholding amended Wicks law for public contracting that included differing threshold requirements; statute bears "a reasonable relationship to a substantial statewide concern which concern falls within the State Legislature's purview and must be accorded great deference by this court").

[107] *See Uniformed Firefighters Assn. v. City of New York*, 50 N.Y.2d 85, 90, 428, N.Y.S.2d 197, 198-99, 405 N.E.2d 679, 680 (1980) (upholding State law that eliminated a local requirement that New York City firefighters live in New York City; residency of employees a matter of State concern).

[108] *See City of New York v. State of New York*, 94 N.Y.2d 577, 591–92, 709 N.Y.S.2d 122, 128–29, 730 N.E.2d 920, 926–27 (2000) (upholding special law that repealed New York City's commuter tax; State had a substantial interest in easing burden on non-City residents who work in New York City).

[109] *See Greater N.Y. Taxi Assn.*, 21 N.Y.3d at 302-308, 970 N.Y.S.2d at 914-19, 993 N.E.2d at 400-405 (upholding special law that allowed livery cabs to accept passengers in the outer boroughs of New York City and outside Manhattan's central business district who hail the livery cabs from the street, and also expanded the number of traditional yellow cabs accessible to passengers with disabilities, notwithstanding that it had always been assumed previously that laws regulating New York City taxicabs required a Home Rule message; statute "addresses a matter of substantial state concern" and was "not a purely local issue").

[110] *See Empire State Ch. of Associated Bldrs. & Contrs., Inc.*, 21 N.Y.3d at 319, 970 N.Y.S.2d at 730, 992 N.E.2d at 1073 ("Home Rule provisions of the Constitution were never intended to apply to legislation" affecting matters of state concern and instead aimed at preventing "unjustifiable state interference in matters of purely local concern").

between matters of State concern and matters of local concern is increasingly indistinct.[111] Few constraints exist on the Legislature's ability to interfere in local affairs by special law.[112] The Court of Appeals said as much in 2013 when it observed:

> there must be an area of overlap, indeed a very sizable one, in which the state legislature acting by special law and local governments have concurrent powers. . . . A great deal of legislation relates *both* to the property, affairs or government of a local government and to [m]atters other than the property, affairs or government of a local government — i.e., to matters of substantial state concern.[113]

See also Gerald Benjamin & Charles Brecher, *Introduction*, *in* THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM 11 (Gerald Benjamin & Charles Brecher eds., 1988) ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

[111] *See* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 ("The line between matters of state concern and matters of local concern remains indistinct[.]"); Cole, *Local Authority to Supersede State Statutes*, *supra* note 21, at 34 ("The areas carved out by Article IX of the State Constitution for control by local governments, free from State interference, except by general law — "property, affairs or government" — has been significantly narrowed and lacks identity.").

[112] *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 171 ("as long as the state is able to make a colorable case that it is acting within respect to a matter of state concern, the Home Rule clause provides little restriction on the legislature's ability to act by special law").

[113] *Empire State Ch. of Associated Bldrs. & Contrs., Inc.*, 21 N.Y.3d at, 316-17, 970 N.Y.S.2d at 728, 992 N.E.2d at 1070 (internal quotation marks & citations omitted; emphasis in original).

As things now stand, the State Legislature decides whether a home rule message is necessary with respect to a given piece of special legislation. And, this legislative judgment has been treated as "effectively unreviewable."[114]

Proponents of home rule despair over the relative ease with which the State Legislature can overcome constitutional limitations on special legislation.[115] They argue that Article IX's protections of the rights of localities have been "undermined . . . by the many exceptions for 'matters of state concern' with respect to which the Legislature is held free to act without the consent of the local body."[116] "The Legislature is not better suited, and indeed, may be less well-suited," goes the argument, "than the local government to deal with essentially local matters such as providing government services, administering the police department and developing new strategies for providing for the homeless."[117]

On the other hand, advocates for the status quo can point to decades of precedent and a system that, on the whole, has arguably served the State

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[114] Report of the Task Force on the New York Constitutional Convention, 52 RECORD OF THE ASSN. OF THE BAR OF THE CITY OF NEW YORK 522, 619 (1997) [hereinafter "CITY BAR 1997 TASK FORCE REPORT"].

[115] *See, e.g.*, Cole, *Ghost of Home Rule*, *supra* note 11, at 749 ("With the extension of the state concern doctrine into areas that logically should be subject to local determination, there is reason only for gloom."); Roberta A. Kaplan, *New York City Taxis and the New York State Legislature: What is Left of the State Constitution's Home Rule Clause After the Court of Appeals Decision in the Hail Act Case*, 77 ALB. L. REV. 113, 118 (2014) (the "highly deferential" approach the Court of Appeals has taken to claims of state concern "cast[s] a long dark shadow on the future of local government autonomy in New York State"), *id.* (the Court's jurisprudence "raises red flags about how much (if any) of the constitution's home rule clause remains in force going forward, making it difficult (if not impossible) for local governments in New York to delineate the appropriate boundaries of autonomous self-rule").

[116] CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 618 (citations omitted).

[117] *Id.* at 619.

well. Home rule is but one of a number of values encompassed by the Constitution, and "the State's commitment to minimal statewide standards of welfare, safety, health, and the like has taken precedence over the goal of local autonomy."[118] No less eminent an authority than Benjamin Cardozo was a staunch guardian of State sovereignty, recognizing, at least in close cases, the need for a dominant State, which represents all, over the power of local governments, which represent only a portion of the State.[119]

C. Unfunded Mandates

Another restriction on Home Rule is State mandates that require local governments to perform certain actions. These can be particularly controversial when unfunded.[120] State mandates cover a wide range of fields, including health care, education and social services. New York imposes more unfunded mandates than any state.[121]

Numerous other states[122] have attempted to resolve the tension between state mandates and Home Rule by adopting constitutional

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[118] GALIE, ORDERED LIBERTY, *supra* note 24, at 292-93.

[119] ANDREW L. KAUFMAN, CARDOZO 378-79 (1998).

[120] *See generally*, Robert M. Shaffer, Unfunded State Mandates and Local Governments, 64 U. CINN. L. REV. 1057 (1996).

[121] GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 278.

[122] *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 179-80 ("Prior to and since [the 1967 Constitutional Convention] fourteen states have adopted constitutional provisions limiting or barring some or all unfunded mandates."); CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 620 ("There also is support for a constitutional amendment to restrict unfunded mandates by the legislature on New York's local governments. We view the debate over unfunded mandates as an extension of the home rule question. Again, New York lags behind other states that have considered and resolved this issue."); Deborah F. Buckman, *Construction and Application of State Prohibitions of Unfunded Mandates*, 76 A.L.R.6th 543 (2012) (collecting state court cases that construe and apply state prohibitions of unfunded mandates).

provisions prohibiting or limiting unfunded mandates.[123] Notably, too, in 2011 a "Mandate Relief Redesign Team" established by Governor Cuomo

[123] *See, e.g.*, CAL. CONST. art. 13B, § 6(a) ("Subject to certain exceptions, [w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service."); FLA. CONST. art. VII, § 18(a) ("No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure."); HAW. CONST. art. VIII, § 5 ("If any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost."); LA. CONST. art. VI, § 14(a)(1) ("No law or state executive order, rule, or regulation requiring increased expenditures for any purpose shall become effective within a political subdivision until approved by ordinance enacted, or resolution adopted, by the governing authority of the affected political subdivision or until, and only as long as, the legislature appropriates funds for the purpose to the affected political subdivision and only to the extent and amount that such funds are provided, or until a law provides for a local source of revenue within the political subdivision for the purpose and the affected political subdivision is authorized by ordinance or resolution to levy and collect such revenue and only to the extent and amount of such revenue."); MICH. CONST. art. IX, § 29 ("A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs."); MO. CONST. art. X, § 21 ("A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs."); N.H. CONST. pt. I, art. 28-a ("The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision."); N.J. CONST. art. VIII, § 2, ¶ 5 ("[A]ny provision of . . . law, or of . . . rule or regulation issued pursuant to a law, which is determined . . . to be an unfunded mandate upon boards of education, counties, or municipalities because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire."); N.M. CONST. art. X, § 8 ("A state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to

recommended the adoption of a constitutional ban in New York on unfunded mandates on local governments.[124]

IV. CONCLUSION

New York's constitutional and statutory provisions regarding home rule are extensive, evincing a clear intent to protect local autonomy.[125] However, the balance between State and local powers has tipped "away from the preservation of local authority toward a presumption of state concern."[126] Some commentators have even observed that Constitutional Home Rule is a "ghost,"[127] "merely a pleasant myth"[128] and "a near total failure."[129]

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provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed."); TENN. CONST. art. II, § 24 ("No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.").

[124] *See* NEW YORK STATE MANDATE RELIEF REDESIGN TEAM, MANDATE RELIEF, FINAL REPORT 14 (DEC. 2011), *available at* http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/FInal_Mandate_Relief_Report.pdf (last visited on Mar. 4, 2016).

[125] *See* WARD, THE NEW YORK STATE CONSTITUTION, *supra* note 6, at 545 (New York's constitutional and statutory provisions are more extensive than those in many states.).

[126] Cole, *Ghost of Home Rule*, *supra* note 11, at 715 (1985); *see also* Benjamin & Brecher, *Introduction*, *supra* note 110, at 11 ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

[127] Cole, *Ghost of Home Rule*, *supra* note 11, at 715 (1985).

[128] W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 326 (1954).

[129] Kirshnitz, *Strikes Another Blow*, *supra* note 94, at 943.

Not since the 1967 Constitutional Convention has the body politic engaged in a serious discussion about Constitutional Home Rule.[130] Intense debates were then waged on this subject, resulting in proposals by the Convention that held the promise for greater local government initiative.[131] But those proposals, along with all others made by the 1967 Convention, failed at the polls.[132]

Today, nearly fifty years later, numerous proposals have been made for constitutional reform in this area. To be sure, "[t]here is no ready solution to the problem of state interference in local government actions."[133] Home Rule "doctrine has reflected in its structure the inherently difficult nature" of drawing lines between what is properly the domain of local government and the State Legislature's ability to legislate.[134] That said, many believe "that the home rule provisions of Article IX are clearly in need

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[130] GERALD BENJAMIN & CHARLES BRECHER, *The Political Relationship* 118 *in* THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM (Gerald Benjamin & Charles Brecher eds., 1988).

[131] *See* HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 273 (1997) ("Coupled with repeal of the existing constitutional provision allowing the state to enact legislation related to the 'property, affairs, or government' of local municipalities — a phrase which over the years had been narrowly construed by the courts to limit local flexibility — and its replacement by new language referring to 'matters of local concern and the local aspects of matters of state concern,' the proposed article offered considerable hope for greater local government initiative.").

[132] *Id.* at 339-41.

[133] Briffault, *Local Government and the New York State Constitution*, *supra* note 2, at 99.

[134] Baker & Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, *supra* note 57, at 1342.

of revision, and given the current state of home rule there is little risk of adverse change."[135]

In sum, Constitutional Home Rule is a subject ripe for consideration and debate by all concerned. There is a need to weigh the benefits and costs of amendments to Article IX that would restore local autonomy through greater certainty and clarity. At a minimum, if and when the State establishes a preparatory constitutional commission, Constitutional Home Rule should be a subject to which it devotes significant time and attention.

[135] CITY BAR, 1997 TASK FORCE REPORT, *supra* note 114, at 620; *see also* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 ("Although the recent constitutional and statutory amendments undoubtedly represent great strides forward . . . much work remains to be done.").

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV)

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

AUGUST 3, 2016

NYSBA

Approved by the House of Delegates on November 5, 2016

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TABLE OF CONTENTS

Page

INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20-years voters be asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning the conservation article in the State Constitution, Article XIV.

In 1894, a New York State Constitutional Convention made world history by adopting the first constitutional provisions mandating nature conservation.[2] In the debates over the establishment of an Adirondack and Catskill Forest Preserve ("the Forest Preserve"), Convention delegates concurred with their President — the eminent lawyer Joseph H. Choate — when he observed: "You have brought here the most important question before this Assembly. In fact, it is the only question that warrants the existence of this convention."[3]

Approved by the voters in 1894, this groundbreaking provision, known as "the forever wild clause," is "generally regarded as the most

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[1] N.Y. CONST. art. XIX, § 2 ("At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . .").

[2] PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 245 (1991) [hereinafter, "REFERENCE GUIDE"].

[3] *Quoted in* 2 ALFRED L. DONALDSON, A HISTORY OF THE ADIRONDACKS 190 (1921) [hereinafter, "HISTORY OF THE ADIRONDACKS"].

important and strongest state land conservation measure in the nation."[4] It is now part of Article XIV of the State Constitution,[5] which currently consists of five sections.

Section 1 contains the forever wild clause, establishing and protecting the Forest Preserve, and then carving out exceptions for certain lands and uses in it. The historic language is set forth in Section 1's first two sentences:

> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.[6]

Section 2 provides for the creation of public reservoirs within the Forest Preserve.[7] Section 3 recognizes that forest and wildlife conservation are public policy and permits acquisition of additional lands outside the Forest Preserve for these purposes.[8] Section 4 — the so-called "Conservation Bill of Rights" — recognizes that the conservation and preservation of the natural resources and scenic beauty of the State are public policy and provides for State acquisition of lands for a "state nature

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[4] WILLIAM R. GINSBERG, The Environment, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 318 (Gerald Benjamin & Hendrik N. Dullea eds., 1997) (paper prepared for the New York State Temporary State Commission on Constitutional Revision established prior to the 1997 mandatory referendum vote on whether to hold a Constitutional Convention).

[5] PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 173, 295-97, 347-49 (1996) [hereinafter, "ORDERED LIBERTY"].

[6] N.Y. CONST. art. XIV, § 1.

[7] *Id.* § 2 (on "Reservoirs"; section titles summarize content and are not part of the Constitution).

[8] *Id.* § 3 (on "Forest and wild life conservation; use or disposition of certain lands authorized").

and historical preserve" located outside the Forest Preserve.[9] Finally, Section 5 addresses how violations of Article XIV may be enjoined.[10]

The Forest Preserve has stood the test of time, enjoying widespread public support since its enactment.[11] Constitutional Conventions held in 1915, 1938 and 1967 all concluded that the forever wild clause should be retained, and voters have defeated all efforts to dilute it. Moreover, since 1894, the State has vastly expanded the acreage of the Forest Preserve, purchasing lands with funds approved by bond acts, legislative appropriations and gifts.[12] Voters have only removed a relatively small volume of acres from the Forest Preserve, through surgically-precise amendments.[13]

In 1997, when New York held its last mandatory referendum on whether to call a Constitutional Convention, concern that a Convention might consider ill-advised changes to Article XIV prompted opposition in some quarters.[14] After more than 120 years, however, the forever wild

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[9] *Id.* § 4 (on "Protection of natural resources; development of agricultural lands").

[10] *Id.* § 5 (on "Violations of article; how restrained").

[11] GINSBERG, The Environment, *supra* note 4, at 318.

[12] DAVID STRADLING, THE NATURE OF NEW YORK: AN ENVIRONMENTAL HISTORY OF THE EMPIRE STATE 102-04 (2010).

[13] These amendments appear as the clauses that begin with the word "Notwithstanding" in Section 1 of Article XIV. *See infra* Appendix A (setting forth each "notwithstanding" amendment). An example of such a limited amendment occurred on November 5, 2013, when the voters approved the Raquette Lake amendments to allow 200 landowners and public facilities to clear title of legal impediments since 1848 affecting their properties, while enlarging the size of the Forest Preserve by adding 295 acres on the Marion River. *See* MIKE PRESCOTT, *Commentary: Vote Yes on the Township 40 Amendment*, ADIRONDACK ALMANAC (Oct. 8, 2013), http://www.adirondackalmanack.com/2013/10/commentary-vote-yes-township-40-amendment.html.

[14] For example, in 1997, a task force of the New York City Bar Association concluded that "the risk of elimination or dilution of the 'forever wild' provisions far outweighs the nominal or speculative gains that could be achieved at a constitutional convention." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE

clause remains intact. Throughout its history, there has never been broad-based public support for repealing or diluting the forever wild protections, and nothing in the lengthy record of past Conventions and amendments to Article XIV suggest that delegates to a 2019 Convention would seek to do so. In any event, worries over the forever wild clause's future should not inhibit study and robust debate over other provisions in Article XIV. Simply put, while there is no reason to modify the forever wild clause, opportunities to simplify and enhance other provisions in Article XIV merit serious consideration by policymakers and the public.

Indeed, few New Yorkers know what Article XIV covers, beyond the "forever wild" clause. Analysis of this one article, illustrates how comparable studies of other articles can make a significant contribution to the public's understanding of the State Constitution. The Committee's review of Article XIV suggests at least four potential changes that warrant study and debate:

First, since the forever wild clause's adoption in 1894, the text immediately following it has been the subject of 19 amendments, making Section 1, by far, the most amended section of the Constitution.[15] The net result is a series of detailed exceptions, consisting of 1,401 words, which have also rendered Section 1 one of the longest sections in the Constitution.[16] One way to eliminate this excessive verbiage — and thereby

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TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION *in* 52 THE RECORD 627-28 (1997) (hereinafter, "CITY BAR REPORT").

[15] PETER J. GALIE & CHRISTOPHER BOPST, *Constitutional "Stuff": House Cleaning the New York Constitution — Part II*, 78 ALB. L. REV. 1531, 1545-46 (2015) [hereinafter, *"House Cleaning"*]; *see also* GALIE, ORDERED LIBERTY, *supra* note 5, at 173 ("The very stringency of [the forever wild clause's] . . . language . . . has frequently interfered with legitimate and important uses of the land, such as scientific forestry. Not surprisingly, this provision has been amended fifteen times [as of 1996] to accommodate other uses.").

[16] GALIE & BOPST, *House Cleaning*, *supra* note 15, at 1540. *See* N.Y. CONST. art. XIV, § 1, *infra* Appendix A (setting forth each "notwithstanding" amendment).

enhance the forever wild mandate — would be to place it in a separately authorized constitutional document.[17]

Second, Section 2, adopted in 1913, reserving up to 3% of the Forest Preserve for constructing possible water reservoirs, has rarely been invoked, and the reasons behind its adoption may no longer exist.[18] An argument can thus be made that Section 2 should be eliminated.

Third, the mandate in the Conservation Bill of Rights (Section 4) to establish a natural and scenic preserve has been unfulfilled. The State has made little effort to implement this mandate, which lacks the clarity of the forever wild clause in Section 1. Other states have natural and scenic preserves, and their approaches could be emulated in New York.

Fourth, the "rights" set forth in Section 4 are not "self-executing,"[19] meaning that they cannot be invoked absent legislative authorization. Several other states,[20] such as Pennsylvania,[21] and 174 nations,[22] have adopted and implemented constitutional "environmental rights." The object of constitutional environmental rights is to ensure that citizens have a right

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[17] For example, New Jersey includes a list of amendments in a constitutional "Schedule." *See* N.J. CONST. art. XI.

[18] *See infra* notes 49 to 51, and 93 to 102, and accompanying text.

[19] *See* GINSBERG, The Environment, *supra* note 4, at 221-29.

[20] BARTON H. THOMPSON, JR., *The Environment and Natural Resources*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM ch. 10 (G. Alan Tarr & Robert F. Williams eds., 2006).

[21] *See* PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people."); *see generally*, James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, *in* PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305 (James. R. May ed., 2011).

[22] DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION (2012).

— and government has a duty — to provide resilient and effective responses for environmental problems.[23] Whether New York should amend Article XIV to include an enforceable "Environmental Bill of Rights" to address contemporary environmental challenges is a question worthy of consideration.

This report takes no position on whether a Constitutional Convention should be called in 2017, or if called, how in 2019 it should address potential changes to Article XIV. Even so, if the voters wish to simplify and enhance the present Constitution, Article XIV provides opportunities to do so.

To provide background for public discussion and debate, this report summarizes the Committee's background and study of Article XIV, provides a historical overview of its provisions, and evaluates potential amendments.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee serves as a resource for the State Bar on issues relating to or affecting the State Constitution; makes recommendations regarding potential constitutional amendments; provides advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional

[23] For discussion of other states' constitutional environmental rights provisions, *see infra* notes 119 to 126, and accompanying text. New York State and local governments have begun to address sea level rise and storm surges, such as experienced in Superstorm Sandy in 2012. In 2014, for example, the State Legislature enacted, and Governor Cuomo signed, The Community Risk and Resilience Act, 2014 N.Y. Sess. Laws ch. 355 (S-6617B) (McKinney) (codified as amended in scattered sections of N.Y. ENVTL. CONSERV. LAW, N.Y. PUB. HEALTH LAW, and N.Y. AGRIC. & MKTS. LAW), which provides for planning to cope with ongoing sea level rise, larger numbers of extreme weather events, and other impacts of climate change. Some other states provide constitutional provisions to cope with climate change impacts. *See, e.g.*, N.J. CONST. art. VIII, § 6(a) (directing, in Tax and Finance Article, that funds shall be available for flood and storm damage). It may be asked whether or not climate change today is an environmental issue comparable to the need in 1894 to save forest lands, or in 1967 to abate extreme pollution through framing a "Conservation Bill of Rights" (adopted just before "Earth Year," 1969), which led to the enactment of laws for pollution control, wetlands preservation, and other environmental legislation of the 1970s and 1980s.

Convention; and promotes initiatives designed to educate the legal community and public about the State Constitution.

On March 10, 2016, the Committee began its study of Article XIV, by listening to a presentation delivered by Committee member Nicholas A. Robinson, Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law Emeritus at the Elisabeth Haub School of Law at Pace University.

At the Committee's next meeting on April 29, 2016, it heard from two additional distinguished experts on environmental law: Michael B. Gerrard and Philip Weinberg. Professor Gerrard is the Andrew Sabin Professor of Professional Practice at Columbia Law School, teaches courses on environmental law, climate change law, and energy regulation, and is director of the Sabin Center for Climate Change Law. Professor Weinberg taught constitutional and environmental law at St John's Law School, after establishing and heading the Environmental Protection Bureau in the New York State Department of Law under Attorney General Louis J. Lefkowitz, and is currently an adjunct member of the faculty of the Elisabeth Haub School of Law at Pace University. Professors Gerrard and Weinberg discussed Article XIV, including its relevance to emerging environmental issues, such as the impacts of climate change in New York.

After further discussion and review, the Committee concluded that the public and legal profession would be well served by a report that provided a review of significant issues concerning Article XIV. On June 2, 2016, the Committee met and reviewed a first draft of this report. The final report and recommendations were considered and generally agreed at a meeting held on July 14, 2016, with final unanimous approval, after reviewing editorial refinements, on August 3, 2016.

II. THE HISTORICAL DEVELOPMENT OF ARTICLE XIV[24]

Since 1894, the New York State Constitution has included an article addressing nature conservation. In that year the Constitutional Convention adopted and voters approved the forever wild clause that conferred constitutional protection of the Forest Preserve.[25] Over time, and through numerous amendments, the current provisions of Article XIV took shape. To understand the opportunities that exist for simplifying and enhancing Article XIV, it is essential to recall the history of how it came to be.

A. The Dawn of Constitutional Conservation

New York inaugurated constitutional conservation in the last quarter of the 19th century because citizens were increasingly troubled by mismanagement of forests in both the Catskill and Adirondack regions of the State.[26] Verplank Colvin, appointed State Surveyor in 1870, had been

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[24] The Committee acknowledges the research on the legal history of Article XIV by its member Professor Nicholas A. Robinson.

[25] *See* J. HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF NEW YORK 350 (2d ed. 1915) (In 1894, "[t]he convention initiated the sound policy of protecting the lands of the State known as the forest preserve, forbad their being leased, sold or exchanged or taken . . . This was the first constitutional recognition of forestation . . ."). Previously, the Forest Preserve had been established by statute. 1885 N.Y. Laws ch. 283, §§ 7 & 8. The Forest Preserve is today defined in Article 9 of the Environmental Conservation Law. *See* N.Y. ENVTL. CONSERV. LAW § 9-0101(6) ("The 'forest preserve' shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster, and Sullivan . . . .").

[26] Extreme forest fires, erosion, flooding and loss of flora and fauna accompanied extensive logging operations, in the Catskills and Adirondacks. In THE ADIRONDACK PARK, Frank Graham, Jr. described the public debates and legislative lobbying of the time. The issues included: intense debates about economic trade-offs between advocates of scientific forestry as opposed to unbridled timber exploitation; distress about unlawful corruption by lumber interests; concerns to preserve watersheds to ensure water supplies for many uses, especially the flow for the Erie Canal; and vocal calls to preserve resources for fish and game, other recreation, health and for spiritual values. *See* FRANK GRAHAM, JR., THE ADIRONDACK PARK *passim* (1978) [hereinafter, "THE ADIRONDACK PARK"].

mapping the Adirondacks for the first time. He and others alerted the State to growing environmental degradation in the wake of undisciplined timbering. As early as 1868, Colvin had urged "the creation of an Adirondack Park or timber preserve under the charge of a forest warden and deputies."[27] Vast areas of trees were being clear-cut and the lands abandoned to fires and erosion. Based on Colvin's topographical survey reports, in 1883, the Legislature banned sales of State lands in the 10 Adirondack counties, appropriated funds for the first time to buy lands, and directed Colvin to locate and survey all State lands.[28] In 1884, the State Comptroller issued a report of investigations into unpaid taxes on abandoned lands. That report featured maps of the State's lands in the Forest Preserve, along with a more extensive map depicting the wider Adirondack region as a "park," with its borders delineated in blue. This is the origin of the term "Blue Line," which continues to refer to the Adirondack Park's borders, an area encompassing both the Forest Preserve and other public and private lands.[29]

On May 15, 1885, the Legislature adopted legislation to establish the Forest Preserve in both the Catskills and Adirondacks, with a State Forest Commission to oversee it.[30] Just prior to the Forest Preserve's

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[27] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 164-65.

[28] *Id.* at 171-75.

[29] The Forest Preserve was defined by the N.Y. Laws of 1885 (ch. 283) to be situated in "the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan." The Adirondack Park was established by the N.Y. Laws of 1892 (ch. 707). The Adirondack and Catskill Forest Preserve and the Adirondack Park were re-enacted in the N.Y. Laws of 1893 (ch. 332, §§ 100 & 120).

[30] N.Y. Laws of 1885 (ch. 283, § 7) provided:

> All the lands now owned or that any hereafter be acquired by the State of New York within the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Laurence, Warren, Washington, Greene, Ulster, and Sullivan, shall constitute and be known as the Forest Preserve.

establishment, on April 20, 1885, the Legislature had transferred the mountain lands and forests, then held by Ulster County, to the State in settlement of the State's outstanding claims for tax revenues.[31] Many parcels of land in the North Woods had escheated to the State,[32] because loggers, after clear-cutting the timber had ceased to pay annual taxes due and abandoned their properties.[33] These damaged lands became the first Forest Preserve acreage.

In the decade after 1885, despite the Forest Commission's oversight, 100,000 acres of forest were logged unlawfully in the Adirondacks. These years saw both increased land degradation and public demands for enhanced protection. In 1886, William F. Fox, a representative of the State Forest Commission, visited the Forest Preserve in the Catskills and noted its value for watershed and recreation, encouraging its protection.[34] By 1890, the Forest Commission had issued a special report, "Shall a Park be established in the Adirondack Wilderness?"[35] However, in 1893 the Forest Commission

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The statute further provided that the lands of the Forest Preserve "shall be kept forever wild" and "shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." *Id.* § 8.

[31] ALF EVERS, THE CATSKILLS: FROM WILDERNESS TO WOODSTOCK ch. 77 (1972) [hereinafter, "CATSKILLS"].

[32] *See, e.g.*, *People v. Turner*, 72 Sickels 227, 117 N.Y. 227, 22 N.E. 1022 (1889) (involving a plea that defendant had not cut state trees unlawfully based on defects in an 1877 tax sale of lands in default of taxes for the years 1864 through 1871).

[33] In 1885, New York State owned 681,374 acres in the Adirondacks and 34,000 acres in the Catskills. Today, the State owns 2.6 million acres in the Adirondack Preserve and 286,000 acres in the Catskill Preserve. N.Y. DEPT. Envtl. Conserv., http://www.dec.ny.gov/lands/4960.html.

[34] EVERS, CATSKILLS, *supra* note 31, at 579-80.

[35] NEW YORK STATE FOREST COMMISSION, THE SPECIAL REPORT OF THE NEW YORK FOREST COMMISSION ON THE ESTABLISHMENT OF AN ADIRONDACK STATE PARK (1891).

also approved extensive wood cutting contracts, which the State Surveyor and the State Engineer disapproved.[36]

B. 1894: The Forever Wild Clause

Concerns over the destruction of the State's forests, and the resulting impact on the public's health and well-being, became a central issue during the 1894 Constitutional Convention.[37] A delegate from New York City, David McClure,[38] introduced an amendment to the Constitution that was supported by delegates committed to nature conservation, led by Louis Marshall, a prominent constitutional lawyer.[39] The heart of the proposed amendment read: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private."[40] This language was refined a bit and during the Convention's debates, Judge William P. Goodelle, a delegate from Syracuse, proposed the addition of a few extra words. The Convention adopted the revised text of New York's first "forever wild" clause by a vote of 122 to 0, which made it the only amendment to be unanimously embraced at that Convention or any prior Convention.[41]

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[36] *Id.* at 186.

[37] GALIE, ORDERED LIBERTY, *supra* note 5, at 173.

[38] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 189-92.

[39] OSCAR HANDLIN, *Introduction, in* LOUIS MARSHALL: CHAMPION OF LIBERTY xi, (Charles Reznikoff ed., 1957). *See also* HENRY M. GREENBERG, *Louis Marshall: Attorney General of the Jewish People, in* NOBLE PURPOSES: NINE CHAMPIONS OF THE RULE OF LAW at 111 (Norman Gross ed., 2006).

[40] GEORGE A. GLYNN, ed., DOCUMENTS AND REPORTS OF THE [1894] CONSTITUTUTIONAL CONVENTION 172 (1895).

[41] *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF ALBANY, ON TUESDAY, THE EIGHTH DAY OF MAY, 1894 786-87; DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 189-92.

The 1894 Convention also addressed how violations of the forever wild clause were to be enjoined. The delegates settled on an enforcement mechanism (the current Section 5) that authorized proceedings brought for this purpose by the State, or by a private citizen with the consent of the Appellate Division of the Supreme Court, on notice to the State Attorney General.[42]

The forever wild clause and its companion enforcement mechanism were placed in Article VII, Section 7, which was approved by the voters on November 6, 1894.[43] Opponents of the forever wild mandate immediately challenged the scope of the provision. In 1896, the Legislature placed before the electorate an amendment that would allow timbering on State lands. However, the proposed amendment was resoundingly defeated, by a vote of 710,505 to 321,486.[44]

New York courts soon took notice of the forever wild clause. In an 1899 case, the Court of Appeals observed: "The primary object of the park, which was created as a forest preserve, was to save the trees for the threefold purpose of promoting the health and pleasure of the people, protecting the water supply as an aid to commerce and preserving the timber for use in the future."[45]

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[42] Former N.Y. CONST. art. VII, § 7 (now N.Y. CONST. art. XIV, § 5). Examples of such lawsuits include: *Helms v. Reid*, 90 Misc.2d 583, 394 N.Y.S.2d 987 (Sup. Ct. Hamilton Cnty. 1977); *Slutzky v. Cuomo*, 128 Misc. 2d 365, 490 N.Y.S.2d 427 (Sup. Ct. Albany Cnty. 1985).

[43] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 193.

[44] *See* HISTORICAL SOCIETY OF THE NEW YORK COURTS, VOTES CAST FOR AND AGAINST PROPOSED CONSTITUTIONAL CONVENTIONS AND ALSO PROPOSED CONSTITUTIONAL AMENDMENTS, https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf [hereinafter, "VOTES CAST FOR AND AGAINST"].

[45] *People v. Adirondack Ry. Co.*, 160 N.Y. 225, 248, 54 N.E.2d 689, 696 (1899), *aff'd*, 176 U.S. 335 (1900).

Nearly every year since the forever wild clause's enactment, the State has acquired lands in the Catskills and Adirondacks to add to the Forest Preserve, with funds provided by Bond Acts approved by the voters, or from appropriations enacted by the Legislature.[46] For example, in 1916, by a majority of 150,496, voters approved a Bond Act to acquire lands for the Palisades Interstate Park and to increase lands in the Forest Preserve.[47] Many subsequent Bond Acts have financed acquisitions expanding the Forest Preserve.[48]

C. 1913: The Burd Amendment

In 1911, a constitutional amendment (known as the "Burd Amendment") was proposed allowing up to 3% of the Forest Preserve to be flooded for reservoirs. This would allow water to be diverted for municipal drinking water, wells, canals, and flood control.[49] Voters approved the Burd Amendment in 1913, and it appears today in Section 2 of Article XIV.[50]

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[46] JANE EBLEN KELLER, ADIRONDACK WILDERNESS: A STORY OF MAN AND NATURE 194-95 (1980). After the great "blowdown" of 1950, a storm of hurricane proportions, on the advice of the New York Attorney General, the Legislature authorized the removal of vast amounts of destroyed trees to avert forest fires and disease, and funds from the wood collected and sold were used to buy more lands to add to the Forest Preserve. *Id.* at 228-30.

[47] 1916 N.Y. Laws ch. 569.

[48] For example, Bond Acts approved by the voters in 1960, 1965, 1986, 1993, and 1996 authorized acquisitions of parks lands. *See* N.Y. State Fin. Law § 97-d (entitled, Environmental Quality Bond Act Fund"). Legislative appropriations and gifts have also enabled additions to the Forest Preserve. As of July 2016, the Forest Preserve contains three million acres in the Adirondacks and 287,500 acres in the Catskills. *See* N.Y. Dep't of Envtl. Conserv., *New York's Forest Preserve*, http://www.dec.ny.gov/lands/4960.html.

[49] STACEY LAUREN STUMP, "Forever Wild," *A Legislative Update on New York's Adirondack Park*, 4 ALB. Gov't L. REV. 682, 694 (2011) [hereinafter, "Forever Wild"].

[50] Former N.Y. CONST. art. VII, § 16 (now N.Y. CONST. art. XIV, § 2).

However, this allotment of potential reservoir sites has been rarely invoked.[51]

D. 1915, 1938 and 1967: Constitutional Conventions Affirm the Forever Wild Mandate

Delegates to the 1915 Constitutional Convention reaffirmed the 1894 forever wild mandate.[52] Similarly, the 1938 Constitutional Convention restated the "forever wild" clause and its enforcement mechanism in a revised Article XIV, with Sections 1 and 5 protecting the Forest Preserve.[53] Additionally, the 1938 Convention added forest and wildlife conservation measures in Section 3.1, in order to facilitate increasing the land area of the Forest Preserve;[54] and Section 3.2, to provide that State lands, situated

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[51] *See infra* notes 93 to 102, and accompanying text.

[52] GINSBERG, The Environment, *supra* note 4, at 318 ("The commitment to forest preservation and a strict interpretation of the 'Forever Wild' clause was reaffirmed by delegates to the 1915 Constitutional Convention.") (citing N.Y. CONSTITUTIONAL CONVENTION, UNREVISED RECORD 1336 (1915)). *See also Ass'n for the Protection of the Adirondacks v. MacDonald*, 228 A.D. 73, 79-80, 239 N.Y.S. 31, 38 (3d Dept. 1930) ("The constitutional convention of 1915 incorporated the 1894 provision verbatim, except that it added the words 'trees and' before the word 'timber' and then expressly added provisions for reforestation, for the construction of fire trails, for the removal of dead trees and dead timber for reforestation and fire protection solely, and for the construction of a state highway from Long Lake to Old Forge."), *aff'd* 253 N.Y. 234, 170 N.E. 902 (1930).

[53] *See* GALIE, ORDERED LIBERTY, *supra* note 5, at 295 ("The 1938 convention created a separate article for the conservation provisions of the constitution. At that time these provisions were primarily, but not exclusively, concerned with the forest preserves of the state. The central provision placed an absolute prohibition on the use of the preserve in the desire to keep it 'forever . . . wild.'").

[54] N.Y. CONST. art. XIV, § 3.1 ("Forest and wild life conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation. The prohibitions of section 1 of this article shall not apply to any lands heretofore or hereafter acquired or dedicated for such purposes within the forest preserve counties but outside of the Adirondack and Catskill parks as now fixed by law, except that such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private.").

outside contiguous Forest Preserve acres, might be sold in order to permit further acquisitions within the Forest Preserve.[55]

The last Constitutional Convention of the 20th century occurred in 1967. Then, as before, there was little partisan disagreement. The delegates left the historic language of the forever wild clause intact.[56]

E. 1969: The Conservation Bill of Rights

At the 1967 Constitutional Convention, significant amendments to strengthen the State's environmental stewardship were adopted, without a single dissenting vote, and became known as the "Conservation Bill of Rights."[57] These amendments failed when the voters rejected the Convention's proffered Constitution in 1967.[58] These same provisions were again presented to the electorate in 1969 as a separate constitutional amendment, and adopted by a vote of 2,750,675 to 656,763.[59] It now appears as Section 4 of Article XIV and reads as follows:

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[55] *Id.* § 3.2 ("As to any other lands of the state, now owned or hereafter acquired, constituting the forest preserve referred to in section one of this article, but outside of the Adirondack and Catskill parks as now fixed by law, and consisting in any case of not more than one hundred contiguous acres entirely separated from any other portion of the forest preserve, the legislature may by appropriate legislation, notwithstanding the provisions of section one of this article, authorize: (a) the dedication thereof for the practice of forest or wild life conservation; or (b) the use thereof for public recreational or other state purposes or the sale, exchange or other disposition thereof; provided, however, that all moneys derived from the sale or other disposition of any of such lands shall be paid into a special fund of the treasury and be expended only for the acquisition of additional lands for such forest preserve within either such Adirondack or Catskill park.").

[56] HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 245 (1996) [hereinafter, "1967 CONSTITUTIONAL CONVENTION"].

[57] *Id.* at 250 ("The Conservation Bill of Rights was adopted, 175-0, with support from all sides.").

[58] *Id.* at 349-50.

[59] VOTES CAST FOR AND AGAINST, *supra* note 44.

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.[60]

Following the adoption of this provision, Governor Nelson A. Rockefeller reconstituted the New York State Conservation Department into the Department of Environmental Conservation. Additionally, in the 1970s the Legislature enacted laws dealing with air and water pollution and other environmental issues.[61] These developments fulfilled the spirit of Section 4 while rendering some provisions of little practical effect.[62]

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[59] DULLEA, 1967 CONSTITUTIONAL CONVENTION, *supra* note 56, at 349-50.

[60] N.Y. CONST. art. XIV, § 4.

[61] GINSBERG, The Environment, *supra* note 4, at 319 n.12.

[62] *See* N.Y. STATE BAR ASS'N, NEW YORK ENVIRONMENTAL LAW HANDBOOK §1.1, at 1-4 (Nicholas A. Robinson ed., 1988) ("The Rapid Development of Environmental Law"); *cf.* GINSBERG, THE Environment, *supra* note 4, at 319 n.12 ("It cannot be ascertained whether these statutes were to some degree a consequence of the

F. Adjustments to the Forest Preserve (1894-present)

Voters have periodically approved small changes to remove or exchange discrete parcels of land from the Forest Preserve to permit clearly defined developments.[63] Such decisions to remove lands have always been narrowly framed and today appear immediately after the forever wild clause in Section 1 of Article XIV.

Examples of such voter approved exceptions include the following:

- 1918: construction of a State Highway from Saranac Lake to Long Lake, and on to Old Forge by way of Blue Mountain Lake and Raquette Lake; [64]
- 1927: construction of a road to the top of Whiteface Mountain as a Memorial to veterans of World War I;[65]
- 1941, 1947 & 1987: ski trails on Whiteface, Belleayre, Gore, South and Peter Gay Mountains;[66]
- 1957 & 1959: 400 acres to eliminate dangerous curves and grades on state highways, as well as lands for the "Northway" Interstate highway, in response to Congress's enactment of the Interstate Highway Act.[67]

Conversely, voters have periodically rejected attempts to carve exceptions to the forever wild mandate. In 1930, for example, Robert Moses campaigned for adoption of the "Closed Cabin Amendment," which would

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constitutional mandate or a reflection of nationwide federal and state legislative activity concerning the environment in the 1970s and 1980s.").

[63] GALIE, ORDERED LIBERTY, *supra* note 5, at 347-349.

[64] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 248-49.

[65] VOTES CAST FOR AND AGAINST, *supra* note 44.

[66] GINSBERG, The Environment, *supra* note 4, at 319.

[67] *Id.*

have allowed construction of lodges, hotels and recreational facilities on Forest Preserve lands. The Legislature approved the placement of this amendment on the ballot in 1932, but voters overwhelmingly defeated it.[68]

The voters have also approved exchanges of parcels of Forest Preserve for other parcels of equal or greater acreage and value. For example:

- 1963: 10 acres conveyed to the Village of Saranac Lake in exchange for 30 other acres;[69]
- 1965: 28 acres exchanged for 340 acres in the Town of Arietta;[70]
- 1979: 8,000 acres exchanged with the International Paper Company for an equivalent acreage;[71]
- 1983: conveyance of Camp Sagamore and its historic buildings, to the Sagamore Institute, in exchange for 200 acres;[72]
- 2013: swap of land for a mining operation to expand into Forest Preserve Lands by removing those lands in exchange for a larger expansion of the Forest Preserve elsewhere.[73]

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[68] GRAHAM, THE ADIRONDACK PARK, *supra* note 26, at 187; STUMP, "*Forever Wild,*" *supra* note 49, at 696.

[69] GINSBERG, The Environment, *supra* note 4, at 319 n.10.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] The proposal placed before the voters for this amendment was as follows:

> The proposed amendment to section 1 of article 14 of the Constitution would authorize the Legislature to convey forest preserve land located in the town of Lewis, Essex County, to NYCO Minerals, a private company that plans on expanding an existing mine that adjoins the forest preserve land. In exchange, NYCO Minerals would give the State at least the same

This pattern of carefully framing and debating amendments to Article XIV on a case-by-case basis, in order to adjust the strictures of the "forever wild" Forest Preserve, has persisted until today. The forever wild clause itself is preserved as first adopted.

In sum, over the 122 years that the forever wild clause has been a part of the Constitution, it has been debated and amended, but the mandate to safeguard the Forest Preserve remains as critical a component of the Constitution as when adopted in 1894.[74] The provision is unique among state constitutions in the United States. It rightly occupies a treasured place in our State Constitution and has been consistently protected but never weakened.[75]

III. THE FOREST PRESERVE, SECTIONS 1, 2 & 5

Today, the Constitutional provisions for the Forest Preserve are found in Sections 1, 2 and 5 of Article XIV. While the Forest Preserve is renowned worldwide,[76] it has a unique legal status under New York law.[77]

> amount of land of at least the same value, with a minimum assessed value of $1 million, to be added to the forest preserve. When NYCO Minerals finishes mining, it would restore the condition of the land and return it to the forest preserve.

New York Land Swap With NYCO Minerals Amendment, Proposal 5 (2013), Ballotpedia.org, https://ballotpedia.org/New_York_Land_Swap_With_NYCO_Minerals_Amendment,_Proposal_5_(2013)#cite_note-quotedisclaimer-5. Implementation of this amendment is the subject of judicial review as of July 2016.

[74] ALFRED S. FORSYTHE & NORMAN J. VAN VALKENBURGH, THE FOREST PRESERVE AND THE LAW (1996).

[75] *See* CITY BAR REPORT, *supra* note 14, at 627 ("The 'forever wild' provision is important and uniquely protective of the environment, and should be retained in the constitution.").

[76] In 1969, it was included by UNESCO in the Champlain-Adirondack Biosphere Reserve. *See* UNESCO, *Champlain-Adirondak* [sic], in MAB BIOSPHERE RESERVES DIRECTORY, http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?code=USA+45&mode=all.

A. Sections 1 & 5

The clarity and mandatory nature of the "forever wild" clause is a classic illustration of an enforceable constitutional norm. Through periodic amendments to Section 1 proposed by the Legislature and approved by the voters, the State has determined the appropriateness of any derogation from the Constitution's "forever wild" mandate. These discrete adjustments to allow non-wilderness uses within the Blue Line boundaries of the Forest Preserve are of relatively little moment, in light of the substantial enlargements to the Forest Preserve over the years. Once placed in the Forest Preserve, new acreage enjoys "forever wild" status and constitutional protection.

Although there has been little litigation under Article XIV,[78] the enforceability of the forever wild clause is not open to question. A violation of Article XIV may be enjoined under Section 5, which authorizes the State to seek such relief through a judicial proceeding, or a private citizen with the

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[77] The Forest Preserve exists in the Catskills and Adirondacks, where it is distinct from the Adirondack Park. It is under the stewardship of the New York State Department of Environmental Conservation. *See, e.g.*, *Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conserv.*, 153 Misc. 2d 606, 583 N.Y.S. 2d 119 (Sup. Ct. Ulster Cnty. 1991), *aff'd*, 199 A.D.2d 852, 605 N.Y.S. 2d 795 (3d Dep't 1993), *app. withdrawn*, 83 N.Y.2d 907, 637 N.E.2d 280, 614 N.Y.S.2d 389 (Table) (1994). The Legislature recognized the Adirondack Park in the N.Y. Laws of 1892 (ch. 707). The Forest Preserve is not legally in the purview of local authorities or the Adirondack Park Agency, both of which govern privately-held lands in the Adirondack Park, or the local authorities in the Catskills, or the New York City Department of Environmental Protection, which manages the reservoirs in the Catskills. When State agencies, such as the Department of Transportation, violate the Forest Preserve's "forever wild" status, enforcement proceedings result. *See* 26 THE N.Y. ENVTL. LAWYER (N.Y. State Bar Ass'n Sec. on Envtl. Law), spring 2006, at 31-34; *id.*, summer 2006, at 9-20.

[78] GALIE, REFERENCE GUIDE, *supra* note 2, at 251. *See also Helms v. Reid*, 90 Misc. 2d at 586, 394 N.Y.S.2d at 992 ("There is almost a total absence of court decisions construing this important provision in our State Constitution and the time has now come for a judicial interpretation of this provision so as to guide the future preservation of the unique Adirondack region of our State.").

consent of the Appellate Division.[79] The intent of Section 5 was to remove the Forest Preserve from the control of the legislature and to vest oversight of its mandates within the powers of the judiciary.[80]

Soon after the 1894 Convention, several New Yorkers formed a civic group to monitor compliance with the "forever wild" mandate. In the 1920s, the Association for the Preservation of the Adirondacks availed itself of its constitutional rights and sought judicial enforcement of the "forever wild" clause.[81] Specifically, the Association opposed siting Winter Olympic facilities in the Forest Preserve. The Appellate Division, Third Department, determined that the Constitution required that the Forest Preserve be preserved "in its wild nature, its trees, its rocks, its streams. It must be a great resort for the free use of all the people, but it must be a wild resort in which nature is given free rein."[82] The Court of Appeals affirmed, declaring that

> [t]he Forest Preserve is preserved for the public; its benefits are for the people of the State as a whole. Whatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for everyone within the state and for the use of the people of the State.[83]

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[79] Formerly N.Y. CONST. art VII, § 9, renumbered and approved on November 8, 1938.

[80] *See* CHARLES Z. LINCOLN, 3 CONSTITUTIONAL HISTORY OF NEW YORK 395 (1906) ("By including these subjects in the Constitution they are withdrawn from legislative control, and this withdrawal is in most cases the chief reason for constitutional interference.").

[81] *Association for the Protection of the Adirondacks v. MacDonald*, 228 A.D. 73, 239 N.Y.S. 31 (3d Dept.), *aff'd* 253 N.Y. 234, 170 N.E. 902 (1930).

[82] *Id.* at 82.

[83] *Association for the Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234, 238, 170 N.E. 902, 904 (1930).

Thus, the State's highest court has recognized that the people's rights in the Forest Preserve, established under Section 1, are effective and enforceable through Section 5. The means by which the public may access or enjoy the Forest Preserve can be regulated by the Legislature, but only if it does not infringe on the "wild" characteristics.[84] Courts have had no difficulty construing and applying these straightforward principles.[85]

Although the "forever wild" clause itself is a model of clarity, the balance of Section 1 is unwieldy and unreadable. After the first two elegant sentences comes a dreary and prolix recitation of each specific exception amending the Constitution's rule of "forever wild."[86]

The text of Section 1 could easily be shortened and improved by authorizing a public roster of Forest Preserve Amendments. The roster can be maintained as an official record of amendments' terms, along with a record of land and waters that have been added to enlarge the Forest Preserve. Once an amendment has been adopted, derogation from "forever wild" is realized (such as when a road is built or lands transferred to allow a rural cemetery expanded in exchange for adding wild river lands to the Forest Preserve), and there would seem to be no reason for the Constitution

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[84] *See id.* at 238-39, 170 N.E. at 904 ("Unless prohibited by the constitutional prohibition, the use and preservation are subject to the reasonable regulations of the Legislature.").

[85] *See* CITY BAR REPORT, *supra* note 14, at 627 ("This provision, first enacted in 1894, has been consistently enforced by the courts as a powerful tool to protect New York's irreplaceable natural resources."). For example, construing Court of Appeals precedent, the court in *Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conserv.*, Supreme Court, Ulster County, found it clear "that insubstantial and immaterial cutting of timber-sized trees was constitutionally authorized in order to facilitate public use of the forest preserve so long as such use is consistent with the wild forest lands." 153 Misc. 2d 606, 609, 583 N.Y.S. 2d 119, 122 (Sup. Ct. Ulster Cnty. 1991), *aff'd*, 199 A.D.2d 852, 605 N.Y.S. 2d 795 (3d Dep't 1993), *app. withdrawn*, 83 N.Y.2d 907, 637 N.E.2d 280, 614 N.Y.S.2d 389 (Table) (1994).

[86] One commentator has referred to the amendments in Article XIV, Section 1, as reading like a road "gazetteer." PHILLIP G. TERRIE, CONTESTED TERRAIN: A NEW HISTORY OF NATURE AND PEOPLE IN THE ADIRONDACKS (2d ed. 2008).

to be used as an historical record of enactments. Indeed, when acres are added to the Forest Preserve, this fact does not appear in the Constitution, even though the "forever wild" safeguard applies to them at once.[87]

Also, the implicit reference in the first sentence of Section 1 to the 1885 Forest Act,[88] through the use of the phrase "as now fixed by law," appears redundant, since "now" has evolved and the Forest Preserve is defined today in the State Environmental Conservation Law.[89] The excision of this phrase would shorten Section 1 without any substantive impact.

While subject to debate, the Forest Preserve's judicial enforcement provisions in Section 5 have proven to be effective.[90] Section 5 anticipated by 78 years the enactment in 1972 of procedures for citizen suits, which appear in many environmental statutes, such as Section 505 of the federal Clean Water Act[91] and its New York State analogue.[92] Section 5 was

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[87] In a similar vein, two noted commentators have suggested condensing the exceptions into a general exception. "For example, the section could be amended to delete everything after the second sentence and simply add to the end of the first sentence the words 'as heretofore guaranteed by constitutional provision." GALIE & BOPST, *House Cleaning*, *supra* note 15, at 1546.

[88] 1885 N.Y. Laws ch. 283.

[89] *See* N.Y. ENVTL. CONSERV. LAW § 9-0101(6) ("The 'forest preserve' shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster, and Sullivan . . . .").

[90] *Compare* GINSBERG, The Environment, *supra* note 4, at 320 ("This section is unusually restrictive in its limitation on citizens' suits. It may also prohibit other remedies such as damages. Thus, if trees are wrongfully destroyed in the Forest Preserve, the wrongdoer can be enjoined from further cutting, but a court may not be able to award damages to the state for the value of the trees destroyed." (citing *Matter of Oneida County Forest Preserve Council v. Wehle*, 309 N.Y 152, 128 N.E.2d 282 (1955)).

[91] 33 U.S.C. § 1365.

[92] *See* N.Y. DEP'T OF ENVTL. CONSERV., DEE-19: CITIZEN SUIT ENFORCEMENT POLICY (July 23, 1994), http://www.dec.ny.gov/regulations/25226.html.

adopted to permit enforcement of the "forever wild" mandate, and has not been used to enforce other potential rights within Article XIV.

B. Section 2

Adopted by the voters in 1913, Section 2 (known as the Burd Amendment) reserves up to 3% of the Forest Preserve for reservoirs and dams. However, in stark contrast to the forever wild mandate in Section 1, Section 2 is rarely used,[93] and has been contested whenever its provisions have been invoked.[94]

Most notably, in 1953, by a vote of 1,002,462 to 697,279, the electorate approved an amendment that revoked the Legislature's power to provide for use of portions of the Forest Preserve for the construction of reservoirs to regulate the flow of streams.[95] As a consequence, Section 2 "was cancelled and withdrawn" to the extent that "the People of the State . . . rendered the lands of the State Forest Preserve inviolate for use in regulating the flow of streams."[96]

Another example of public opposition to the placement of reservoirs and dams in the Forest Preserve occurred in 1955. Voters then defeated (1,622,196 to 613,727) a proposed amendment to use Forest Preserve lands

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[93] In 1915, the Legislature enacted the Machold Storage Law, which allowed a Water Power Commission in the Conservation Department to authorize dams. 1915 N.Y. Laws ch. 662. In general, use of Section 2 to site reservoirs for waterpower in the Forest Preserve has been highly contested; and section 2 has gone largely unused for municipal water supplies. While the Stillwater Reservoir was expanded in 1924, little other use was sought to be made of Forest Preserve lands, until the City of New York in the 1960s sought additional water sources.

[94] For example, when proposals were made to flood the Moose River Valley with a dam, they were challenged in *Adirondack League Club v. Board of Black River Regulating Dist.*, 301 N.Y. 219, 93 N.E.2d 647 (1950).

[95] VOTES CAST FOR AND AGAINST, *supra* note 44.

[96] *Black River Regulating Dist. v. Adirondack League Club*, 307 N.Y. 475, 484, 121 N.E.2d 428, 430-31 (1954), *rearg. denied*, 307 N.Y. 906, 123 N.E.2d 562 (1954), *app. dismissed*, 351 U.S. 922 (1956).

for the construction and operation of the Panther Mountain reservoir to regulate the flow of the Moose and Black rivers.[97] Likewise, in 1947 Governor Thomas E. Dewey opposed proposals for constructing the proposed Higley Mountain Dam, which the Legislature authorized in the 1920s.[98]

In recent years, few reservoirs and dams have been constructed nationally, and even less in New York.[99] Worries that cities would deplete their water supplies have dissipated. Moreover, statutes enacted long after the adoption of Section 2 would constrain future attempts to place reservoirs, dams and the like in the Forest Preserve. For example, among the provisions of the Environmental Conservation Law is protection of the extensive fresh water wetlands found in the Adirondacks,[100] along with rules for environmental impact assessment,[101] both of which would restrict any contemplated use of Section 2.[102]

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[97] VOTES CAST FOR AND AGAINST, *supra* note 44; GRAHAM, THE ADIRONDACK PARK, *supra* note 26, at 206-07.

[98] PAUL SCHNEIDER, THE ADIRONDACKS: A HISTORY OF AMERICA'S FIRST WILDERNESS 291-94 (1998).

[99] In 2014, the Lake Placid Village Dam was removed from the Chubb River. In 2015, the Saw Mill Dam in Willsboro was removed from the Bouquet River. There is an increasing nationwide trend of dam removals to restore ecological systems. *See* AMERICAN RIVERS, MAP OF U.S. DAMS REMOVED SINCE 1916, https://www.americanrivers.org/threats-solutions/restoring-damaged-rivers/dam-removal-map/.

[100] *See* N.Y. ENVTL. CONSERV. LAW art. 24; N.Y. COMP. CODES R. & REGS. tit. 6.

[101] N.Y. ENVTL. CONSERV. LAW art. 8 (the "State Environmental Quality Review Act" or "SEQRA").

[102] Beyond locating possible dam sites, enabling legislation would be required to select the sites, in addition to further constitutional amendments to remove the sites chosen along with access roads for construction equipment, eminent domain procedures to condemn private or other public rights unavoidably impacted by the dam and reservoirs, and appropriations to pay for the dam construction.

Thus, a question exists as to whether Section 2 continues to serve a constitutional purpose and should remain part of New York's fundamental law. As noted, Section 2 has rarely been invoked, and any future use of it would be constrained by statute. Arguably, too, the repeal of Section 2 from the Constitution would enhance Section 1's "forever wild" norms.

IV. THE CONSERVATION BILL OF RIGHTS, SECTION 4

Although Section 4 was intended to be a "Conservation Bill of Rights,"[103] it is debatable whether it has attained fundamental constitutional stature. After Section 4's adoption, and at the request of Governor Rockefeller in 1970, the legislature authorized a codification of the 1911 Conservation Law, which it then re-enacted in 1972 as the Environmental Conservation Law. The Legislature thereafter enacted new legislation, including the State's Endangered Species Act,[104] Tidal and Freshwater Wetlands Acts,[105] Wild and Scenic Rivers Act,[106] and New York's implementing statutes for the federal Clean Air Act,[107] Clean Water Act,[108] and laws on solid[109] and hazardous wastes.[110]

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[103] Proposals for strengthening the environmental rights in the Constitution predate the 1967 Convention. *See, e.g.*, ANNUAL REPORT OF THE JOINT LEGISLATIVE COMM. ON CONSERV., NAT'L RES. AND SCENIC BEAUTY, Legislative Document No. 13 (1967). On the continuing debate over a broader environmental rights, *see* CAROLE L. GALLAGHER, *Movement to Create an Environmental Bill of Rights: From Earth Day 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 107 (1997).

[104] 1970 N.Y. Laws ch. 1047 & 1048; N.Y. ENVTL. CONSERV. LAW § 11-0535.

[105] N.Y. ENVTL. CONSERV. LAW art. 24 (Freshwater wetlands) and art. 25 (Tidal wetlands).

[106] 1972 N.Y. Laws ch. 869 ; N.Y. ENVTL. CONSERV. LAW art. 24, tit. 22.

[107] The Clean Air Act of 1970, Pub. L. No. 88-206, 77 Stat. 392 (1970), *codified at* 42 U.S.C. §§ 7401, *et seq.*, implemented in New York as N.Y. Comp. Codes R. & Regs. tit. 6, §§ 200, *et seq.*; *see Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977), *cert denied* 434 U.S. 902 (1977).

[108] *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), *codified at* 33 U.S.C. § 1251, *et seq.* (the "CLEAN WATER

In one sense, the broad policy goals of the Conservation Bill of Rights have been realized through federal and State environmental statutes.[111] In fact, Section 4 was enacted on the eve of the first "Earth Day" in 1970, which was a time when the State suffered severe water and air pollution, acute loss of wetlands and species, and widespread contamination of hazardous and toxic waste. It was apparent that the voters in 1969 wanted a constitutional mandate to oblige government to restore and secure their environmental public health and quality of life, and the Legislature responded accordingly.

In another sense, the more profound environmental rights contemplated by Section 4 have not been effectuated. Section 4 expressly provides for State acquisition of lands for a "state nature and historical preserve" located outside the Forest Preserve.[112] Although this provision has been on the books for nearly fifty years "with questionable effect,"[113] the State has not established a "Preserve" for natural resources and scenic beauty, either on par with the Forest Preserve or with such preserves in other states.[114]

ACT"); N.Y. ENVTL. CONSERV. LAW art. 17; N.Y. Comp. Codes R. & Regs. tit. 6, §§ 750, *et seq.*

[109] The Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (1976), *codified at* 42 U.S.C. 6901, *et seq.*; N.Y. ENVTL. CONSERV. LAW art. 27.

[110] N.Y. ENVTL. CONSERV. LAW art. 27, tit. 9 *and* N.Y. Comp. Codes R. & Regs. tit. 6, §§ 200, *et seq*.

[111] *See* GALIE, REFERENCE GUIDE, *supra* note 2, at 251 ("Protection of the kind envisaged by this section had already been provided by statute, at least in part. . . . The broad policy goals of this section were implemented by statues in the 1970s.").

[112] N.Y. CONST. art. XIV, § 4.

[113] GINSBERG, The Environment, *supra* note 4, at 326.

[114] Comparable provisions are found in the states of Arkansas, Florida, Hawaii, Illinois, Indiana, Maryland, Michigan, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Virginia and Washington. *See* Frank P. Grad, 10 TREATISE ON

Furthermore, Section 4 does not appear to be self-executing. At least one court has held that Section 4's provisions afford no constitutionally-protected property right enforceable by courts.[115] Hence, the provision amounts to little more than an exhortation for the government to act.[116] Citizens apparently cannot seek judicial enforcement of the Conservation Bill of Rights, as they can the "forever wild" clause.[117]

Over 20 years ago, Professor William R. Ginsberg argued that New York should move "toward 'self-executing' status for the existing constitutional statement of environmental goals."[118] He recommended converting the general language of Section 4 into a specific "environmental right," such as exists in other states. For example, the constitution for the Commonwealth of Pennsylvania provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are

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ENVIRONMENTAL LAW § 10.03(v) (1986). Although laws in New York exist to protect wild plants and biodiversity, sufficient funding has not been provided to implement them nor integrated them with Article XIV's provisions. *See* PHILIP WEINBERG, *Practice Commentaries*, N.Y. ENVTL. CONSERV. LAW § 3-0302, at 54 (McKinney's 2005).

[115] *See Leland v. Moran*, 235 F.Supp.2d 153, 169 (N.D.N.Y. 2002) ("Article 14, section 4 of the New York State Constitution requires the legislature to include adequate provision for the abatement of various types of pollution. It has done so by enacting the ECL [Environmental Conservation Law]. Nothing in the language of this constitutional provision sufficiently restricts the DEC's discretion in enforcing the ECL such that it provides plaintiffs with a source of a constitutionally protected property right."), *aff'd*, 80 Fed. Appx. 133, 2003 WL 22533185 (2d Cir. 2003).

[116] *See* GINSBERG, The Environment, *supra* note 4, at 320 ("This section is similar to other provision of other state constitutions that mandate state legislatures to enact environmentally protective legislation. The efficacy of such provisions is limited. Courts usually refuse to compel legislatures to act on the basis of constitutional mandates. Since the judiciary is a coordinate branch of government, it does not have the power to compel the legislature to act in a purely legislative function.") (citations omitted).

[117] *See id.*

[118] *Id.* at 326 (Conclusion #2).

> the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people.[119]

Florida,[120] Hawaii,[121] Illinois,[122] and Montana[123] provide comparable constitutional environmental rights (as do 174 nations),[124] and 19 states provide constitutional rights for hunting and fishing.[125] Establishing such rights in state constitutions serve varied objectives,[126] and afford a unique dimension of environmental protection.[127]

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[119] PA. CONST. art. I, § 27. The Pennsylvania Supreme Court gave direct effect to this provision in *Robinson Township, Washington Cnty., Pa. et al. v. Commonwealth*, 623 Pa. 564, 683-87, 83 A.3d 901, 974-977 (Pa. 2013).

[120] FLA. CONST. art. II, § 7 ("It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.").

[121] HAW. CONST. art. XI, § 9 ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.").

[122] ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.").

[123] MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities . . . .").

[124] DAVID R. BOYD, THE RIGHTS REVOLUTION *passim* (2012).

[125] *See* NAT'L CONFERECE OF STATE LEGISLATURES, *State Constitutional Right to Hunt and Fish* (Nov. 9, 2015), http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx.

[126] *See* ART ENGLISH & JOHN J. CARROL, *State Constitutions and Environmental Bills of Rights*, *in* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 18 (2015), http://knowledgecenter.csg.org/kc/content/state-constitutions-and-environmental-

But it is by no means clear that New York would benefit from the inclusion in the State Constitution of a self-executing environmental right. Current State and federal law provide ample environmental protections, and regulators already police environmentally harmful conduct. Judicial review of most environmental issues is readily available under Article 78 of the Civil Practice Law & Rules, and citizen suits can be brought to authorize enforcement of most environmental statutes.[128] Thus, it is debatable whether the addition of a self-executing constitutional environmental right could do more; indeed, it might even lead to needless, duplicative litigation, which would discourage economic development, especially in economically-depressed regions of the State.

To be sure, though, there is another side of the argument. Arguably, the narrow scope of Section 4 in Article XIV is insufficient to address New York's new environmental challenges. In 1894, the destruction of forests was deemed a crisis worthy of constitutional reform. The "forever wild" mandate was thus born. In 1969, pollution presented a comparable crisis. The "Conservation Bill of Rights" was thus created.[129] Today's analogue may be impacts associated with climate change, as evaluated in reports by

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bills-rights; *see also* JAMES R. MAY, PRINCIPLES OF CONSTITUIONAL ENVIRONMENTAL LAW *passim* (2011).

[127] *See generally*, JOHN C. DERNBACH, JAMES R. MAY & KENNETH T. KRISTL, *Robinson Township v. Commonwealth of Pennsylvania*: *Examination and Implications*, 67 RUTGERS L.J. 1169 (2015).

[128] *See, e.g.*, CLEAN WATER ACT § 505; *supra* note 92.

[129] Environmental constitutionalism began in New York, and was expanded in 1969, influenced in part by Dr. Rachel Carson's seminal book, *Silent Spring*. Dr. Carson wrote that "[i]f the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem." RACHEL CARSON, SILENT SPRING 12-13 (1962).

the New York Academy of Sciences,[130] the U.S. National Academy of Sciences,[131] and the Intergovernmental Panel on Climate Change.[132]

CONCLUSION

In 2017, voters will have a unique opportunity to debate whether the provisions of the State Constitution's conservation article, Article XIV, are sufficient to meet current needs or can otherwise be improved. As this report illustrates, Article XIV presents opportunities to simplify its text, address obsolete aspects, and to consider how to enhance its effectiveness. At a minimum, if and when the State establishes a preparatory constitutional commission, it has ample reason to carefully study Article XIV.

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[130] *See* NEW YORK CITY PANEL OF CLIMATE CHANGE, *Building the Knowledge Base for Climate Resiliency: New York City Panel on Climate Change 2015 Report*, 1336 ANNALS N.Y. ACAD. SCI. 1-150 (2015), http://onlinelibrary.wiley.com/doi/10.1111/nyas.2015.1336.issue-1/issuetoc.

[131] *See* U.S. NAT'L ACAD. OF SCI. & U.K. ROYAL SOCIETY, *Climate Change: Evidence and Causes* (2014), nas-sites.org/americasclimatechoices.

[132] *See* INTERGOVT'L PANEL ON CLIMATE CHANGE, *Fifth Assessment Report* (2013-14), https://www.ipcc.ch/report/ar5/. *Fifth Assessment Report.*

APPENDIX A

ARTICLE XIV

CONSERVATION

{Text, annotated with subject headings in brackets}

[Forest preserve to be forever kept wild; authorized uses and exceptions]

Section 1.[1] *The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.* (Italics added.)

Nothing herein contained shall prevent the state from constructing, completing and maintaining any highway heretofore specifically authorized by constitutional amendment, nor from constructing and maintaining to federal standards federal aid interstate highway route five hundred two from a point in the vicinity of the city of Glens Falls, thence northerly to the vicinity of the villages of Lake George and Warrensburg, the hamlets of South Horicon and Pottersville and thence northerly in a generally straight line on the west side of Schroon Lake to the vicinity of the hamlet of Schroon, then continuing northerly to the vicinity of Schroon Falls, Schroon River and North Hudson, and to the east of Makomis Mountain, east of the hamlet of New Russia, east of the village of Elizabethtown and continuing northerly in the vicinity of the hamlet of Towers Forge, and east of Poke-O-Moonshine Mountain and continuing northerly to the vicinity of the village

[1] Article 14 was formerly Section 7 of N.Y. CONST. art. VII in the Constitution of 1894. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 4, 1941; November 4, 1947; November 5, 1957; November 3, 1959; November 5, 1963; November 2, 1965; November 6, 1979; November 8, 1983; November 3, 1987; November 5, 1991; November 7, 1995; November 6, 2007; November 3, 2009; November 5, 2013.

of Keeseville and the city of Plattsburgh, all of the aforesaid taking not to exceed a total of three hundred acres of state forest preserve land, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than five miles of such trails shall be in excess of one hundred twenty feet wide, on the north, east and northwest slopes of Whiteface Mountain in Essex county, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than two miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Belleayre Mountain in Ulster and Delaware counties and not more than forty miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than eight miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Gore and Pete Gay mountains in Warren county, nor from relocating, reconstructing and maintaining a total of not more than fifty miles of existing state highways for the purpose of eliminating the hazards of dangerous curves and grades, provided a total of no more than four hundred acres of forest preserve land shall be used for such purpose and that no single relocated portion of any highway shall exceed one mile in length.

Notwithstanding the foregoing provisions, the state may convey to the village of Saranac Lake ten acres of forest preserve land adjacent to the boundaries of such village for public use in providing for refuse disposal and in exchange therefore the village of Saranac Lake shall convey to the state thirty acres of certain true forest land owned by such village on Roaring Brook in the northern half of Lot 113, Township 11, Richards Survey.

Notwithstanding the foregoing provisions, the state may convey to the town of Arietta twenty-eight acres of forest preserve land within such town for public use in providing for the extension of the runway and landing strip of the Piseco airport and in exchange therefor the town of Arietta shall convey to the state thirty acres of certain land owned by such town in the town of Arietta.

Notwithstanding the foregoing provisions and subject to legislative approval of the tracts to be exchanged prior to the actual transfer of title, the state, in order to consolidate its land holdings for better management, may convey to International Paper Company approximately eight thousand five hundred acres of forest preserve land located in townships two and three of Totten and Crossfield's Purchase and township nine of the Moose River Tract, Hamilton county, and in exchange therefore International Paper Company shall convey to the state for incorporation into the forest preserve approximately the same number of acres of land located within such townships and such County on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands to be conveyed by the state.

Notwithstanding the foregoing provisions and subject to legislative approval of the tracts to be exchanged prior to the actual transfer of title and the conditions herein set forth, the state, in order to facilitate the preservation of historic buildings listed on the national register of historic places by rejoining an historic grouping of buildings under unitary ownership and stewardship, may convey to Sagamore Institute, Inc., a not-for-profit educational organization, approximately ten acres of land and buildings thereon adjoining the real property of the Sagamore Institute, Inc. and located on Sagamore Road, near Racquette Lake Village, in the Town of Long Lake, county of Hamilton, and in exchange therefor; Sagamore Institute, Inc. shall convey to the state for incorporation into the forest preserve approximately two hundred acres of wild forest land located within the Adirondack Park on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands and buildings to be conveyed by the state and that the natural and historic character of the lands and buildings conveyed by the state will be secured by appropriate covenants and restrictions and that the lands and buildings conveyed by the state will reasonably be available for public visits according to agreement between Sagamore Institute, Inc. and the state.

Notwithstanding the foregoing provisions the state may convey to the town of Arietta fifty acres of forest preserve land within such town for

public use in providing for the extension of the runway and landing strip of the Piseco airport and providing for the maintenance of a clear zone around such runway, and in exchange therefor, the town of Arietta shall convey to the state fifty-three acres of true forest land located in lot 2 township 2 Totten and Crossfield's Purchase in the town of Lake Pleasant.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, the state may convey to the town of Keene, Essex county, for public use as a cemetery owned by such town, approximately twelve acres of forest preserve land within such town and, in exchange therefor, the town of Keene shall convey to the state for incorporation into the forest preserve approximately one hundred forty-four acres of land, together with an easement over land owned by such town including the riverbed adjacent to the land to be conveyed to the state that will restrict further development of such land, on condition that the legislature shall determine that the property to be received by the state is at least equal in value to the land to be conveyed by the state.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, because there is no viable alternative to using forest preserve lands for the siting of drinking water wells and necessary appurtenances and because such wells are necessary to meet drinking water quality standards, the state may convey to the town of Long Lake, Hamilton county, one acre of forest preserve land within such town for public use as the site of such drinking water wells and necessary appurtenances for the municipal water supply for the hamlet of Raquette Lake. In exchange therefor, the town of Long Lake shall convey to the state at least twelve acres of land located in Hamilton county for incorporation into the forest preserve that the legislature shall determine is at least equal in value to the land to be conveyed by the state. The Raquette Lake surface reservoir shall be abandoned as a drinking water supply source.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, the state may convey to National Grid up to six acres adjoining State Route 56 in St. Lawrence County where it passes through Forest Preserve in Township 5, Lots 1, 2, 5 and 6 that is

necessary and appropriate for National Grid to construct a new 46kV power line and in exchange therefore National Grid shall convey to the state for incorporation into the forest preserve at least 10 acres of forest land owned by National Grid in St. Lawrence county, on condition that the legislature shall determine that the property to be received by the state is at least equal in value to the land conveyed by the state.

Notwithstanding the foregoing provisions, the legislature may authorize the settlement, according to terms determined by the legislature, of title disputes in township forty, Totten and Crossfield purchase in the town of Long Lake, Hamilton county, to resolve longstanding and competing claims of title between the state and private parties in said township, provided that prior to, and as a condition of such settlement, land purchased without the use of state-appropriated funds, and suitable for incorporation in the forest preserve within the Adirondack park, shall be conveyed to the state on the condition that the legislature shall determine that the property to be conveyed to the state shall provide a net benefit to the forest preserve as compared to the township forty lands subject to such settlement.

Notwithstanding the foregoing provisions, the state may authorize NYCO Minerals, Inc. to engage in mineral sampling operations, solely at its expense, to determine the quantity and quality of wollastonite on approximately 200 acres of forest preserve land contained in lot 8, Stowers survey, town of Lewis, Essex county provided that NYCO Minerals, Inc. shall provide the data and information derived from such drilling to the state for appraisal purposes. Subject to legislative approval of the tracts to be exchanged prior to the actual transfer of the title, the state may subsequently convey said lot 8 to NYCO Minerals, Inc., and, in exchange therefor, NYCO Minerals, Inc. shall convey to the state for incorporation into the forest preserve not less than the same number of acres of land, on condition that the legislature shall determine that the lands to be received by the state are equal to or greater than the value of the land to be conveyed by the state and on condition that the assessed value of the land to be conveyed to the state shall total not less than one million dollars. When NYCO Minerals, Inc. terminates all mining operations on such lot 8 it shall remediate the site and

convey title to such lot back to the state of New York for inclusion in the forest preserve. In the event that lot 8 is not conveyed to NYCO Minerals, Inc. pursuant to this paragraph, NYCO Minerals, Inc. nevertheless shall convey to the state for incorporation into the forest preserve not less than the same number of acres of land that is disturbed by any mineral sampling operations conducted on said lot 8 pursuant to this paragraph on condition that the legislature shall determine that the lands to be received by the state are equal to or greater than the value of the lands disturbed by the mineral sampling operations.

[**Reservoirs]**

§2.[2] The legislature may by general laws provide for the use of not exceeding three per centum of such lands for the construction and maintenance of reservoirs for municipal water supply, and for the canals of the state. Such reservoirs shall be constructed, owned and controlled by the state, but such work shall not be undertaken until after the boundaries and high flow lines thereof shall have been accurately surveyed and fixed, and after public notice, hearing and determination that such lands are required for such public use. The expense of any such improvements shall be apportioned on the public and private property and municipalities benefited to the extent of the benefits received. Any such reservoir shall always be operated by the state and the legislature shall provide for a charge upon the property and municipalities benefited for a reasonable return to the state upon the value of the rights and property of the state used and the services of the state rendered, which shall be fixed for terms of not exceeding ten years and be readjustable at the end of any term. Unsanitary conditions shall not be created or continued by any such public works.

[2] An addition made in 1913 to former N.Y. CONST. art. VII, §7, which was renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November of 1953, and November of 1955.

[Forest and wild life conservation; use or disposition of certain lands authorized]

§3.[3] 1. Forest and wild life conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation. The prohibitions of section 1 of this article shall not apply to any lands heretofore or hereafter acquired or dedicated for such purposes within the forest preserve counties but outside of the Adirondack and Catskill parks as now fixed by law, except that such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private.

2. As to any other lands of the state, now owned or hereafter acquired, constituting the forest preserve referred to in section one of this article, but outside of the Adirondack and Catskill parks as now fixed by law, and consisting in any case of not more than one hundred contiguous acres entirely separated from any other portion of the forest preserve, the legislature may by appropriate legislation, notwithstanding the provisions of section one of this article, authorize: (a) the dedication thereof for the practice of forest or wild life conservation; or (b) the use thereof for public recreational or other state purposes or the sale, exchange or other disposition thereof; provided, however, that all moneys derived from the sale or other disposition of any of such lands shall be paid into a special fund of the treasury and be expended only for the acquisition of additional lands for such forest preserve within either such Adirondack or Catskill park.

[Protection of natural resources; development of agricultural lands]

§4.[4] The policy of the state shall be to conserve and protect its natural

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[3] Formerly N.Y. CONST. art. VII, §16, this provision as renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 5, 1957; November 6, 1973.

[4] First proposed and accepted by the Constitutional Convention in 1967, whose proposed constitution was not accepted, and thereafter added by amendment adopted by

resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.

[Violations of article; how restrained.]

§5.[5] A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in the appellate division, on notice to the attorney-general at the suit of any citizen.

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the legislature and approved by vote of the people November 4, 1969.

[5] Initially adopted in 1894 in former N.Y. CONST. art. VII, §7; retained by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938, and renumbered §5 by vote of the people November 4, 1969.

Report and Recommendations of the

New York State Bar Association Committee on the New York State Constitution

The Judiciary Article of the New York State Constitution – Opportunities to Restructure and Modernize the New York Courts

Approved by the House of Delegates on January 27, 2017

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TABLE OF CONTENTS

"There shall be a unified court system for the state."

New York State Constitution Art. VI, § 1

INTRODUCTION AND EXECUTIVE SUMMARY

Article VI of the New York State Constitution, known as the Judiciary Article, creates the structure and organization of the Unified Court System in New York. It controls a wide range of important issues regarding New York's Judiciary, such as: a) the number and jurisdiction of our trial and appellate courts, and the interrelationships between those courts and cases that are filed in them; b) how our State's courts are managed, financed and administered; c) the number of judges of each of the State's courts; d) how New York's judges are selected and disciplined, their eligibility for office, their terms, their retirement ages and how their compensation is fixed; and e) which particular courts the families, individuals, corporations, non-profits and government agencies who have disputes must turn to for judicial resolution, which sometimes results in the need to turn to multiple courthouses.

In short, the Judiciary Article sets out the operating structure for our State's sprawling court system – ranging from:

- Town and Village Courts upstate;
- To District Courts on Long Island;
- To the Courts of New York City;
- To other City Courts around the State;
- To County, Family and Surrogate's Courts;
- To the Supreme Courts and Court of Claims across the State;
- Up to the four Appellate Divisions; and
- Ultimately, to our State's highest court, the Court of Appeals.

But there is much more than that in Article VI. In fact, the Judiciary Article contains approximately 16,000 words – representing almost 1/3 of the entire State Constitution. Because of the manner in which the State Constitution was drafted and amended – spanning a period of more than two centuries, the Judiciary Article continues to contain various anachronistic or superseded concepts. These include: a) a mandate that, when called on to make a placement of a child, courts will place children in an "institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child"; and b) a provision specifying that there shall be only 11 Judicial Districts of the Unified Court System and laying out which counties fall into which District, even though the Legislature has since provided for 13 such Districts.

For various reasons, decades have gone by without any successful effort to restructure and modernize the Constitutional underpinnings of our State's court system. The result has been a Unified Court System that has 11 different trial courts, resulting in an overly complex, unduly costly and unnecessarily inefficient court structure.

The New York State Constitution provides that the question "[s]hall there be a convention to revise the constitution and amend the same" will be presented to voters every twenty years.[1] The next such vote will occur on November 7, 2017.

In July of 2015, the then President of the New York State Bar Association (hereinafter "New York State Bar" or "State Bar"), David P. Miranda, created a Committee on the New York State Constitution to: a) serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; b) make recommendations regarding potential constitutional amendments; c) provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and d) promote initiatives designed to educate

[1] N.Y. Const. art. XIX, § 2.

the legal community and the public about the State Constitution.[2] Thereafter, that Committee created a Subcommittee to analyze Article VI of the State Constitution and its provisions affecting New York's Judiciary.[3]

Perhaps due to the cumbersomeness, complexity and length of Article VI, as well as its importance to members of the New York State Bar, the State Bar has long taken positions supporting amendment or reform of various provisions of this Article.[4] As a result, the vast majority of the issues addressed in this Report are already the subjects of established State Bar policy that will be summarized – but not re-assessed – in this Report.

What follows is an analysis of Article VI and a discussion of issues that potentially could be addressed at a future Constitutional Convention should one be held. This assessment is not a determination as to whether changes should be made to the Judiciary Article through a Constitutional

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[2] N.Y. State Bar Assn. Comm. on the N.Y. State Const., Report and Recommendations Concerning the Establishment of a Preparatory State Comm'n on a Constitutional Convention (2015), at 4, *available at* http://www.nysba.org/nysconstitutionreport/.

[3] The positions taken herein have been reached by the Committee on the New York State Constitution ("Committee") as an entity and should not be attributed to any particular member of the Committee or to any groups, committees, or affiliations associated with a member. As an example, Hon. Alan D. Scheinkman, a member of the Committee, has been named by Chief Judge Janet DiFiore to serve as Co-Chair of the Judicial Task Force on the New York State Constitution. In addition, the work of the Committee was ably assisted by the input and historical knowledge of Marc Bloustein, who is First Deputy Counsel of the Office of Court Administration and a counsel to the Chief Judge's Task Force. Any positions asserted in this report are not necessarily positions taken by Justice Scheinkman or the Judicial Task Force.

[4] Other groups, such as the New York City Bar Association, have noted that "[t]he need for constitutional revision of Article VI is great (whether accomplished by constitutional convention or legislative amendment), and the risk of adverse change in this area is small." New York City Bar Assn., Report of the Task Force on the New York State Constitutional Convention (dated June 1997), at 595, *available at* http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf.

Convention – or what particular changes should be made from the many available options for reform of the Unified Court System.

This Report is divided into four sections. Part I summarizes the background of the State Bar's Committee on the New York State Constitution and the issuance of this Report. Part II contains an overview of the current Judiciary Article of the State Constitution and summarizes the history of that Article in New York, including its key provisions in prior versions of the State Constitution. Part III discusses the issues involving the Judiciary Article that the Committee deemed to be most deserving of consideration for reform or revision. Finally, Part IV sets out the conclusions of the Committee's Report.

I. BACKGROUND OF THE REPORT

A. Background on the State Bar's Committee on the New York State Constitution

On July 24, 2015, then State Bar President David P. Miranda announced the creation of the Committee on the New York State Constitution. This Committee has identified various issues that would be worthy of consideration should a Constitutional Convention be convened in New York.

The Committee has already accomplished a great deal in the nearly 17-month period since its inception. On October 8, 2015, the Committee issued a report entitled "The Establishment of a Preparatory State Commission on a Constitutional Convention."[5] That Report was approved unanimously by the State Bar House of Delegates on November 7, 2015.[6] A

[5] N.Y. State Bar Assn. Comm. on the N.Y. State Const., Report and Recommendations Concerning the Establishment of a Preparatory State Comm'n on a Constitutional Convention (2015), *available at* http://www.nysba.org/nysconstitution report/.

[6] Press Release, N.Y. State Bar Assn., New York State Bar Association Calls on State Government to Prepare Now for Statewide Vote on State Constitution in 2017 (Nov. 13, 2015), *available at* http://www.nysba.org/NYSConstitutionVote/.

second Report concerning Constitutional Home Rule was issued on March 10, 2016. That Report was approved by the House of Delegates on April 2, 2016. Another Report, concerning the Environmental Conservation Article of New York's Constitution, was issued on August 3, 2016. That Report was approved by the House of Delegates on November 5, 2016.[7]

B. <u>The Subcommittee's Work Regarding the Judiciary Article</u>

The Committee's Subcommittee on the Judiciary Article sought to consider the views of multiple interest groups both within and outside the Judiciary. For example, the Subcommittee invited members of the Judiciary who represent New York City and/or statewide judicial organizations to share their views on the Judiciary Article.[8]

- The Subcommittee held its first meeting on May 12, 2016. At that meeting, then President David Miranda addressed the Subcommittee and reminded its members of the importance of the Judiciary Article and the work they were about to undertake.
- Chief Administrative Judge Lawrence K. Marks addressed a June 2, 2016 meeting of the full Committee on the New York State Constitution. At that meeting, Judge Marks discussed his opinions on topics such as the utility of court consolidation as it impacts the administration of justice, the problems caused for the court system as a result of the Constitution's

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[7] *See* N.Y. State Bar Assn. Comm. on the N.Y. State Const., Report and Recommendations Concerning the Conservation Article in the State Constitution (Article XIV) (2016), *available at* https://www.nysba.org/WorkArea/DownloadAsset. aspx?id= 68757.

[8] Various judicial organizations declined invitations to address the Subcommittee, whether due to scheduling or other concerns. The Subcommittee was informed that the Franklin Williams Commission, Judicial Friends, the Latino Judges Association, and the New York State Family Court Judges Association have decided not to take positions at this time on a potential Convention as it relates to the Judiciary Article. The views of those groups that did address the Subcommittee are summarized in this Section of the Report.

cap on the number of Supreme Court justices, and the need for improvements in the Town and Village Courts.

- The Subcommittee again met on June 15, 2016 and heard comments from Hon. Jonathan Lippman, former Chief Judge of the State of New York. Chief Judge Lippman emphasized the importance of a convention as a means to accomplish some form of court consolidation. When discussing judicial selection, Chief Judge Lippman noted that any form of selection is only as good as the entity or entities doing the selecting. He also noted the potential benefits to be achieved if a Fifth Department of the Appellate Division were to be created. Consistent with his support for the 2013 judicial retirement age proposal, discussed in Section II.b.12 below, he explained that raising and unifying the retirement age for all judges could be a productive use of a Convention.
- The Subcommittee's next meeting was held on July 21, 2016. The meeting began with a discussion with Michael A. Cardozo, a former New York City Corporation Counsel who was involved in the 1977 court reforms discussed in Section II.b.9 below. Cardozo highlighted, *inter alia*, how a Constitutional Convention could be a useful springboard for court reform in New York. He advocated for merger in place, which would combine New York's trial courts into a single court of original jurisdiction. This single court would share a retirement age of 76, including two-year re-certifications. In addition, a Fifth Department could be created, and the Justices of the Appellate Division could be chosen from among all the judges in this new, unified trial court.
- At its July 21st meeting, the Subcommittee also was addressed by Hon. Paul Feinman of the Appellate Division, First Department, on behalf of the statewide Association of Supreme Court Justices. Justice Feinman is a Past Chair of the Judicial Section of the New York State Bar. Justice Feinman indicated that the Association of Supreme Court Justices supports the current elective system for Supreme Court Justices and supports restricting eligibility for the Appellate Division to Supreme

Court Justices. He agreed with creating a Fifth Department to cure some of the caseload difficulties experienced in the Second Department.

- The Subcommittee also met on October 25, 2016 to discuss the Report and receive an update on the status of potential speakers.
- On November 8, 2016, the Subcommittee met and heard from Hon. Sarah Cooper, President of the New York City Family Court Judges Association, and Hon. Erik Pitchal, a New York City Family Court Judge who is assigned to Kings County. Judges Cooper and Pitchal discussed the operations of the Family Court. Although their Association does not have a formal position on a Constitutional Convention, in a poll about potential issues, their members expressed a desire to bring parity to the Judges of the Family Court in New York City. Such parity could cover a variety of issues, including: judicial pay, retirement age, term in office and other aspects of a Family Court judgeship. They supported consolidating the Family Courts with the Supreme Court and expanding Family Court jurisdiction to include divorces and certain criminal matters.

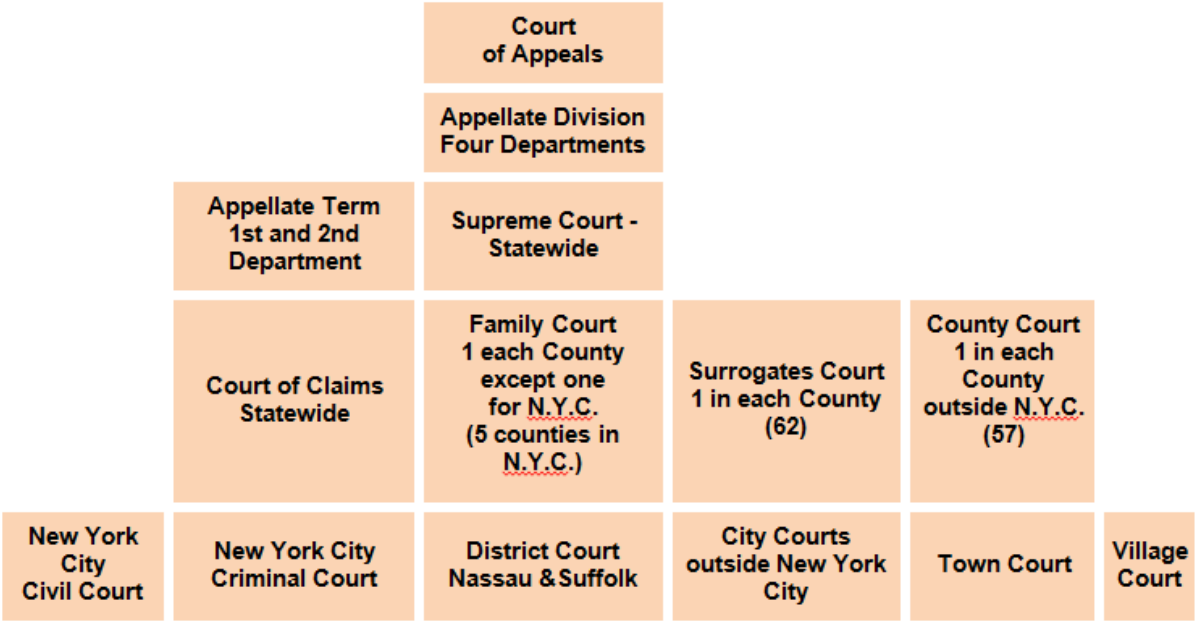
II. OVERVIEW OF THE JUDICIARY ARTICLE AND ITS HISTORY IN THE STATE CONSTITUTION

A. Overview of the Current Judiciary Article

Article VI as it exists today establishes a "unified court system"[9] for the State of New York. This court system is comprised of a) at the trial level: the Supreme Court, the Court of Claims, the Family Court, the Surrogate's Court, New York City-specific courts, such as the New York City Criminal Court and the New York City Civil Court, County Courts outside New York City, District Courts in Nassau and Suffolk counties, various City Courts, and Town and Village Justice Courts around the State; and b) three appellate-level courts: the four Appellate Divisions of the

[9] N.Y. Const. art. VI, § 1.

Supreme Court, which are New York's principal, intermediate appellate courts; two Appellate Terms in the New York City metropolitan area; and finally, the Court of Appeals, which is the State's highest court.[10] As shown in a chart on the Unified Court System's website,[11] the New York Courts are organized as follows:



The Unified Court System is led by its Chief Judge, who is also a member of the Court of Appeals, and by a Chief Administrator, who need not be but typically is a judge. The State is divided into four Departments of the Appellate Division of the Supreme Court and thirteen Judicial Districts. Each Department is headed by a Presiding Justice. The Chief Judge and the four Presiding Justices of the Appellate Divisions together form the Administrative Board of the Unified Court System.

Article VI prescribes the jurisdiction for each of New York's courts and establishes the criteria governing how judges are selected, the duration

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[10] All of these courts, except for the Appellate Terms, are expressly mentioned in Section 1 of Article VI; the Appellate Terms are branches of the Supreme Court. *See* N.Y. Const. art. VI, § 8.

[11] http://www.courts.state.ny.us/ctapps/outline.htm.

of their respective terms and how their compensation is set.[12] Through a Commission on Judicial Conduct and other provisions, the State Constitution provides for the discipline and removal of judges where necessary.

Article VI provides the framework that defines today's Judiciary and both its structure and operations in New York. Within that framework, the Legislature has enacted a number of laws – such as the Judiciary Law and various court and procedural acts – which flesh out the details of this system.

Despite its name, the Unified Court System is anything but – with its patchwork quilt of 11 different trial-level courts and multiple levels of appellate courts. As a result, it has been observed that "[n]o state in the nation has a more complex court structure than New York," with resulting cost and inefficiency.[13]

As discussed below, a Constitutional Convention, if one were held, would provide an opportunity to re-examine the structure of our Unified Court System and to bring long overdue change that could modernize, simplify and bring greater efficiency to the operations of New York's Judiciary.

B. History of the Judiciary Article

Today's Judiciary Article is the culmination of a long history of statutes and previous versions of the State's Constitution. The initial New York State Constitution was drafted over the course of 1776 and 1777 and was promulgated in 1777. Since then, there have been eight other constitutional conventions held in New York in 1801, 1821 (ratified in

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[12] Article VI, § 25(a) provides that judges' compensation "shall be established by law and shall not be diminished during the term of office…." *See Maron v. Silver*, 14 N.Y.3d 230 (2010).

[13] The Committee for Modern Courts, "Court Simplification in New York State: Budgetary Savings and Economic Efficiencies", at 1 (2012), *available at* http://moderncourts.org/files/2013/10/CourtSimplificationinNewYorkState73112.pdf.

1822), 1846, 1867-68, 1894, 1915, 1938, and 1967. Several additional constitutional commissions sought to revise and rewrite specific portions of the State Constitution. These conventions and commissions have produced several altogether new State Constitutions and many amendments to existing constitutional provisions.

1. The Colonial Era

During the Colonial era, New York had a primarily English-based court system, with some Dutch antecedents. In 1683, following the 1674 Treaty of Westminster, the Assembly in New York passed a bill creating a court of law called the Court of Oyer and Terminer and a court with equity jurisdiction called the Court of Chancery.[14] In addition, there was a Court of Sessions in each county of New York[15] and a Petty Court in each town.[16]

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[14] This split between law and equity jurisdiction continues to have relevance today. Article VI, § 7 (specifying that the jurisdiction of New York's Supreme Court is to encompass law and equity). *See, e.g., IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132 (2009) (applying different statutes of limitations to determine the timeliness of a claim depending on whether the claim is legal or equitable in nature); *see also Waldo v. Schmidt*, 200 N.Y. 199 (1910).

[15] *See* http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-sessions-1684.html.

[16] *See* http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-petty-1684.html. The law of England applicable in the Colonial era still has implications for today's legal system. As the Court of Appeals has explained: "The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, become in fact the common law rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New-York, by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province." *Melcher v. Greenberg Traurig*, 23 N.Y.3d 10, 14-15 (2014) (quoting *Bogardus v. Trinity Church*, 4 Paige Ch. 178, 198 (1833)). For example, New York's Judiciary Law § 478 has been traced by the Court of Appeals to the "first Statute of Westminster . . . adopted by the Parliament summoned by King Edward I of England in 1275." *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 12 (2009).

In 1691, a Supreme Court of Judicature was established in New York.[17] At that time, there also was a Court of Common Pleas,[18] Courts of Sessions[19] and Justice of the Peace Courts.[20]

2. State Constitution of 1777[21]

New York's first State Constitution, which was promulgated in 1777, did not contain an article on the Judiciary. Instead, the initial State Constitution combined aspects of the Declaration of Independence with other provisions typical of a state constitution of its day. That original version of New York's Constitution: a) continued the colonial office of Supreme Court Judge, b) created the new judicial office of Chancellor, c) provided that all judicial officers be selected by a Council of Appointment, and d) established a retirement age of 60 years old for the Chancellor, for the other Judges of the Supreme Court and for the first judge of each County Court in every county.[22] The 1777 Constitution barred the Chancellor and Judges of the Supreme Court from holding any other office except for Delegate to the general Congress "upon special occasions."[23]

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[17] *See* http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-supreme.html.

[18] *See* http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-common-pleas.html.

[19] *See* http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-quarter-sessions.html.

[20] *See* http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-justice-peace.html.

[21] *Available at* http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1777-NY-Constitution.pdf.

[22] N.Y. Const. art. XXIV (1777).

[23] N.Y. Const. art. XXV (1777).

A Court for the Trial of Impeachments and Correction of Errors, commonly known as the Court of Errors, was also created as a body to hear appeals from certain cases in the Supreme Court.[24]

Otherwise, the 1777 State Constitution provided little in the way of specifics about the structure and operations of New York's Judiciary.

3. State Constitution of 1821[25]

Our State's second Constitution was considerably more specific with respect to the Judiciary than the 1777 version. It established a court system with: a) a Supreme Court consisting of a Chief Justice and two other Justices[26] and b) judicial circuits with a Circuit Judge appointed in each and with the same tenure as Justices of the Supreme Court.[27] The Supreme Court was granted jurisdiction over some appeals from Circuit Courts, and the Court for the Correction of Errors had the final word in appellate matters. This new Constitution also continued the office of Chancellor,[28] and provided that the Governor was to nominate and appoint all judicial officers, except justices of the peace.[29]

Nonetheless, the 1821 version of the Constitution contained nothing similar to our State's current form of Article VI.[30]

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[24] N.Y. Const. art. XXXII (1777).

[25] *Available at* http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1821-NY-Constitution.pdf. The Historical Society of the New York Courts and most other sources refer to it as the Constitution of 1821, as it was drafted in and dated that year. However, because the Constitution was voted on and went into effect the next year, it is also "often cited as the Constitution of 1822." *Id.*

[26] N.Y. Const. art. V, § 4 (1821).

[27] N.Y. Const. art. V, § 5 (1821).

[28] N.Y. Const. art. V, § 3, 7 (1821).

[29] N.Y. Const. art. IV, § 7 (1821).

[30] The first judiciary-related amendment was passed in 1845, which established a procedure for removing judicial officers.

4. State Constitution of 1846[31]

Article VI of today's State Constitution had its genesis in the framework found in the State Constitution that was ratified in 1846.

The 1846 State Constitution abolished the Court of Chancery and the position of Chancellor, and provided for "a supreme court, having general jurisdiction in law and equity."[32] For the first time, a Court of Appeals was established, consisting of eight Judges (four elected for an eight-year term, and four chosen from the "class of justices of the supreme court with the shortest time to serve.").[33] The elected Judges of the Court of Appeals were chosen by the "electors of the state," whereas the Supreme Court Justices were to be elected by the electors of the various judicial districts.[34] The Constitution directed the Legislature to develop procedures for the selection of a Chief Judge from among the four elected judges and for selecting the Supreme Court Justices.[35] In the event that a judicial vacancy arose before a term ended, the Governor was charged with filling the vacancy until the next election took place, at which time a judge would be elected for the remainder of the term.[36] With the establishment of the Court of Appeals, the Court for the Trial of Impeachments and the Correction of Errors was abolished.

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[31] *Available at* http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1846-NY-Constitution.pdf.

[32] N.Y. Const. art. VI, § 3 (1846).

[33] N.Y. Const. art. VI, § 2 (1846). For a history of the Court of Appeals, *see* Francis Bergan, The History of the New York Court of Appeals, 1847-1932 (1985) and Bernard S. Meyer *et al.*, The History of the New York Court of Appeals, 1932-2003 (2006).

[34] N.Y. Const. art. VI, § 12 (1846).

[35] N.Y. Const. art. VI, §§ 2, 12 (1846).

[36] N.Y. Const. art. VI, § 13 (1846).

The 1846 State Constitution established eight Judicial Districts across the State.[37] The First District was to be New York City, while the others were to be based on groupings of counties, with those Districts to be as compact and close in population as possible.[38] The Judicial Districts could be restructured at the first session after the return of every state enumeration,[39] but no more than one District could be eliminated at any one time. Each District was to have four justices, but eliminating a District would not remove a judge from office.[40]

Moreover, this Constitution included a section guaranteeing judicial compensation,[41] although the procedures for setting the amount of such compensation were left to the Legislature. In addition, Judges were directed not to hold "any other office or public trust."[42]

The 1846 Constitution also established a four-year term for County Court Judges.[43]

5. 1869-82 Amendments to Article VI[44]

The State's Constitutional Convention held in 1867-68 was largely a failure. The sole proposition of the 1867-1868 State Constitutional Convention that was approved by the people was a new Judiciary Article. The people by a vote of 247,240 to 240,442 endorsed a new Judiciary Article VI to replace the Judiciary Article adopted in 1846. Elements of this new Article VI included: a) an authorization for the election of seven judges

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[37] N.Y. Const. art. VI, § 4 (1846).

[38] *Id.*

[39] N.Y. Const. art. VI, § 16 (1846).

[40] *Id.*

[41] N.Y. Const. art. VI, § 7 (1846).

[42] N.Y. Const. art. VI, § 8 (1846).

[43] N.Y. Const. art. VI, § 14 (1846).

[44] *Available at* http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf.

of the Court of Appeals, each for a term of fourteen years;[45] b) a provision for a Commission on Appeals to aid the Court of Appeals in the disposition of its backlog;[46] c) the establishment of 14-year terms of office for Justices of the Supreme Court, and six-year terms of office for County Judges;[47] d) the establishment of age 70 as the mandatory retirement age for judges;[48] and e) a provision for two 1873 voter referenda on the questions of whether judges of the Court of Appeals and of certain lower courts, respectively, should be appointed.[49]

Eight additional amendments were put to a vote during the 25 years between the 1869 amendments and a new State Constitution that was adopted in 1894. Successful amendments during that period included an 1872 amendment relating to the Commission of Appeals[50] and an 1882 amendment creating a Fifth Judicial Department.

6. State Constitution of 1894[51]

The 1894 State Constitution introduced many aspects of the framework found in today's Judiciary in New York.

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[45] N.Y. Const. art. VI, § 2 (1869).

[46] N.Y. Const. art. VI, § 4 (1869).

[47] N.Y. Const. art. VI, §§ 13, 15 (1869).

[48] N.Y. Const. art. VI, § 13 (1869).

[49] N.Y. Const. art. VI, § 17 (1869).

[50] The Commission of Appeals, originally created through an 1869 constitutional amendment, was given jurisdiction over the remaining appeals pending in the New York courts prior to 1870 in order to allow the newly-created Court of Appeals to begin its work with a new docket. During this time period, both the Commission and the Court of Appeals were co-equal "highest" courts. Although the Commission was supposed to end in 1873, the 1872 amendment extended the Commission of Appeals' jurisdiction for another two-year period.

[51] *Available at* http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1894-NY-Constitution.pdf.

Under the 1894 Constitution, the Judges of the Court of Appeals – chosen by state electors and serving 14-year terms – were continued as provided under the 1869 amendments.[52] The Court's jurisdiction was limited to questions of law, except for cases involving a judgment of death.[53] Appeals of right to the Court of Appeals – aside from judgments of death – were confined to certain appeals from final judgments or orders, or appeals from orders granting new trials in which the appellant was willing to stipulate that an affirmance would result in a final judgment against the appellant.[54]

The 1894 Constitution continued the pre-existing judicial district system from the 1846 Constitution.[55] Those districts were combined into four Departments – similar to what we have today. The First Department was comprised of New York City, including New York County. The Legislature was instructed to create the other three Departments by grouping counties into Departments which were approximately equal in population.[56] The Legislature was prohibited from creating additional departments.[57]

The court system was to include a Supreme Court having general jurisdiction.[58] Each Department was to have an Appellate Division, with seven Justices in the First Department and five Justices in each of the other three Departments.[59] The Justices of the Appellate Division were to be

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[52] N.Y. Const. art. VI, § 7.

[53] N.Y. Const. art. VI, § 9.

[54] *Id.* This provision is akin to a current form of appeal to the Court of Appeals under CPLR 5601, involving a stipulation to "judgment absolute."

[55] N.Y. Const. art. VI, § 1.

[56] N.Y. Const. art. VI, § 2.

[57] *Id.*

[58] N.Y. Const. art. VI, § 1.

[59] N.Y. Const. art. VI, § 2.

designated by the Governor from the pool of Supreme Court Justices[60] – similar to the manner of selecting justices for today's Appellate Divisions.

Supreme Court Justices were to be elected to their positions. In addition, the then-current Justices and specified other judges were to be transferred into the Supreme Court as a result of this restructuring of the courts.[61] These Justices would serve 14-year terms.[62]

Various lower level courts, such as the Superior Court of the City of New York, the Superior Court of Buffalo, and the City Court of Brooklyn were abolished, with pending actions and judges being transferred to the Supreme Court.[63]

Additional provisions of the 1894 Constitution included guaranteeing that judges would be paid and continuing the judicial retirement age at 70.[64] Other provisions continued the County[65] and Surrogate's[66] Courts.

Multiple amendments to the 1894 Constitution were put to a vote in subsequent years, including: a) several failed amendments to increase judicial salaries, b) a failed amendment to create a new judicial district, and c) successful amendments in 1921, which established the Children's Courts and the Domestic Relations Courts.[67]

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[60] N.Y. Const. art. VI, § 2.

[61] N.Y. Const. art. VI, § 1.

[62] N.Y. Const. art. VI, § 4. Thereafter, in 1897, the Legislature changed the name of the Board of Claims to the Court of Claims, but that Court did not then have status in Article VI. The Legislature would again replace the Court of Claims with the Board of Claims in 1911, only to revive the Court of Claims again in 1915.

[63] N.Y. Const. art. VI, § 5.

[64] N.Y. Const. art. VI, § 12.

[65] N.Y. Const. art. VI, § 14.

[66] N.Y. Const. art. VI, § 15.

[67] The Court of Domestic Relations is the original predecessor to the Family Court system in New York. The Children's Courts were a statewide court system similar to the Children's Part, previously a section of the Court of Special Sessions, in New York City.

7. Constitutional Convention of 1915

Although the voters rejected the new Constitution that was proposed as a result of the 1915 Convention, its provisions affecting the Judiciary Article were largely incorporated in a new Article VI that the voters approved in 1925. This new Article VI continued many of the basic elements of the Judiciary as had been adopted in the 1894 Constitution, but it added some new matters, including:

1) establishing the Appellate Term as a permanent constitutional court;

2) increasing the number of permanent seats on the Appellate Division, Second Department to seven;

3) modifying the Court of Appeals' jurisdiction; and

4) changing the ratio that governed the maximum number of Supreme Court Justice positions that the Legislature could create in a particular Judicial District.

8. Constitutional Amendments of 1938[68]

In 1938, another Constitutional Convention was held. Although the outcome of the Convention was considered to be a new Constitution, the voters only approved six of the proposed 57 amendments.

As a result of the amendments that did pass, Article VI of the 1938 State Constitution:

1) continued the Court of Appeals, with seven Judges chosen by state electors;[69]

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[68] *Available at* http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1938-NY-Constitution.pdf.

[69] N.Y. Const. art. VI, § 5 (1938).

2) Maintained limitations on the Court of Appeals' jurisdiction as to certain appeals as of right from final judgments and orders as well as judgments of death;[70]

3) called for four Judicial Departments, each with an Appellate Division, and made no provision for the creation of any additional department;[71]

4) maintained the four Appellate Divisions of the Supreme Court, each with Justices designated by the Governor from among the Supreme Court Justices in the State, and required that the Presiding Justice and a majority of the Justices designated in any Appellate Division be residents of that department;[72]

5) established a general jurisdiction Supreme Court, with Justices elected by Judicial District;[73]

6) capped the number of Supreme Court Justices in any Judicial District at one Justice per each sixty thousand or fraction over thirty-five thousand persons within that District, as determined by the last federal census or state enumeration;[74]

7) authorized the First and Second Departments to create Appellate Terms "to hear and determine all appeals now or

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[70] N.Y. Const. art. VI, § 7 (1938).

[71] N.Y. Const. art. VI, § 2 (1938).

[72] *Id.*

[73] N.Y. Const. art. VI, § 1 (1938). Although a proposed amendment to establish the Court of Claims as an Article VI court failed in 1938, thereafter, in 1949, the electorate approved the creation of the Court of Claims as an Article VI court under the State Constitution. N.Y. Const. art. VI, § 23 (1949). *See Easley v. N.Y.S. Thruway Auth.*, 1 N.Y.2d 375 (1956) (sustaining validity of a statute passed under Section 23 of Article VI with regard to Court of Claims jurisdiction over claims against the Thruway Authority); *see also* http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf.

[74] N.Y. Const. art. VI, § 1 (1938).

hereafter authorized by law to be taken to the supreme court or the appellate division other than appeals from the supreme court, a surrogate's court, or the court of general sessions of the city of New York[,]" with Appellate Term Justices to be selected by the Appellate Division;[75] and

8) set terms of judicial office at: a) 14-year terms for Judges of the Court of Appeals[76] and Supreme Court Justices;[77] b) the remainder of their term in office as a Supreme Court Justice as the term for the Presiding Justice of each Appellate Division;[78] and c) a five-year term for other members of the Appellate Division.[79]

The State Constitution as of 1938 also continued other trial-level courts, such as the County and Surrogate's Courts.[80]

9. 1962 Judiciary Article

In November 1961, New York's electorate voted on whether to revamp the Judiciary Article and the court structure. Passing by an overwhelming margin, this new Judiciary Article ushered in the era of the "unified court system," a term that appeared for the first time in this version of Article VI.

The Article's 1962 revisions largely adopted previously unsuccessful recommendations made by the Tweed Commission following its review of the courts conducted in the 1950s.[81] Among other changes, this new

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[75] N.Y. Const. art. VI, § 3 (1938).

[76] N.Y. Const. art. VI, § 5 (1938).

[77] N.Y. Const. art. VI, § 4 (1938).

[78] N.Y. Const. art. VI, § 2 (1938).

[79] *Id.*

[80] N.Y. Const. art. VI, §§ 11-15 (1938).

[81] *See* A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State

Judiciary Article created the Administrative Board of the Judicial Conference, comprised of the Chief Judge of the Court of Appeals and the Presiding Justices of each Appellate Division. The Administrative Board was charged with establishing statewide policies and procedures for the Unified Court System. The Article also formalized the trial-court system in the State and granted the Appellate Divisions day-to-day oversight over the trial courts located within their respective Departments.

One new feature of this modified trial-court system was the Civil Court of the City of New York, which was formed by combining the City Court and the Municipal Court of the City of New York.[82] Thereafter, in 1972, a Housing Part was established within the Civil Court[83] out of what had been previously known as the Landlord and Tenant Part. This Housing Part is known today as the Housing Court.

In addition, the 1962 court reforms eliminated the Courts of General Sessions in New York City, which had criminal jurisdiction.

10. 1976 Unified Court Budget Act

In response to increasing caseloads and expense throughout the State's judicial system, including the impact of the New York City fiscal crisis, the Legislature passed the Unified Court Budget Act during a special

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Courts, (dated Feb. 2007), at 51-53, *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf. The "Tweed Commission" was formally named the New York State Temporary Commission on the Courts. It was formed by Gov. Thomas E. Dewey in 1953 and was chaired by Harrison Tweed. In 1954, the Tweed Commission delivered its preliminary report to the Governor and the Legislature, but its recommendations were largely not implemented.

[82] *See* https://www.nycourts.gov/COURTS/nyc/housing/civilhistory.shtml.

[83] New York Civil Court Act § 110 (McKinney Supp. 1974); L. 1972, ch. 982. Currently, Housing Court Judges are not provided for in Article VI of the State Constitution and they are therefore not Article VI judges.

session held in 1976.[84] The Act provided for State funding of the Unified Court System in New York – aside from Town and Village Justice Courts – and replaced the historical system of local funding of local courts that had been used in New York State for centuries. As a result, all judges and local court employees in these newly state-funded courts became state employees. By passing this Act, the Legislature relieved local-level governments from the burden of paying a substantial portion of the court budget. Although the Unified Court Budget Act transferred court operational costs to the State, it left the obligation to maintain court facilities in the hands of the localities.

11. 1977 Court Reforms

The most recent amendments to the Constitution's Judiciary Article that have major significance were adopted in 1977. These amendments were the product of a Task Force on Court Reform appointed by then Governor Hugh Carey and chaired by Cyrus R. Vance, known as the Vance Commission.

On December 23, 1974, the Vance Commission issued a report to then Governor-elect Hugh Carey on "Judicial Selection and Court Reform." That report concluded that Governor Carey's administration should give "top priority" to court reform in order to "restore public confidence" in the Judiciary and "assure the high caliber judicial system to which New Yorkers are entitled…."[85] Accordingly, the Vance Commission made a series of recommendations for reforming the court system, including that:

1) the Governor support "passage of a constitutional amendment requiring merit selection of judges through judicial nominating

[84] Judiciary Law §39 (1976); L. 1976, ch. 966. This legislation resulted from a 1974 report by the Governor-Elect's Task Force on Judicial Selection and Court Reform, which was headed by Cyrus R. Vance.

[85] "Report of the Governor-Elect's Task Force on Judicial Selection and Court Reform" (1974), p.1.

commissions" with the Governor selecting from candidates recommended by those commissions;[86]

2) pending a constitutional amendment, political parties "be urged to adopt nominating procedures which would ensure that only qualified persons are presented as potential nominees to the judicial district conventions";[87]

3) the Governor support "a Constitutional amendment establishing a unified system of judicial administration supervised by a chief state court Administrator appointed by and responsible to the Chief Judge….";[88] and

4) the Governor support a measure "dealing with removal and discipline of judges."[89]

Thereafter, on June 26, 1975, the Vance Commission issued another report, entitled "The Integration and Unification of the New York State Trial Courts," finding that New York's then and still "present trial court system… generates unnecessary procedural confusion and results in inefficient and expensive court administration." [90] As a result, the Vance Commission recommended a comprehensive court merger plan.[91]

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[86] *Id.* at 1-2.

[87] *Id.* at 2.

[88] *Id.*

[89] *Id.* That report of the Vance Commission also recommended "centralized state funding of the courts" – which became the Unified Court Budget Act, as discussed in Section II.B.10, *supra*.

[90] The Integration and Unification of the New York State Trial Courts: A Report by the Governor's Task Force on Court Reform, (1975), at 1.

[91] *Id.* at 3-10. Previously in the 1970s, the Legislature had created what is known as the Dominick Commission headed by then N.Y.S. Senator D. Clinton Dominick. Among other recommendations, that Commission proposed a court merger plan and the creation of a Fifth Department. *See* Temp. Comm'n on the State Court System,...and Justice for All (Pt. 2) (1973). Ultimately, the Legislature failed to enact these proposals.

Ultimately, the Vance Commission recommendations led to a package of Constitutional amendments that were approved by the Legislature. Originally, another possible amendment was discussed which would have consolidated New York's courts but that proposal was not pursued – leaving it for later discussion.

Then Governor Hugh Carey and Chief Judge Charles D. Breitel both met with legislators to encourage passage of the proposed constitutional amendments.[92] As part of this effort, Chief Judge Breitel gave a speech to the Legislature urging support of court reform.[93]

Three amendments relating to the Judiciary were approved by the voters in 1977.

The first – passing by nearly 200,000 votes – created a Commission on Judicial Nomination for the Court of Appeals. That 12-member Commission on Judicial Nomination provides lists of candidates to the Governor for nomination to fill Court of Appeals vacancies. The creation of this Commission in 1977 brought about a "merit selection" system of appointment for selecting judges to the State's highest court.[94]

The second – which passed by more than 425,000 votes – a) provided for statewide court administration under the leadership of the Chief Judge of the State of New York, who was made "the chief judicial officer of the unified court system," and b) created a new position of Chief Administrator of the Courts.[95] The Chief Administrator was granted the power to run the system of trial courts throughout the State, which had formerly been

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[92] *See* Linda Greenhouse, *Compromises Speed Windup of Legislature in Albany*, N.Y. Times (June 30, 1976), at 41, *available at* http://www.nytimes.com/1976/06/30/archives/compromises-speed-windup-of-legislature-in-albany.html.

[93] *See* Richard J. Bartlett Oral History, Session 2 (May 13, 2005) (recalling address to the Legislature by Chief Judge Breitel about restructuring the courts).

[94] N.Y. Const. art. VI, § 2(c) – (f) (1977).

[95] N.Y. Const. art. VI, § 28 (2016) (1977).

exercised by the Appellate Divisions. At the same time, the Chief Judge became responsible for promulgating standards and administrative policies to be applied to courts statewide. This power had formerly been exercised by the Administrative Board of the Judicial Conference, which now was renamed the Administrative Board of the Courts and given more limited responsibilities.

The third – passing by more than 750,000 votes – created an 11-member Commission on Judicial Conduct to supplant the former Court on the Judiciary.[96] That Commission[97] was granted the power to sanction or remove from office members of the Judiciary, subject to review by the Court of Appeals.[98]

12. 1985 Amendment Providing for Certified Questions to the Court of Appeals

In 1985, a constitutional amendment was passed modifying the jurisdiction of the Court of Appeals in order to permit it to answer certified questions from certain courts outside the Unified Court System.[99] That amendment enabled "the United States Supreme Court, federal courts of appeals and high courts of other states to send unsettled questions of New York law to the state Court of Appeals for authoritative resolution."[100]

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[96] The Court on the Judiciary previously held the power to remove New York's major court judges in the event of misconduct. *See* Raymond J. Cannon, *The New York Court on the Judiciary 1948 to 1963*, 28 Alb. L. Rev. 1 (1964).

[97] Despite this amendment, other provisions for removing judges continue to appear in the State Constitution. *See, e.g.*, N.Y. Const. art. VI, § 23 (2015). *See also* Section III.M, *infra.*

[98] N.Y. Const. art. VI, §§ 22 and 24 (1985).

[99] N.Y. Const. art. VI, § 3(b) (1985).

[100] Judith S. Kaye and Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373, 373 (2000), *available at* http://ir.lawnet.fordham.edu/flr/vol69/iss2/3. *See also* Sol Wachtler, *Federalism is Alive and Well and Living in New York—Honorable Hugh R. Jones Memorial Lecture*, 75 Alb. L. Rev. 659 (2012).

This process allows New York's highest court to give certain federal and out-of-state courts conclusive answers to questions of New York law that are raised in federal and state disputes being litigated outside the New York courts. Prior to the passage of that amendment, those legal issues were subject to being resolved without sufficient authority or clarity, or being resolved in different ways in different jurisdictions – until such time as a given issue were to come before the Court of Appeals on a direct appeal within New York's Unified Court System.

13. 1986 First Passage of a Court Merger Proposal

In 1986, the Legislature voted for first passage of a comprehensive constitutional amendment calling for a "merger-in-place" of New York's trial courts – which would involve: a) merger into the Supreme Court of the following courts: the Court of Claims, County Court, Family Court, Surrogate's Court and the New York City Civil and Criminal Courts, and b) preservation of existing methods of selection for the judges who thereby would become Supreme Court Justices. That amendment also would have authorized the Legislature to create up to two new Judicial Departments. The amendment failed to gain second passage in the Legislature when it came up for consideration in 1987.

14. *Lopez Torres* Litigation

Under existing election law provisions enacted under our current State Constitution, Supreme Court Justices are nominated and elected through a three-step process and are not subject to the primary election process that is applicable to non-judicial or other judicial candidates. First, delegates to a political party's Judicial Nominating Convention are selected as delegates at the time of the primary elections. Second, a week or two after the primary election – usually in September – each party holds its Judicial Convention to decide who will be selected as the party's Supreme Court nominee.[101]

[101] Election Law § 6-158(5) (2016).

Finally, the vote of the electorate at the general election determines who will serve as a Justice of the Supreme Court.

In 1992, Hon. Margarita Lopez Torres was elected to the New York City Civil Court for Kings County. Thereafter, unable to obtain a nomination for Supreme Court in ensuing party judicial conventions, she brought suit challenging the constitutionality of the convention system of nominating candidates for election to the Supreme Court. Justice Lopez Torres asserted that she would not cooperate with party leaders' demands following her election to the Civil Court, and alleged that this resulted in her being blocked from being nominated at the Supreme Court Judicial Conventions held in 1997, 2002, and 2003. She further alleged that she lacked any available means to run independently as a candidate for Supreme Court without being nominated at a Judicial Convention.

In 2006, both the U.S. District Court for the Eastern District of New York and the Court of Appeals for the Second Circuit agreed with Judge Lopez Torres's claim on First Amendment grounds and enjoined New York's judicial convention system for nominating Supreme Court Justices.[102] This led to various initiatives seeking to reform the method of nominating candidates for Supreme Court in New York and trying to promote appointive systems for the selection of Supreme Court Justices.

Before any of those initiatives came to fruition, in 2008, the U.S. Supreme Court unanimously reversed the Second Circuit and sustained the constitutionality of the New York's Judicial Convention system. The Court's majority opinion, written by Justice Scalia, reasoned that, although the political party's process must be "fair" when the party is actively given a role in the election process,[103] "[s]election by convention has never been thought unconstitutional [and] has been a traditional means of choosing

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[102] *Lopez Torres v. N.Y.S. Bd. of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y. 2006); *Lopez Torres v. N.Y.S. Bd. of Elections*, 462 F. 3d 161 (2d Cir. 2006).

[103] *N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 207 (2008).

party nominees."[104] According to the Court, because Judge Lopez Torres and all potential judicial candidates still had an opportunity to obtain the requisite signatures and be placed on the general election ballot as independent candidates, there was no constitutional violation.[105]

In one concurring opinion, Justice Stevens, quoting Justice Marshall, commented with regard to the wisdom behind the nominating convention process, noting: "[t]he Constitution does not prohibit legislatures from enacting stupid laws."[106] In another concurrence, Justice Kennedy wrote: "When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence."[107] Justice Kennedy thus concluded: "If New York statutes for nominating and electing judges do not produce both the perception and the reality of a system committed to the highest ideals of the law, they ought to be changed and to be changed now. But… the present suit does not permit us to invoke the Constitution in order to intervene."[108]

15. Special Commission on the Future of the New York State Courts

In 2006, before the U.S. Supreme Court's decision in *Lopez Torres*, New York's then Chief Judge Judith S. Kaye appointed the Special Commission on the Future of the New York State Courts, headed by Carey Dunne (known as the "Dunne Commission"). From July 2006 through February 2007, the Dunne Commission reviewed New York's court system

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[104] *Id.* at 206.

[105] *Id.* at 207-08.

[106] *Id.* at 209 (Stevens, J., concurring).

[107] *Id.* at 212 (Kennedy, J., concurring).

[108] *Id.* at 213 (Kennedy, J., concurring).

and assessed what changes should be made, focusing particularly on the structure of the courts.

In February 2007, the Dunne Commission issued a report, entitled "A Court System for the Future: The Promise of Court Restructuring in New York State."[109] That report called for: a) creating a two-tiered, consolidated trial court system in New York; b) creating a Fifth Department of the Appellate Division; c) removing the population cap on the number of Supreme Court Justices; and d) giving Housing Court Judges in New York City status under Article VI of the State Constitution but changing their selection to appointment by the Mayor of the City of New York (as is currently the case with the New York City Criminal and Family Courts).[110] The report recommended a system of "merger in place" – meaning that its proposal would combine and simplify the various trial-level courts without changing how particular judges were to be appointed or elected or what the terms of those judges would be.[111]

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[109] A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts, (dated Feb. 2007), at 51-53, *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf.

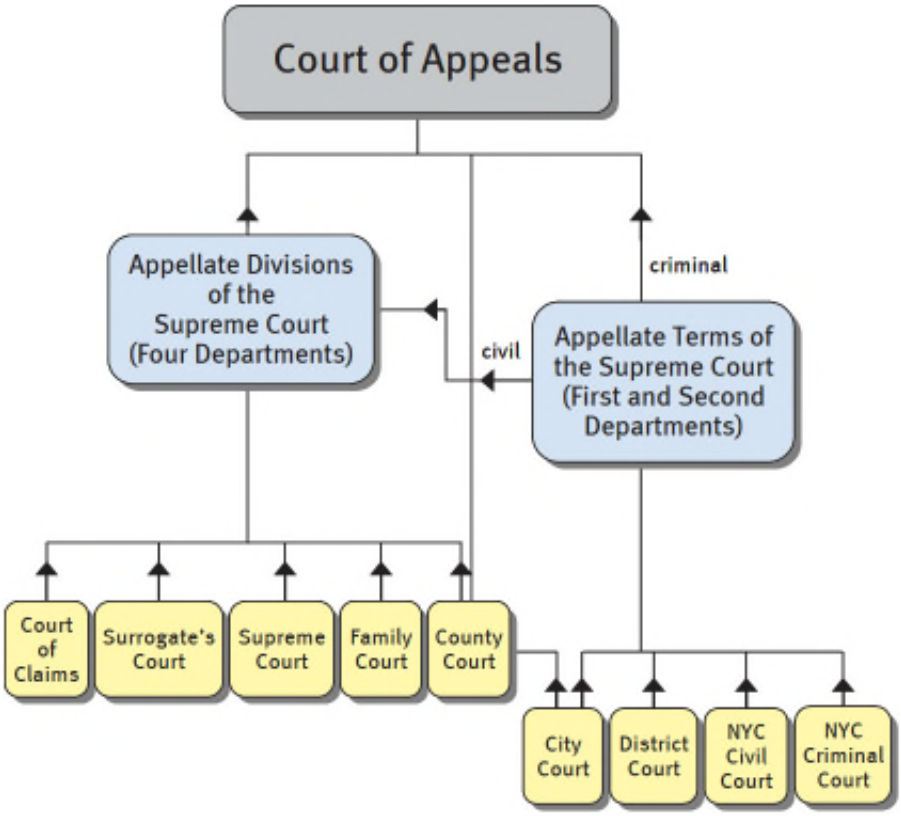
[110] *Id.* at 10. Legislation was introduced, but not passed, which proposed to amend the State Constitution in order to implement these Dunne Commission recommendations. Senate Bill S5827 (2007); Assembly Bill A1266 (2007).

[111] In 1982, the Legislature created the Twelfth Judicial District, consisting of Bronx County. In addition, in 2007, the number of Judicial Districts was further increased to 13 through an act of the Legislature, which passed N.Y. Judiciary Law § 140, creating a Thirteenth Judicial District for Staten Island. As a result, the actual number of judicial districts in New York is greater than the number provided for in the State Constitution and counties are allocated to judicial districts somewhat differently from what the Constitution provides.

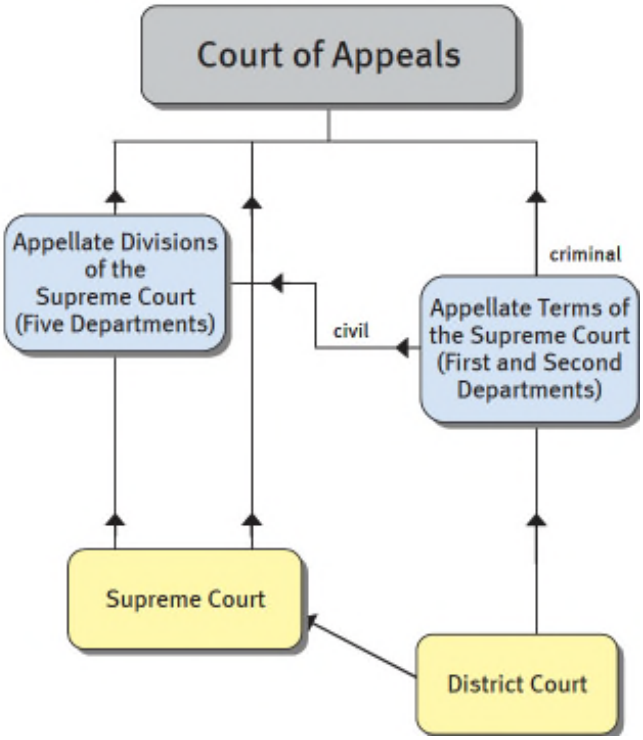
The court system as proposed by the Dunne Commission would have modernized and simplified today's Unified Court System, as shown in the diagrams appearing on the following page:[112]

[112] Town and Village Justice Courts and direct appeals are excluded from the current court structure diagram that is set forth in the Dunne Commission's report. In the Third and Fourth Departments, criminal appeals from the City Court proceed to the County Court and can be further appealed to the Court of Appeals. The Town and Village courts were the subject of their own report by the Dunne Commission, entitled Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts (Sept. 2008). The Town and Village Justice Courts are discussed in Section III.I, *infra*.

Current Structure



Proposed Structure



Although the proposals made by the Dunne Commission gained substantial support, particularly within the legal community, they ultimately were not enacted into law.

16. 2013 Judicial Retirement Proposal

In 2013, the Legislature proposed a constitutional amendment that would have allowed Court of Appeals Judges to finish their 14-year terms, although they would not have been able to serve past age 80.[113] Similarly, under this proposal, Supreme Court Justices would have been eligible to be re-certified for five two-year periods, from age 70 through age 80, instead of the three two-year periods that are currently available to them. Other members of the Judiciary were not covered by this proposed amendment, including Court of Claims Judges, Surrogates, Family Court Judges, County Court Judges and Judges of the New York City Criminal and Civil Courts.[114]

In a November 2013 referendum, the voters failed to pass this retirement age amendment.[115]

III. JUDICIARY ARTICLE ISSUES THAT THE COMMITTEE CONSIDERS TO BE RIPE FOR CONSIDERATION

A. Court Reorganization

The judicial system in New York is a mixture of various types of courts, each with its own particular jurisdiction (although sometimes

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[113] Assembly Bill 4395 (2013); Senate Bill S886A (2013).

[114] At the time when this retirement age proposal received second passage, the Legislature alternatively could have passed a separate proposal that would have raised judicial retirement ages in the Unified Court System to a uniform age of 74 – through a proposed amendment that had previously received first passage by the Legislature. *See* Senate Bill S4587A (2011). That proposal was consistent with the policy of the State Bar. *See* Section III.D, *infra*. However, that age 74 retirement proposal failed to receive second passage from the Legislature.

[115] *See* James C. McKinley Jr., *Plan to Raise Judges' Retirement Age to 80 Is Rejected,* NY Times (Nov. 6, 2013).

overlapping the jurisdiction of other courts), practices and policies. Many of these courts have their own rules, structure, judicial terms of office, and levels of judicial compensation. Significantly, New York has 11 different courts at the trial level alone, which is far more than the typical court structure in other states.

A wide range of groups has long advocated for the consolidation or merger of these trial-level courts in order to reduce or eliminate the unnecessary costs, undue inefficiencies and even confusion that this complex structure engenders.[116] The New York State Bar has done so for over 35 years.[117] The State Bar has consistently supported efforts to simplify the structure of the Unified Court System, based on the Association's belief that it will: a) make the State's courts more accessible to litigants; b) reduce the cost and burden to clients and their counsel involved in navigating the State's multi-faceted court structure; c) remove obstacles to effective case management that are associated with the current trial court structure, and d) result in more cost-effective and efficient courts.[118]

In 1997, then-Chief Judge Judith S. Kaye and then-Chief Administrative Judge Jonathan Lippman proposed a plan to consolidate New

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[116] The Fund for Modern Courts has repeatedly called for court simplification, and in 2011, the Fund organized a broad-based coalition, which was supported by the State Bar, to advocate for this reform. *See* http://moderncourts.org/programs-advocacy/court-restructuring-and-simplification/.

[117] New York State Bar Association – Report of Action Unit No. 4 (Court Reorganization) to the House of Delegates on Trial Court Merger and Judicial Selection (dated 1979).

[118] *See, e.g.*, November 4, 2011 New York State Bar Association Executive Committee Minutes, at 3 (noting that the "current court structure creates inefficiencies that waste time and money for judges, lawyers and litigants[.]"). In 2012, the Fund for Modern Courts' Court Restructuring and Simplification Task Force concluded that court system reforms in New York could result in savings of over $56 million annually. The Committee for Modern Courts, "Court Simplification in New York State: Budgetary Savings and Economic Efficiencies" (2012) at Appendix C, *available at* http://moderncourts.org/files/2013/10/CourtSimplificationinNewYorkState73112.pdf.

York's court system. That proposal would have consolidated our State's patchwork quilt of trial courts into just two levels of courts: a) Supreme Court, which would have original jurisdiction over most cases around the State, including most criminal, civil, family and probate matters; and b) District Courts, which would handle housing and minor criminal and civil matters.[119]

A 1998 State Bar resolution endorsed reorganizing the State's courts using this two-tier trial court system, and this remains State Bar policy today.[120] Under this reorganization proposal, the present Supreme Court, Court of Claims, County Court, Family Court, and Surrogate's Court would be merged into a single Supreme Court with Judicial Districts around the State. The New York City Civil Court, New York City Criminal Court, and

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[119] Jan Hoffman, *Chief Judge Offers a Plan to Consolidate the Court System*, N.Y. Times (Mar. 20, 1997), *available at* http://www.nytimes.com/1997/03/20/nyregion/chief-judge-offers-a-plan-to-consolidate-the-court-system.html. The New York City Bar Association has frequently supported consolidating all trial courts into a single trial court of general jurisdiction. *See* September 27, 1977 Association Statement to the Assembly Committee on the Judiciary by Michael A. Cardozo (Chair, Committee on State Courts of Superior Jurisdiction); April 24, 1979 Association Statement to the Senate Judiciary Committee by Merrell E. Clark, Jr. (President); "Legislative Proposals on Court Merger and Merit Selection of Judges," by the Committee on State Courts of Superior Jurisdiction, 35 The Record 66 (1980); December 5, 1983 Association Statement to the Senate and Assembly Judiciary Committees by Michael A. Cardozo (Chair, Council on Judicial Administration); September 30, 1985 Association Statement to the Senate Judiciary Committee by Bettina B. Plevan (Chair, Council on Judicial Administration). In 1997, the City Bar, under its then President Michael A. Cardozo, supported Chief Judge Kaye's plan to create a two-tier trial court in New York. Association of the Bar of the City of New York, Council on Judicial Administration, "The Chief Judge's Court Restructuring Plan, with Certain Modifications, Should Be Adopted," *available at* http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=46.

[120] April 1998 New York State Bar Association House of Delegates Minutes; May 31, 2007 New York State Bar Association Executive Committee Minutes; November 4, 2011 New York State Bar Association Executive Committee Minutes. *See also* Letter from President M. Alcott of the New York State Bar Association to C. Dunne of Davis Polk & Wardwell (dated Feb. 1, 2007).

City Courts and District Courts outside New York City would be merged into a statewide District Court.

As noted previously,[121] in 2007, the Dunne Commission similarly proposed merging the same courts into a statewide Supreme Court and regional District Courts.[122] The State Bar found the Commission's recommendations to be "consistent with the Association's positions and recommended that the Association endorse the Governor's program bill."[123]

During 2011-12, the State Bar participated along with a broad-based coalition in advocating for court simplification and promoting the adoption of a two-tier trial court.[124] Although this effort was not successful, it

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[121] *See* Section II.B.15, *supra*.

[122] A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf; NYSBA Committee on Court Structure & Operations: Report by Sub-committee on Court Reorganization (dated Sept. 6, 2011). *See also* II.B.15, *supra.*

[123] May 31, 2007 New York State Bar Association Executive Committee Minutes. While not addressed specifically at that time, the State Bar has also long advocated for raising the age of criminal responsibility in New York to age 18. For a recent discussion of this issue, *see* January 21, 2015: Statement on Raising the Age of Criminal Responsibility from President Glenn Lau-Kee, *available at* http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=54267. As a result, a discussion at a Convention about reorganizing the Unified Court System could also include a consideration as to where best to place courts that address charges involving youthful offenders and related issues.

[124] The New York State Bar continues to be listed as a supporter of this effort on the Fund for Modern Courts website. *See* http://moderncourts.org/programs-advocacy/court-restructuring-and-simplification/. This is consistent with the position taken by the Executive Committee in 2011, reaffirming the State Bar's policy on court restructuring from April 1998. *See* November 4, 2011 New York State Bar Association Executive Committee Minutes. Nonetheless, as indicated by a 2011 letter from the State Bar's Judicial Section, some concern has been raised in the past about this form of court restructuring. *See* Letter from Hon. D. Karalunas, Presiding Member of the Judicial Section, to President V. Doyle, III of the New York State Bar Association (dated Nov. 1, 2011).

received wide support from: a) a broad range of bar groups across the State who urged reform of the courts; b) good government groups who sought to improve the State's court structure; c) advocates who work in the Family Court and groups opposing domestic violence who experienced difficulties resulting from the Family Court's limited jurisdiction; and d) business groups who were concerned about the inefficiencies that the State's complex court structure creates for business litigation in New York. While restructuring the Unified Court System would require an initial expense, there would be substantial long-term savings for the courts, litigants and counsel resulting from the increased efficiencies of a simplified court structure.[125]

The potential to simplify the State's court system, promote access to justice and reduce unnecessary costs and inefficiencies make the issue of court consolidation one that is ripe for consideration at a Constitutional

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[125] The Committee for Modern Courts, "Court Simplification in New York State: Budgetary Savings and Economic Efficiencies" (2012) at Appendix C, *available at* http://moderncourts.org/files/2013/10/CourtSimplificationinNewYorkState73112.pdf. That effort focused particularly on: a) benefits to be attained in the Family Court from court simplification, especially for victims of domestic violence who otherwise may need to access multiple courts, b) benefits to the business community from simplifying commercial litigation, and c) benefits to be attained in certain litigations involving the State where overlapping cases need to be filed in the Court of Claims against the government but also separately in the Supreme Court as to private actors.

In 2004, the Unified Court System experimented with a "merger" model for criminal cases in Bronx County. The project survived a court challenge when the Court of Appeals affirmed the Chief Judge's authority to implement this program. *People v. Correa*, 15 N.Y.3d 213, 220 (2010). In 2012, this project was disbanded as unsuccessful. *See* Daniel Beekman, "Court administrators will undo 'experiment' that merged Bronx courts in 2004 and created backlog," New York Daily News, Apr. 12, 2012, *available at* http://www.nydailynews.com/new-york/bronx/court-administrators-undo-experiment-merged-bronx-courts-2004-created-backlog-article-1.1060088. However, this experience is not germane to the State Bar's position on court restructuring. Significantly, the Bronx criminal court model did not involve the structure proposed by the Dunne Commission – *i.e.*, in Bronx County, the handling of felony cases was merged with misdemeanors, whereas the Dunne Commission proposed placing misdemeanors in a lower level court and continuing felony cases in the Supreme Court.

Convention, should the voters choose to hold one. In short, a Constitutional Convention could provide a unique opportunity to re-design, restructure, modernize and simplify our State's Unified Court System – whether using the Dunne Commission merger-in-place model or some modification of that plan.[126]

B. Creation of a Fifth Department

Under Article VI, New York's Unified Court System is currently divided into four Departments, *i.e.*:[127]

> *First Department*: Made up of the First Judicial District as established in the State Constitution and the Twelfth Judicial District created by statute.
>
> *Second Department*: Made up of the Second, Ninth, Tenth, and Eleventh Judicial Districts established in the State Constitution and the Thirteenth Judicial District created by statute.[128]
>
> *Third Department*: Made up of the Third, Fourth, and Sixth Judicial Districts.
>
> *Fourth Department*: Made up of the Fifth, Seventh, and Eighth Judicial Districts.

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[126] While the State Bar has not yet formally addressed such issues directly, a review of various appellate jurisdiction issues could also be in order in connection with a Constitutional Convention. This could include whether the manner of granting leave to appeal to the Court of Appeals in criminal cases ought to be reconsidered. *See* Minutes of the Executive Committee of the New York State Bar Association (Nov. 2009); New York State Bar Association, Recommendations of the Committee on Courts of Appellate Jurisdiction Regarding Applications for Leave to Appeal to the New York Court of Appeals in Criminal Cases, (June 10, 2009), at 1-3. In addition, a Convention could consider such matters as: a) whether the finality limitation on the Court of Appeals' civil jurisdiction continues to be consistent with its current role as a *certiorari* court, and b) whether to provide for *en banc* review of Appellate Division decisions, as is the practice in U.S. Circuit Courts of Appeal.

[127] N.Y. Const. art. VI, § 4 (2015).

[128] N.Y. Judiciary Law § 140 (2016).

As noted in Section II.B.6, *supra*, since 1894, the State Constitution has prohibited increasing the number of Departments which make up the Unified Court System. As a consequence, despite major population changes, the allocation of judicial districts, courts and caseloads within these Departments has not been changed for more than a century.

As a result, certain of these Departments have long been facing significant burdens, particularly the Second Department. The 2007 Dunne Commission Report noted that the Second Department then contained approximately half of the State's population and had a larger caseload than the other three Departments combined.[129] These caseload issues have only been exacerbated since that time. In 2015, there were 8,623 civil and 2,977 criminal appeals filed in the Appellate Division, Second Department, for a total of 11,600 appeals; whereas, the First Department, the next busiest Department in the State, had only 3,072 combined civil and criminal appeals as of the same time period.[130] The Second Department's 11,600 combined appeals stands out when compared to the 6,340 total appeals in all of the three other Departments combined – representing over 80% more filings in the Second Department than the rest of the Appellate Divisions taken together.[131]

One proposal that has been made several times in the past has been to create a Fifth Department on Long Island, splitting up the Second Department and relieving some of the Appellate Division, Second Department's substantial caseload. The New York State Bar has long supported establishing a Fifth Department. For example, the same State Bar resolution that supported the 1998 court merger framework included a

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[129] A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf.

[130] The New York State Unified Court System, 2015 Annual Report, at 23.

[131] *Id.*

resolution advocating for the establishment of a Fifth Department.[132] The creation of a Fifth Department was also recommended by the Dunne Commission's report in 2007, which was deemed to be consistent with State Bar policy.[133] Because of political considerations involved in establishing a Fifth Department, it has typically been recommended that the particular boundaries of that Department be left to the Legislature.[134]

As an alternative to creating a Fifth Department in order to better balance the caseloads allocated to the four Departments, a Constitutional Convention could decide instead to realign the Judicial Districts that are assigned to the four Departments. As an example, there has been discussion in the past of moving all or parts of the Ninth Judicial District from the Second Department to another Department so as to provide greater balance in population and caseload across the four existing Departments of the State's courts.

While political complications have left this issue unresolved for many years, it is one that could be addressed at a Constitutional Convention as part

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[132] April 1998 New York State Bar Association House of Delegates Minutes; Letter from President M. Alcott of the New York State Bar Association to C. Dunne of Davis Polk & Wardwell (dated Feb. 1, 2007); May 31, 2007 New York State Bar Association Executive Committee Minutes; November 4, 2011 New York State Bar Association Executive Committee Minutes. The New York City Bar has also supported a Fifth Department. *See* Association of the Bar of the City of New York, Council on Judicial Administration, "The Chief Judge's Court Restructuring Plan, with Certain Modifications, Should Be Adopted" (*retrieved* at http://www2.nycbar.org/ Publications/reports/show_html_new.php?rid=46).

[133] A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* http://nycourts.gov/reports/courtsys-4future_ 2007.pdf. *See also* May 31, 2007 New York State Bar Association Executive Committee Minutes.

[134] *See, e.g.,* A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts at 73 n. 149 (noting that past proposals have called for the Legislature to draw boundaries for the State court system's four Departments).

of an overall court restructuring effort. History has shown that judicial restructurings have been tackled successfully at previous Constitutional Conventions and that a Convention could provide an opportunity to address what has long been an intractable issue.

C. Selection of Judges

1. Choice of Appointive or Elective Systems for Selecting Judges

Currently, New York's Judiciary, as constituted under Article VI, reflects a mixture of elected and appointed judges. As presently structured, the judges of the Court of Appeals,[135] the Appellate Divisions of the Supreme Court,[136] the Court of Claims,[137] the New York City Criminal Court,[138] and the Family Court within New York City[139] are appointed.[140] In contrast, the voters elect the judges of the Supreme Court,[141] the County Court,[142] the Surrogate's Court,[143] the Family Court outside New York City,[144] the District

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[135] N.Y. Const. art. VI, § 2(e) (2015).

[136] N.Y. Const. art. VI, § 4(c) (2015).

[137] N.Y. Const. art. VI, § 9 (2015).

[138] N.Y. Const. art. VI, § 15(a) (2015).

[139] N.Y. Const. art. VI, § 13(a) (2015).

[140] While the Chief Administrative Judge appoints Housing Court Judges in New York City, those judgeships are not created by Article VI of the State Constitution but are instead creations of statute. *See* Section III.F *infra.*

[141] N.Y. Const. art. VI, § 6(c) (2015).

[142] N.Y. Const. art. VI, § 10(a) (2015).

[143] N.Y. Const. art. VI, § 12(b) (2015).

[144] N.Y. Const. art. VI, § 13(a) (2015).

Courts,[145] and the New York City Civil Court,[146] and many of the Justices of Town Courts, and most City and Village Courts[147] outside New York City.[148]

The New York State Bar has frequently advocated for "merit selection" of New York's Judiciary.[149] For example, in the October 2006 edition of the *State Bar Journal*, then-President Mark H. Alcott noted that one of the opportunities for the State Bar following the *Lopez Torres* lower court decisions (*see* Section II.B.14, *supra*) was "to reform New York's dysfunctional method of selecting Supreme Court" Justices.[150] The "better way," as endorsed by President Alcott and the State Bar, was "[m]erit selection, in which the chief elected official of the state, city or county appoints judges from candidates designated by non-partisan nominating commissions, subject to confirmation by the Senate or local legislative body."[151] Alcott's President's Message noted the State Bar House of Delegates' prior endorsements of "merit selection" in 1973, 1979 and 1993.

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[145] N.Y. Const. art. VI, § 16(h) (2015).

[146] N.Y. Const. art. VI, § 15(a) (2015).

[147] N.Y. Const. art. VI, § 17(d) (2015).

[148] New York's Town and Village Justice Courts are discussed more fully at Section III.I, *infra*.

[149] *See, e.g.*, April 3, 1993 New York State Bar Association House of Delegates Resolution ("RESOLVED, that this House of Delegates hereby endorses and reaffirms the position adopted by the New York State Bar Association in 1979 in support of the concept of merit selection[.]")

[150] "President's Message: Promoting Needed Reform, Defending Core Values," NYSBA Journal, at 5, October 2006. As discussed in Section II.B.14, *supra*, the *Lopez Torres* litigation involved a challenge to New York's judicial nominating convention system for the election of Supreme Court Justices. *Lopez Torres, v. N.Y.S. Bd. of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y. 2006), *aff'd*, 462 F. 3d 161(2d Cir.), *rev'd sub nom. N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 196 (2008). Although the Eastern District and the Second Circuit found that the convention system violated the First Amendment, the Supreme Court ultimately upheld the constitutionality of that system. *N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 196 (2008).

[151] *Id.* at 6.

In 1993, the State Bar had approved a "Model Plan" for selection of all judges, which was similar to that used for the Court of Appeals, except that it provided for a retention election at the conclusion of an incumbent's term.[152]

In 2007, Program Bill #34 was introduced in the Senate.[153] Drafted with input from the State Bar, the bill called for "justices of the appellate division" to be "appointed by the governor . . . for terms of fourteen years." Similarly, the legislation provided for Supreme Court Justices to be appointed by the Governor for 14-year terms. Under that bill, County Court judges, Surrogates and Family Court judges also were to be appointed by the Governor for 14-year terms. The Legislature did not pass that legislation. Nonetheless, the State Bar has continued to support commission-based appointment systems for the Judiciary.

Some have pointed to diversity issues as a factor weighing in favor of judicial elections versus appointive processes for selecting members of New York's Judiciary. It is beyond the scope of this Report to determine whether statistical data support this conclusion. However, it appears that geography and the particular selecting authority – regardless of whether the system is

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[152] April 3, 1993 House of Delegates Resolution. Similarly, for courts of record, the New York City Bar has long supported "merit selection," defined as "the nomination of a limited number of well-qualified individuals for a judicial vacancy by a diverse, broad-based committee composed of lawyers and non-lawyers, appointed by a wide range of executive, legislative and judicial officials and possibly individuals not associated with government, guided by standards that look to experience, ability, accomplishments, temperament and diversity." New York City Bar Association, Report of the Task Force on the New York State Constitutional Convention (dated June 1997), at 596, *available at* http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForce ontheNYSConstitutionalConvention.pdf. In that report, the City Bar concluded, *inter alia*, that the judicial elective system may discourage those who have not been previously active in politics from serving in the Judiciary. *Id.*

[153] Senate Bill S06439 (2007).

an elective or appointive one – are the biggest factors in promoting diversity within the Judiciary.[154]

In 2014, the State Bar's Judicial Section prepared a report, entitled "*Judicial Diversity: A Work in Progress*,"[155] discussing the progress and need for further improvement in diversifying the Judiciary. According to that report, the percentage of judges of color in each Department varied from 35% in the First Department to just 1% in the Third Department.[156] At that time, although 52% of New York's population was female, the percentage of women judges varied from a high of 46% in the First Department to only 19% in the Third Department.[157] That report concluded that the Section hoped its report would "serve as a call to corrective action by the decision makers in both the elective and appointive judicial selection systems."[158]

Based on the latest data received from the Office of Court Administration ("OCA"), the percentage of female jurists has improved somewhat, to a high of 52% in the First Department and a low of 23% in the Third Department. The percentage of jurists from diverse backgrounds has similarly improved slightly since the time of the Judicial Section's report. Based on the most recent OCA data, that percentage varies from 38% in the First Department to just 3% in the Third Department.

On the Appellate Divisions, there has been significant progress in advancing diversity since the time of the Judicial Section's report. For

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[154] It has also been suggested that the size of the geographic area from which a judge is chosen could affect the diversity of a given court. For example, courts drawing from smaller areas – such as a single county – may be more diverse than courts having jurisdiction over a multi-county district which covers a much larger geographic area.

[155] *Available at* http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html. The report was approved by the State Bar's Executive Committee on September 17, 2014.

[156] *Id.* at 5.

[157] *Id.* at 5.

[158] *Id.* at 47.

example, according to recent OCA data, a majority of the current Justices on the Appellate Division, First Department (not including those who are certificated) are female and 36% of them are ethnic minorities. On the Appellate Division, Second Department, 35% of the current Justices are female and 35% are minorities. While half of the current Justices of the Third Department are female, the remaining diversity statistics for the Third and Fourth Departments are still in need of improvement.

In addition, in New York City, the Mayor's Advisory Committee on the Judiciary was initially formed in 1978 under Mayor Ed Koch "to recruit, to evaluate, to consider and to nominate judicial candidates fully qualified for appointment and to evaluate incumbent judges for reappointment[.]"[159] Still today, the Mayor's Committee nominates and provides to the Mayor a list of qualified candidates from which the Mayor chooses a candidate to appoint as a judge on the New York City Criminal and Family courts.[160] Data provided by the Mayor's Committee has also shown improvement in the diversity of appointed judges to these New York City courts over the past ten years. From 2006 to 2011, there were 36 total Mayoral appointments to these courts. Of these appointees, 53% were female and 31% were ethnic minorities. From 2012 through 2016, there were 64 such appointments. Of this group, 63% of the appointees were female and 42% were minorities.

Statistics from the Court of Appeals nominations process also suggest that there has been improvement in promoting diversity and opportunities for underrepresented groups. A March 7, 2013 press release from the Commission on Judicial Nomination listed demographic data for both applicants to the Commission and nominees to the Governor with respect to vacancies on the Court of Appeals occurring between 1997 and 2008 and

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[159] Executive Order No. 10: Mayor's Committee on the Judiciary (Apr. 11, 1978).

[160] Executive Order No. 4: Mayor's Advisory Committee on the Judiciary (May 29, 2014).

two additional vacancies in 2012 and 2013.[161] At the time of the 1997 vacancy, only 18% of the Commission's interviewees were female and 9% were ethnic minorities; in comparison, as of 2013, 41% of the interviewees were female, and 41% were ethnic minorities. While only one of the Commission's seven nominees was female and one of the seven nominees was an ethnic minority in 1997, in contrast, in 2013, three of the seven nominees were female and three of seven were ethnic minorities.[162]

The December 1, 2016 press release of the Commission on Judicial Nomination, reporting on the most recent vacancy on the Court of Appeals, reflects similar data. That press release stated that: a) the Commission had received 35 applications for that particular vacancy, b) 34% of the applications were from female candidates, and c) 25% were from candidates of diverse backgrounds.[163] The Commission further reported that: a) it had interviewed 21 of these 35 applicants; and b) of the 21 interviewees, 38%

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[161]March 7, 2013 Press Release, State of New York Commission on Judicial Nomination, *available at* http://nysegov.com/cjn/assets/documents/press/Jones%20 Vacancy%20Report%20Press%20Release%203-7-2013.pdf.

[162] After former Chief Judge Judith S. Kaye became Chair of the Commission on Judicial Nomination in 2009, the Commission: a) adopted an express rule that the "commission will strive to identify candidates who reflect the diversity of the citizenry of the State of New York"; b) specifically embraced a commitment to diversity in many characteristics, including, but not limited to, "diversity in race, ethnicity, gender, religion, sexual orientation, community service, nature of legal practice or professional background and geography"; and c) adopted rules that encourage greater publicity of vacancies on the Court of Appeals. 22 N.Y.C.R.R. §§ 7100.6, 7100.8(e). Prior to that time, the Commission had considered diversity as part of the factors listed in Article VI for determining whether candidates were "well qualified" to serve on the Court of Appeals, including by their "professional aptitude and experience." N.Y. Const. art. VI § 2(c). *See* Feb. 3, 2009 Testimony of Hon. John F. O'Mara before the Senate Standing Committee on the Judiciary on the Nomination Process for Judges to the New York State Court of Appeals, at 10, *available at* http://nysegov.com/cjn/assets/documents/press/ Prepared_Testimony_of_Judge_OMara.pdf.

[163] December 1, 2016 Press Release, State of New York Commission on Judicial Nomination, *available at* http://nysegov.com/cjn/assets/documents/CJN-Vacancy%20 List%20Press%20Release%20and%20Report.pdf.

were female candidates and 29% were ethnic minorities.[164] Moreover, three of the seven nominees forwarded to the Governor in December 2016 were female, with one nominee being a minority.

Additionally, the seven-member Court of Appeals has had in the past and again has today a majority of female judges. The Court currently has, among its 7 members, one African-American judge and two judges of Hispanic heritage.

Accordingly, although it appears that diversity within New York's Judiciary has continued to improve – including among judges selected through appointive systems – there is still much work to be done.

Whether to appoint or elect members of New York's Judiciary has long been a fractious issue. While a wide range of groups successfully coalesced to support appointive selection of Court of Appeals Judges in 1977, the issue has gained the level of traction needed to achieve wider-scale reform of judicial selection in other courts. As a result, in 2007, the Dunne Commission advanced its "merger in place" proposal, which would have continued the election of certain of New York's judges as part of its court consolidation proposal. While the issue of judicial selection drew substantial attention in connection with the *Lopez Torres* litigation and related events, ultimately, systemic change was not accomplished once the U.S. Supreme Court upheld New York's judicial convention system in 2008.

A Constitutional Convention could provide an opportunity to revisit how best to select judges in New York, either as part of an overall restructuring of the Unified Court System or as a stand-alone issue.

2. Methods of Electing Judges in Elective Systems

In the event that certain of New York's judges continue to be elected, an additional question arises – *i.e.*, how are these judicial nominees to be selected? As discussed in Section II.B.14, *supra*, the current elective system

[164] *Id.*

for the Supreme Court involves: a) selecting delegates to a judicial nominating convention at a primary, b) followed by a judicial convention at which those delegates choose candidates for nomination, and c) thereafter, a general election to choose the winning candidates. This system – which ultimately survived the First Amendment challenge raised in the *Lopez Torres* litigation[165] – may not be the optimal one for nomination and election of Supreme Court Justices if New York continues to elect Supreme Court Justices. Even if a Constitutional Convention were to choose to continue the election of Supreme Court Justices, it could also consider whether: a) to retain this current nominating system for judicial elections (which is statute-based);[166] or b) to switch to another system – whether the pure primary election system advocated by Judge Lopez Torres in her lawsuit or some other method of designating or nominating candidates for election to the bench.

In contrast to the judicial convention procedure for nominating and electing of Supreme Court Justices, candidates wishing to serve as judges of the Surrogate's Court, the New York City Civil Court, the County Court, Family Courts outside of New York City, and the District Courts are nominated through party primary elections and are thereafter elected at the general election.[167]

The New York State Bar has opposed the use of primaries for judicial elections. In 2007, then-State Bar President Mark Alcott testified before the New York State Senate that the primary system risks the "prospect of judicial candidates promising in advance how they will decide politically-

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[165] *N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

[166] Election Law §§ 6-124, 6-126 (2016).

[167] *See* New York City Bar, "Judicial Selection methods in the State of New York: A Guide to Understanding and Getting Involved in the Selection Process," at 23-24 (Mar. 2014) ("Under the election method, which is a partisan political process, candidates must first win the nomination of their political party through a primary election or, in the case of New York State Supreme Court Justices, through a judicial convention.").

charged cases, or at least being pressured to do so by special interest groups, and negative advertisements attacking judicial candidates for their real or imagined positions on hot-button issues."[168] Concerns were also raised about the cost of waging primary campaigns for judicial election. Instead, the State Bar endorsed reforms to the judicial nominating process in an effort to make it more transparent and to promote an improved judicial selection process.[169]

In the event that elections are continued as part of New York's system for selecting members of the Judiciary, the particular form of judicial election system that New York should embrace is ripe for further discussion, and a Constitutional Convention could serve as a vehicle for such a review.[170]

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[168] Mark H. Alcott, Testimony before the New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (Jan. 8, 2007). The New York City Bar Association similarly cautioned that "primary elections by themselves (*i.e.*, without a convention system and without public financing) are far from the best constitutional solution for the shortcomings of the current convention system" and concluded that such a system would make elections "undesirable as a means of providing to the electorate a diverse slate of the highest caliber candidates[.]" Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial Selection System in New York* (December 2006), at 21.

[169] The State Bar's House of Delegates ultimately endorsed recommendations such as: a) providing judicial convention delegates with information about judicial elections, b) providing convention delegates and the general public with a list of candidates at least ten business days before the convention, and c) giving candidates for judicial nomination the opportunity to speak with the convention delegates. *See* New York State Bar Association, Report by New York State Bar Association Special Committee on Court Structure and Judicial Selection on Recommendations Contained in the Report of the Commission to Promote Public Confidence in Judicial Elections of the Committee on Courts of Appellate Jurisdiction Regarding Applications for Leave to Appeal to the New York Court of Appeals in Criminal Cases, (2006); June 24, 2006 New York State Bar Association House of Delegates Minutes (noting passage of report on a voice vote).

[170] Although the State Bar has not taken a direct position on the matter, there is also a question as to whether caps on spending for judicial elections should be implemented in New York. In 2015, the U.S. Supreme Court held that it does not violate

3. Systems for Appointing Appellate Judges

In addition to the broader-scale issue of whether a Convention could call for changes the methods of electing or appointing trial-level judges, the Committee considered the current method of selecting appellate judges.

As a result of the 1977 court reforms, the process for selecting Judges of the Court of Appeals was changed to an appointive system using a Commission on Judicial Nomination, which reports a limited number of candidates for consideration by the Governor.[171] The State Bar supported those amendments to the State Constitution when they were enacted in 1977.[172]

To be eligible for nomination for appointment to the Court of Appeals, an applicant need only be a New York resident admitted to the New York Bar for at least 10 years and be found by the Commission to be "well qualified" to serve on the Court.[173] As a result, the Commission can consider for recommendation to the Governor any members of the Judiciary who serve on any court within the Unified Court System or any qualified members of the New York bar.

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the First Amendment for states to prohibit judicial candidates from soliciting campaign contributions personally from supporters. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). Delegates to a Constitutional Convention delegates could have the opportunity to determine what types of restrictions ought to be placed on the financing, running or administration of judicial campaigns.

[171] N.Y. Const. art. VI, § 2(c)-(f) (2015). The Judiciary Law gives the Commission the power to promulgate its own rules. Under former Chief Judge Judith S. Kaye, who was the Commission's last Chair, the Commission's rules were updated and modernized. *See* 22 N.Y.C.R.R. Part 7100.

[172] Apr. 16, 1977 New York State Bar Association House of Delegates Minutes (urging the Legislature to give second passage to an amendment providing for merit appointment of judges to the Court of Appeals, improved court administration and management, and strengthened judicial discipline processes).

[173] N.Y. Const. art. VI, § 2(c), (e) (2015).

In contrast, with respect to the appointment of Justices of the Appellate Divisions, the State Constitution provides for a Presiding Justice in each Department, seven Supreme Court Justices in each of the First and Second Departments, and five Supreme Court Justices in each of the Third and Fourth Departments, all of whom are appointed by the Governor from among the State's Supreme Court Justices.[174] The Governor has the power to designate additional Justices of the Supreme Court to the respective Appellate Divisions.[175] While not bound to do so, Governor Andrew M. Cuomo has (as have Governors in the recent past) implemented a screening committee mechanism for this appointment process in order to screen candidates for designation and re-appointment to those appellate courts.[176]

Currently, the Governor can only designate a Justice to the Appellate Division from among the existing group of elected Supreme Court Justices, thereby narrowing the pool of potential applicants to the Appellate Division. A potential benefit of court restructuring could be a broadening of the eligible pool for the Appellate Division to include judges who are appointed or elected to other trial-level courts within the Unified Court System – or even qualified members of the bar who are not serving as judges, as is possible with nominations to the Court of Appeals.[177]

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[174] N.Y. Const. art. VI, § 4(b) (2015).

[175] N.Y. Const. art. VI, § 4(e) (2015).

[176] Executive Order No. 15, Establishing Judicial Screening Committees, dated Apr. 27, 2011. The Governor's screening committees also review candidates for the Court of Claims.

[177] Although the State Bar appears not to have taken a specific position as to who ought to be eligible to serve as Appellate Division Justices, it did conclude that the Dunne Commission's report on court restructuring was "consistent" with the Association's position. May 31, 2007 New York State Bar Association Executive Committee Minutes. In that report, the Dunne Commission noted that one of the "benefits" of its "merger in place" plan was the expansion of the pool of potential Appellate Division Justices to include the judges of all courts that would be merged into the newly expanded Supreme Court; this would include: Court of Claims Judges, County Court Judges, Family Court Judges, Surrogate's Court Judges, and Judges in the New York City Civil and Criminal

With respect to the Appellate Term, Article VI provides that the Chief Administrative Judge has the power to appoint Justices to the Appellate Terms, with the approval of the Presiding Justice in the respective Appellate Division. As with appointments to the Appellate Division, each appointee to the Appellate Term must be a Justice of the Supreme Court; in addition, such appointees must reside in the Judicial Department of the Appellate Term to which they are appointed.[178] There is no formal screening committee mechanism currently in place for appointments to the Appellate Term.

A Constitutional Convention would provide an opportunity to consider broadening the eligibility criteria for candidates for appointment to the Appellate Division and the Appellate Term.

D. Judicial Retirement Age

The State Constitution sets a judicial retirement age of 70 for any "judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court[.]"[179] This leaves only Town and Village Justice Courts and Housing Court Judges without a constitutionally-mandated retirement age. Justices of the Supreme Court have an additional option that is unique to their positions – even though they must retire at age 70, they can continue to be

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Courts who were serving as Acting Supreme Court Justices. *See* A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts, (dated Feb. 2007), at 51-53, *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf.

[178] N.Y. Const. art. VI, § 8(a) (2015).

[179] N.Y. Const. art. VI, § 25(b) (2015).

certificated to continue in office for successive two-year periods up until age 76.[180]

These retirement age restrictions have led to calls for reform. For example, in 2013, there was a failed attempt in 2013 to amend the State Constitution to allow certain Court of Appeals Judges (depending on when their terms commenced), and Supreme Court Justices to continue in serving through age 80.[181]

In 2007, the New York State Bar adopted a report advocating a raise in the retirement age for all judges in the Unified Court System to age 76, with two-year re-certification periods available to all judges – other than Court of Appeals Judges, who would need to retire from the Court at age 76.[182] In calling for higher judicial retirement ages across the board, the State Bar pointed to: a) today's longer lifespans as compared to those when New York's Constitution adopted the age of 70 as the retirement age; b) the need for experienced judges to handle an ever-increasing workload in the courts; and c) the desire for parity in retirement ages for all judges within the Unified Court System.[183]

A Constitutional Convention could provide an opportunity to re-examine judicial retirement ages in New York, whether as part of an overall restructuring of the Unified Court System or as a stand-alone issue.[184]

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[180] *Id.* While rarely exercised, this certification process also applies to Court of Appeals Judges who reach age 70 but they must serve on the Supreme Court after age 70.

[181] *See* James C. McKinley, Jr., "Plan to Raise Judges' Retirement Age to 80 is Rejected," NY Times, Nov. 6, 2013, at A20, *available at* http://www.nytimes.com/2013/11/06/nyregion/plan-to-raise-judges-retirement-age-to-80-is-rejected.html.

[182] March 31, 2007 New York State Bar Association House of Delegates Minutes.

[183] March 31, 2007 New York State Bar Association House of Delegates Minutes; "Report and Recommendations of the New York State Bar Association Task Force on the Mandatory Retirement of Judges" (Mar. 2007).

[184] At a 2015 State Bar House of Delegates meeting, the House adopted a resolution which advocated changing an aspect of judges' retirement practices so that judges would not be put in the difficult position of needing to retire when they suffer a

E. Limited Number of Supreme Court Justices

The State Constitution allows the Legislature to increase the number of Justices of the Supreme Court once every 10 years; however, such increases are subjected to a cap so that the number of justices in any judicial 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."[185] This cap is only minimally reduced from the cap that was originally established in 1925.[186] The New York State Bar, like the Dunne Commission, has advocated for removing this cap on the number of Supreme Court Justices.[187] This cap – as well as the burdens it causes to the courts, litigants and the bar – has long been a concern of the State Bar and the legal community at large.[188]

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terminal illness in order to prevent their survivors' pension rights from being jeopardized. Nov. 2015 New York State Bar Association House of Delegates Minutes (*approving* 2015 NYCLA Report on the Death Gamble and Section 60 of the New York Retirement and Social Security Law). A Convention could also provide a vehicle to discuss other judicial retirement issues such as this one or also whether judges should have a separate retirement plan, an issue the State Bar has not yet considered.

[185] N.Y. Const. art. VI, § 6(d) (2015).

[186] In 1925, the cap was fixed at one justice for 60,000, or fraction over 35,000, of the population.

[187] *See, e.g.*, April 1998 New York State Bar Association House of Delegates Minutes ("The population cap limiting the number of Supreme Court Justices per district should be abolished."); May 31, 2007 New York State Bar Association Executive Committee Minutes (finding the Dunne Commission report consistent with State Bar policies); November 4, 2011 New York State Bar Association Executive Committee Minutes (resolving that "[t]he population cap limiting the number of Supreme Court Justices per judicial district should be abolished[.]").

[188] *See, e.g., New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967) (seeking a "judicial re-apportionment" designed to eliminate court delays in the Supreme Court and other trial-level courts of various counties in the State, and asserting allegations about the insufficient number judges assigned to courts in certain New York counties). In the past, the issue of whether there have been too few judges available to litigants has also been alleged to violate the U.S. Constitution. *See, e.g., Kail v. Rockefeller*, 275 F. Supp. 937 (E.D.N.Y. 1967) (alleging on behalf of a group

The Committee is cognizant that this cap on the number of Justices and the heavy caseload experienced by the Supreme Court – particularly in the First and Second Departments – already has resulted in a "work around" system through designations of Acting Supreme Court Justices. Under this system, many judges of the Court of Claims, the New York City Civil Court, Criminal Court and Family Court, and other courts outside New York City frequently are designated as Acting Supreme Court Justices. This is often done to mitigate case management problems presented by the court system's growing caseload, while technically complying with the constitutional cap.[189]

A Constitutional Convention also could consider whether to: a) remove the population-based cap on the number of Supreme Court Justices; and b) authorize the Legislature to establish the number of judges at a level that is sufficient to dispense justice properly and to meet the needs of the litigants who utilize New York's courts.

F. Status of New York City Housing Court Judges

Housing Court Judges handle the Housing Parts of the New York City Civil Court but are not Article VI judges. Unlike most other judges in the Unified Court System, Housing Court judges only serve 5-year terms.[190] These judges are not subject to any mandatory retirement age, nor are they subject to the jurisdiction of the Commission on Judicial Conduct.

Given the duties performed by Housing Court Judges, many have advocated bringing these judges within the purview of a re-drafted Article

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of litigants that the limited number of justices assigned to a particular Judicial District, given the overall population numbers in Queens County, irreparably harmed litigants in that area).

[189] *See Taylor v. Sise*, 33 N.Y.2d 357 (1974) (rejecting a challenge to the system of long-term, temporary but open-ended administrative assignments to the Supreme Court of judges from other trial-level courts).

[190] New York City Civil Court Act § 110(i)(2016).

VI.[191] Although the New York State Bar has supported promoting parity among trial-level judges within the Judiciary through consolidation of trial-level courts (*see* Section III.C.1, *supra*), as far as we can determine, the State Bar has not taken an official position on this specific issue. The State Bar did conclude that the report of the Dunne Commission as a whole, which included a recommendation to include Housing Court Judges within the provisions of Article VI, was consistent with State Bar policy.[192]

New York City Housing Court Judges are appointed by the Chief Administrative Judge from a list of qualified applicants compiled by the Housing Court Advisory Council.[193] The Dunne Commission also advocated vesting this appointment authority in the New York City Mayor as part of an overall court restructuring.[194]

A Constitutional Convention could provide a forum in which to re-consider the current status of and method of selecting Housing Court Judges, particularly in the context of an overall court restructuring effort. Such re-consideration could also include determining whether Housing Court Judges: a) should be included within Article VI of the State Constitution, b) should be eligible to serve longer terms, c) should be subject to a

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[191] *See, e.g.*, A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf.

[192] May 31, 2007 New York State Bar Association Executive Committee Minutes.

[193] The Housing Court Advisory Council screens and interviews applicants for Housing Court judgeships. The Council then submits a list of approved candidates to the Chief Administrative Judge from which judges are selected. The Council consists of 14 members – representing a broad range of interests in the City – 12 of whom are appointed by the Chief Administrative Judge. *See* https://www.nycourts.gov/COURTS/nyc/housing/advisory.shtml.

[194] *Id.*

mandatory retirement age, and d) should be subject to oversight by the Commission on Judicial Conduct.[195]

G. Terms for Trial-Level Courts

Trial-level judges throughout New York are elected or appointed for differing terms of office. Supreme Court Justices[196] and New York City Surrogates[197] are elected for periods of 14 years. Court of Claims judges are appointed for terms of nine years.[198] Judges of the New York City Civil and Criminal Court,[199] County Court,[200] Family Court,[201] Surrogates in counties outside New York City,[202] and full-time City Court judges[203] have ten-year terms of office. As discussed in Section III.F, *supra*, Housing Court judges serve five-year terms. District Court judges[204] and part-time City Court judges[205] serve six-year terms. Town and Village Justices are elected (and, in some instances, appointed) for terms of four years.[206]

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[195] Previous statutory attempts to subject Housing Court Judges to the Commission on Judicial Conduct have been vetoed. *See* New York State Commission on Judicial Conduct 2016 Annual Report, at 7, *available at* http://www.scjc.state.ny.us/Publications/AnnualReports/nyscjc.2016annualreport.pdf (noting that "[l]egislation that would have given the Commission jurisdiction over New York City housing judges was vetoed in the 1980s").

[196] N.Y. Const. art. VI, § 6(c) (2015).

[197] N.Y. Const. art. VI, § 12(c) (2015).

[198] N.Y. Const. art. VI, § 9 (2015).

[199] N.Y. Const. art. VI, § 15(a) (2015).

[200] N.Y. Const. art. VI, § 10(b) (2015).

[201] N.Y. Const. art. VI, § 13(a) (2015).

[202] N.Y. Const. art. VI, § 12(c) (2015).

[203] Uniform City Court Act § 2104(d) (2016).

[204] N.Y. Const. art. VI, § 16(h) (2015).

[205] Uniform City Court Act § 2104(d) (2016).

[206] Village Law § 3-302(3) (2016).

As noted above in the context of judicial selection (*see* Section III.C.1, *supra*), depending on what actions may be taken regarding court restructuring, the appropriate terms of office for judges is an additional issue that could be discussed in a Constitutional Convention. If New York's court system were to be restructured in the manner that the State Bar has advocated or along similar lines – but without standardizing the differentiated terms of office within the Judiciary – a restructured Supreme Court would include justices having a variety of different term lengths.[207]

Whether as part of a comprehensive court restructuring effort or otherwise, a Constitutional Convention could provide a mechanism to address parity in judicial terms across the Unified Court System.

H. Family Court Jurisdiction

Currently, Family Court Judges lack the broad range of jurisdiction that is necessary to address fully matters affecting victims of domestic violence. As a result, in some Judicial Districts of the State, Acting Supreme Court Justice status is granted to a limited number of Family Court Judges as a "work around." For example, the Unified Court System has implemented Integrated Domestic Violence Parts in some Judicial Districts to address these serious issues.[208] Nonetheless, these solutions are not uniform throughout the State and there remain areas of the State where victims of domestic violence who seek resort to the courts are hampered by the Family Court's limited jurisdiction.

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[207] Notably, the State Bar previously found the Dunne Commission report that endorsed "merger in place" – including maintaining different term lengths for New York's judges – to be consistent with the Association's prior positions. *See* May 31, 2007 New York State Bar Association Executive Committee Minutes.

[208] For a discussion of these courts, *see* https://www.nycourts.gov/ip/domesticviolence/; http://moderncourts.org/education-and-outreach/integrated-domestic-violence-courts/. In November 2016, Chief Judge Janet DiFiore announced an innovative program permitting domestic violence victims in certain counties to obtain orders of protection by video-link. *See* http://www.nycourts.gov/press/PDFs/PR16_14.pdf.

Should the Family Court be merged into the Supreme Court as part of an overall court restructuring, this issue would necessarily be resolved as a consequence of such a merger. Otherwise, the impact of the Family Court's limited jurisdiction in domestic violence cases would be an issue that would be ripe for consideration should a Constitutional Convention be held.

In addition, New York's Family Courts currently lack jurisdiction over divorce matters, which jurisdiction is vested only in the Supreme Court. In some districts of the State, this dichotomy has been addressed by designating certain Family Court Judges as Acting Supreme Court Justices so that they may exercise divorce jurisdiction.

The Family Court routinely deals with a wide range of topics affecting families that are ancillary to divorce cases (such as custody of minors, child and spousal support, guardianship of minors, paternity and termination of parental rights). As a result, the exclusion of divorce jurisdiction – and jurisdiction over various related matters that are incidental to a divorce case – from the Family Court appears to be inconsistent with the interests of judicial economy. Although the rise of no-fault divorce may have reduced somewhat the impact of the Family Court's limited jurisdiction *vis-à-vis* divorce cases themselves, there remains a potential for inconsistent or even conflicting rulings particularly with respect to issues of custody, visitation and support.

Accordingly, it would also be appropriate for a Constitutional Convention to address whether Family Courts should be given sole or concurrent jurisdiction over divorce cases and their ancillary matters.[209] Nonetheless, as discussed above, if the Family Court were merged into the Supreme Court as part of a court consolidation plan, this issue would resolve itself.

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[209] This Report takes no position on whether Family Courts should have sole or concurrent jurisdiction over divorces or over matters that are ancillary to divorces.

I. Town and Village Justice Courts

Outside of New York City, Justice Courts – also known as Town and Village Courts – are found in many municipalities across the State. "These courts have jurisdiction over a broad range of matters, including vehicle and traffic matters, small claims, evictions, civil matters and criminal offenses."[210]

Currently, the State Constitution grants the Legislature the power to "regulate [town and village] courts, establish uniform jurisdiction, practice and procedure for city courts outside the city of New York and [] discontinue any village or city court outside the city of New York existing on the effective date of this article."[211]

The Legislature has exercised this authority in limited instances, such as: a) specifying the terms of office for Village Court Justices (four years by statute);[212] b) limiting the number of such justices in each town or village;[213] and c) imposing residency requirements for elected justices.[214] But there remain substantial issues regarding and proposals for reform of these courts. Most notably, unlike other judges in New York, there is no requirement that these justices be members of the Bar, although they must receive some judicial training after election, the extent of which depends on whether they are members of the Bar.

Given the authority of these Town and Village Justice Courts – especially in criminal matters – many have suggested that New York should require that these judges be attorneys who are admitted to practice in New

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[210] http://www.nycourts.gov/courts/townandvillage. Note that in some areas of the State, the jurisdiction of Town or Village Justice Courts is more limited, and the District Courts have jurisdiction over many of these matters.

[211] N.Y. Const. art. VI, § 17(b) (2015).

[212] Village Law § 3-302(3) (2016).

[213] Village Law § 3-301(2)(a) (2016).

[214] Public Officers Law § 3 (2016); Town Law § 23 (2016).

York. Supporters of the present system point to, among other issues, the practical difficulty in finding resident attorneys to serve as justices in many jurisdictions where Town and Village Justice Courts sit and also New York's long tradition of such local "citizen judges."

In 2001, the New York State Bar adopted the position that all judges in our State's Justice Courts should be lawyers, concluding that: "[i]t is unfair for litigants in civil or criminal cases to have matters determined by a person who may be unfamiliar with the law."[215]

A September 2008 Report by the Dunne Commission entitled, "Justice Most Local: The Future of Town and Village Courts in New York State," concluded that there were serious flaws in New York's Town and Village Court system. However, the Report found no compelling basis to eliminate these courts altogether or to require that the justices serving in them be admitted attorneys. Instead, the Dunne Commission issued multiple recommendations to ensure that the Town and Village Courts function as intended and to protect the citizens of New York, including: a) developing minimum standards for these courts; and b) developing panels to discuss court consolidation within the Town and Village Court system.[216]

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[215] William Glaberson, *How a Reviled Court System Has Outlasted Many Critics*, N.Y. Times, at B8-B9 (Sept. 27, 2006)

[216] Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts (Sept. 2008), at 83-104.

Thereafter, in 2009, the Legislature passed a bill, which was proposed by then-Attorney General Andrew M. Cuomo, allowing for (but not mandating), *inter alia*, petitions and votes on whether to reorganize local government by consolidating or dissolving Towns, Villages and certain other local governmental bodies in the State. *See "New N.Y. Government Reorganization and Citizen Empowerment Act" (2009), codified at* Gen. Mun. Law art. 17-A (2010). At present, this statutory authority could be invoked to seek to consolidate overlapping Town and Village Justice Courts in particular communities of the State.

Three months thereafter, the State Bar's Committee on Court Structure and Judicial Selection prepared a report addressing the Dunne Commission's recommendations. This State Bar Committee agreed with the Dunne Commission that: a) requiring Town and Village Court justices to be lawyers was no longer feasible; b) that development of minimum standards for all Town and Village Courts was an important goal; and c) that consolidation of these courts was a worthy topic of discussion.[217]

At that time, the State Bar's House of Delegates did not agree with all of the Dunne Commission proposals. For example, the House of Delegates disagreed with the specifics of the proposed minimum eligibility criteria for justices of these courts – as to which the State Bar proposed a minimum age of 30 plus a four-year college degree whereas the Dunne Commission proposed a minimum age of 25 plus a two-year degree.[218]

Given the complexity of the issues concerning New York's Town and Village Courts and the important due process issues involved in proceedings that are held in those courts, discussion of issues affecting the Town and

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[217] *See* January 30, 2009 New York State Bar Association House of Delegates Minutes (adopting Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State but rejecting one recommendation in the Committee report in favor of the original recommendation set forth in the Dunne Commission Report); Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State (Dec. 16, 2008). *See also* Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts (Sept. 2008).

[218] *Compare* January 30, 2009 New York State Bar Association House of Delegates Minutes (adopting Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State except rejecting one recommendation for the original recommendation found in the Dunne Commission Report) *with* Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State (Dec. 16, 2008); Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts (Sept. 2008).

Village Court system would be appropriate for a Constitutional Convention.[219]

J. Court Budgets

Under Article VII of the State Constitution, the Chief Judge is to transmit the Judiciary's budget to the Governor by December 1st of each year for inclusion in the Executive Budget.[220] The Governor is obliged to transmit the Judiciary Budget to the Legislature "without revision but with such recommendations as the governor may deem proper." Once before the Legislature, the Judiciary Budget is subject to customary budget deliberations and negotiation. If the Legislature adds new expenditures to the Judiciary Budget, such expenditures can thereafter be vetoed by the Governor.[221]

As a consequence of this budgeting process, the Judiciary is subject to the outcome of budget negotiations between the Executive Branch and the Legislature. The budgeting process in New York often involves a give and take between legislative representatives and the Executive Branch in which the typical sorts of political horse-trading can take place. As an independent branch of government, the Judiciary should necessarily remain at a distance from this negotiation process to a significant extent.

This year, on December 1, 2016, state court officials released a Judiciary Budget seeking $2.18 billion for the Unified Court System's 2017-18 spending plan; neither Governor Andrew M. Cuomo nor the

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[219] Another major issue affecting the Town and Village Courts involves arraignments and the cost of indigent criminal defense. Those issues are outside the scope of this Report. Certain aspects of those issues are the subject of legislation passed during the Legislature's 2016 legislative session. *E.g.*, Assembly Bill A10360 (2016) (providing for off-hours arraignment); Senate Bill S07209-A (2016) (same). This bill was signed by Governor Cuomo on November 28. Joel Stashenko, *New Law Allows Centralized Arraignments Outside New York City*, N.Y.L.J. (Nov. 29, 2016).

[220] N.Y. Const. art. VII, § 1 (2015).

[221] N.Y. Const. art. VII, §§ 1, 4 (2015); *see* N.Y. Const. art. IV, § 7 (2015).

Legislature has weighed in publicly on the court budget as of the time of this Report.[222]

At times in the past, this constitutional construct has led to friction, if not outright budget disputes, between the Judiciary and other branches of government. For example, in 1991, a budget stand-off between the then-Chief Judge and the Governor led to litigation captioned *Wachtler v. Cuomo.* In that lawsuit, then Chief Judge Sol Wachtler challenged Governor Mario Cuomo's unilateral action to reduce the Judiciary's budget submission to the Legislature for the 1991-92 State fiscal year.[223]

Following the 2008 fiscal crisis, the American Bar Association ("ABA") established a Task Force on Preservation of the Justice System, noting that "many of our state court systems have been in a crisis because of severe underfunding."[224] Through several initiatives, the ABA sought to

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[222] In reporting on the Judiciary's 2017-18 budget proposal, the New York Law Journal noted previous conflicts between the Governor and the Judiciary over past budget proposals. *See* Joel Stashenko, "Judicial Budget Proposal Calls for 200 Hires, Security Gear," N.Y.L.J. (Dec. 1, 2016), *available at* http://www.newyorklawjournal.com/home/id=1202773591040/Judicial-Budget-Proposal-Calls-for-200-Hires-Security-Gear?mcode=1202617075062&curindex=0.

[223] No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991). *See* Walter E. Swearingen, *Wachtler v. Cuomo: Does New York's Judiciary Have an Inherent Right of Self-Preservation?*, 14 Pace L. Rev. 153, 155-56 (1994). In response to this litigation, the State Bar's House of Delegates authorized the Association's Executive Committee to file an amicus brief (although the case was resolved before such a brief was needed). *See* November 2, 1991 New York State Bar Association House of Delegates Minutes. This House resolution followed a discussion within the Executive Committee, in which members "noted that the budgetary problems and the current impasse among the three branches of government were essentially political and would likely require negotiations outside the context of litigation if a successful, long-term solution is to be found." October 7, 1991 New York State Bar Association Executive Committee Minutes.

[224] This ABA Task Force issued a "toolkit" to address funding issues affecting state courts across the country. This "toolkit" can be found at http://www.americanbar.org/groups/committees/american_judicial_system/task_force_on_the_preservation_of_the_justice_system/Court_Funding_Toolkit.html.

explore this underfunding and supply solutions and ideas designed to ensure that state courts receive their necessary funding. In 2012, the Task Force on Preservation of the Justice System worked with the National Center for State Courts and Justice at Stake to produce a report, entitled "Funding Justice: Strategies and Messages for Restoring Court Funding."[225] The suggestions made in that report included: a) developing a year-round relationship with those involved in enacting laws within the Executive and Legislative branches of state government; b) proposing credible court budgets for state court systems; and c) presenting data about court systems in ways that could easily be understood by branches of government that are unfamiliar with – or perhaps unsympathetic – to the budgetary woes of the Judiciary.

A Constitutional Convention would provide an opportunity to look afresh at the process through which the Judiciary Budget is determined in New York and to help ensure that the Judiciary receives adequate funds to support its operations and to promote access to justice in this State.[226]

In 2011 and thereafter, similar issues affected New York's Judiciary after the court budget was cut. *See* March 30, 2012 New York State Bar Association Executive Committee Minutes (noting efforts to inform legislators of the "negative impact on individuals and businesses that are seeking nothing more from the court system than a fair and timely resolution to their legal problems"). *See also* New York County Lawyers' Association Task Force on Judicial Budget Cuts, "Preliminary Report on the Effect of Judicial Budget Cuts on New York State Courts," *available at* https://www.nycla.org/siteFiles/Publications/Publications1475_0.pdf (highlighting the delays, increased workloads, and reductions in service that were visible months after the Judiciary budget cuts were made in 2011).

[225] This National Center for State Courts' report was intended to set forth important lessons about: a) how the public views the courts and their funding needs; and b) how to tell the story of the courts, and why they matter to the citizenry at large. *See* http://www.justiceatstake.org/media/cms/Funding_Justice_Online2012_D28F63CA32368.pdf.

[226] Each year the State Bar President appears before the Legislature at hearings on the court budget, frequently to support the budget allocations requested by the Chief Judge.

K. Commission on Judicial Conduct

As a result of the 1977 court reforms, the State Constitution provides for a Commission on Judicial Conduct which is authorized 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."[227] Given the need to safeguard the appearance of fairness and justice in the court system, a well-functioning Commission that reviews these sensitive matters helps assure our State's citizenry that the judicial process is sound. But any such safeguard for the judicial system ought to be careful not to encroach on the independence of the judicial process. Moreover, unless there is a fair process for investigating, reviewing and adjudicating judicial disciplinary complaints, the work of the Commission could carry the potential to do more harm than good.

In 2009, the Task Force on Judicial Independence of the New York County Lawyers' Association ("NYCLA") issued a report on the Commission on Judicial Conduct.[228] This report assessed the Commission's operations and made various suggestions and recommendations which were intended to preserve judicial independence while maintaining a robust oversight function for judicial discipline. These recommendations included: a) establishing and maintaining a "firewall" between the prosecutorial and adjudicative roles of the Commission; b) giving respondent judges in the disciplinary process notice of Commission inquiries; c) affording respondent judges subpoena power so they can compel the production of documents and witnesses in matters before the Commission; d) strengthening confidentiality protections for the Commission's process; and e) modifying the

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[227] N.Y. Const. art. VI, § 22(a) (2015).

[228] *See* New York County Lawyers' Association Task Force on Judicial Independence, "Report on the New York State Commission on Judicial Conduct," *available at* http://www.nycla.org/siteFiles/Publications/Publications1303_0.pdf.

Commission's standards and processes to better match the ABA's Model Rules of Judicial Disciplinary Enforcement.[229]

NYCLA's Board of Directors approved this report on September 14, 2009.[230] After the Commission agreed to adopt certain of NYCLA's recommendations, but not others,[231] the State Bar's House of Delegates adopted the remaining recommendations in January 2011.[232]

A Constitutional Convention may provide an appropriate opportunity to review the functions of the Commission on Judicial Conduct and the extent of the due process protections that are afforded to subjects of Commission investigations.[233]

L. Participation of Judges at a Constitutional Convention

While qualifications for members of a constitutional convention are to be established from time to time by the State legislature, the State Constitution specifically permits judges to serve as members of a

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[229] ABA Model Rules of Judicial Disciplinary Enforcement (1994), *available at* http://www.americanbar.org/groups/professional_responsibility/model_rules_judicial_disciplinary_enforcement.html.

[230] *See* New York County Lawyers' Association Task Force on Judicial Independence, "Report on the New York State Commission on Judicial Conduct," *available at* http://www.nycla.org/siteFiles/Publications/Publications1303_0.pdf.

[231] *See generally* 22 N.Y.C.R.R. 7000.1 *et seq*.

[232] *See* January 28, 2011 New York State Bar Association House of Delegates Minutes (approving NYCLA's recommendations regarding sanctions, liability insurance for judges, training for referees, separation of Commission functions, and certain recommendations on notice and discovery in the Commission process). *See also* "NYCLA Recommendations Regarding Commission on Judicial Conduct Adopted by NYSBA," https://www.nycla.org/siteFiles/Publications/Publications1423_0.pdf.

[233] Additionally, the State Constitution still references convening a Court on the Judiciary (N.Y. Const. art. VI, § 22(j) (2015)) and the availability of a Court for the Trial of Impeachments within the Legislature (N.Y. Const. art. VI, § 24 (2015)). Should a Constitutional Convention be called, any potential redundancy in these provisions could be cleared up as well. *See* Section III.M, *infra*.

constitutional convention.[234] Nonetheless, some have raised concerns that earlier conventions encountered potential conflict issues when judges served as convention delegates while also serving on the bench.[235]

Recently, on June 16, 2016, the Unified Court System's Advisory Committee on Judicial Ethics issued an opinion addressing a judge's potential activities around a constitutional convention.[236] That Advisory Committee recognized that the State Constitution specifically permits judges to seek election to serve as a delegate. The Committee also drew attention to the seeming inconsistency between: a) permitting judges to engage in "publicly discuss[ing] the need for judicial reform and a constitutional convention, as these are matters relating to the law, the legal system or the administration of justice", while b) prohibiting judges from discussing anything that would "cast reasonable doubt on the judge's capacity to act

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[234] N.Y. Const. art. VI, § 20(b)(1) (2015).

[235] *See, e.g.*, The Delegate Selection Process: Interim Report of the Temporary New York State Commission on Constitutional Revision (March 1994) (quoting concurring statement of commission member Hon. Malcolm Wilson that "there is no logical basis for permitting judges to serve as Convention delegates"), reprinted in DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 434 (Gerald Benjamin & Hendrik N. Dullea eds., 1997); William J. van den Heuvel, Reflections on Constitutional Conventions, 40 N.Y.S.B.J. 261, 266 (June 1968) ("No single group of delegates [at the 1967 Convention] came in for more criticism both from the public and from themselves than did the judges. The public image of the judiciary is of a non-partisan branch of government delicately weighing the needs of justice and rendering those impartial decisions far removed from political pressures and interests. Suddenly these robed men become gladiators in a political arena-and even worse, they seem to enjoy it. And then comes the debate on the judiciary article. Instead of divorcing themselves from the committee in which the article is drafted, they dominate it; and in the public debate, all of the rivalries and resentments which are hidden by the heavy curtains of the courts are suddenly revealed."). Concerns have also been raised regarding the potential receipt of dual salaries both as a convention delegate and as a judicial officer.

[236] Opinion 16-94 (June 16, 2016). *See also* Opinion 96-146 (Mar. 19, 1997) (confirming that a judge can serve as a delegate to a State constitutional convention).

impartially as a judge, detract from the dignity of judicial office, or otherwise interfere with the proper performance of judicial duties."[237]

Some discussion of the participation by judges in future conventions would be ripe for consideration if a Constitutional Convention were to be approved in 2017.

M. Length, Style, and Outdated Portions of the Judiciary Article

The text of the Judiciary Article alone comprises approximately 16,000 words – representing almost one-third of the State Constitution as a whole. The City Bar's 1997 Report of the Task Force on the New York State Constitutional Convention called the article "substantially more comprehensive and detailed than any other part of the Constitution."[238]

Some provisions of the Judiciary Article appear to be outdated or potentially inappropriate for a modern court environment. For example, Section 32 of Article VI mandates that, when called on to make child placements, courts are to place children in "an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child." Other provisions appear to be anachronistic. As an example, the number of Judicial Districts provided for in the Judiciary Article is less than the number actually specified by the Legislature pursuant to its authority to make such changes; and Article VI still references a Court

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[237] Opinion 16-94 (June 16, 2016). This is different from judges being involved in a public group that develops proposals for how to change the State Constitution prior to a convention being called; the language of this ethics opinion language suggests that judges are prohibited from engaging in this type of activity. Opinion 16-60 (May 5, 2016).

[238] New York City Bar Association, Report of the Task Force on the New York State Constitutional Convention (dated June 1997), at 595, *available at* http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf. *See also* Peter J. Galie & Christopher Bopst, "Constitutional 'Stuff': House Cleaning the New York Constitution – Part I," 77 Alb. L. Rev. 1385, 1424 (2013 & 2014) ("[T]here are numerous provisions of the article that can either be removed or truncated without significantly changing the substantive nature of the article.").

for the Trial of Impeachments which includes judges and a Court on the Judiciary, despite the creation of the Commission on Judicial Conduct 40 years ago.[239]

In addition, the Judiciary Article contains minute details – such as the location of particular courts and the numbers of judges assigned to them. Those details could be more appropriate subjects of legislative action, thereby permitting such provisions to be updated more readily.

In the event that a Convention is called, a re-drafting effort addressed to the Judiciary Article would be appropriate, with a goal of simplifying and updating Article VI. This sort of re-drafting could prove to be beneficial for the Judiciary, users of the court system and the bar.[240]

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[239] N.Y. Const. art. VI, §§ 22(j), 24 (2015).

[240] If delegates to a Convention were to decide to make certain other changes to the Constitution noted in this Report, it may of necessity result in simplifying and shortening Article VI before separate attention is paid to the length and language of the Article's remaining provisions.

IV. CONCLUSION

At present, the Judiciary Article represents an unnecessarily large and complex portion of the State Constitution. Article VI governs a multitude of critical aspects of New York's legal system – certain of which are ripe for discussion if a Constitutional Convention is called in 2017. Moreover, other issues that are central to the functioning of a statewide court system are not adequately addressed by the existing Judiciary Article. Certain other issues affecting the Judiciary are currently treated at the constitutional level when they might better be addressed by the Legislature, from time to time as may be needed.

A theme that is common to many of the most significant reform issues concerning Article VI, is the opportunity that a Convention would provide to reorganize, modernize and simplify the constitutional structure of the Unified Court System. If the voters were to decide in 2017 to call a Constitutional Convention, various other changes to Article VI could be considered in order to improve the Judiciary in New York, and those reforms could be tied to an overall court restructuring effort.

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