Report of the Task Force on the New York State Constitutional Convention

The New York State Constitution requires that every twenty years the voters of the State decide by public referendum whether to convene a State constitutional convention. The next occasion for this critically important decision will be November 4, 1997. In preparation for the referendum, the Association has analyzed the substantive provisions of the State Constitution and concluded that important areas genuinely need change. We have concluded, however, that for a variety of reasons a constitutional convention held under the present circumstances would be ill-equipped to consider and adopt the structural changes that most concern us, and might ultimately do more harm than good. Accordingly, we recommend a "no" vote in the upcoming constitutional convention referendum and urge the creation of interdisciplinary panels to develop specific proposals for constitutional reform for consideration by the Legislature or a future constitutional convention.

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protections, and we would oppose any efforts to weaken any of these provisions. The few substantive changes we would recommend if a convention is called—incorporating an express right to privacy, deletion of the criminal libel provision of section 8, broadening the categories of persons protected by the nondiscrimination provision of section 11 and deletion of Article VI, section 32 requiring consideration of religion in adoptions—are insufficient, in and of themselves, to risk opening the Bill of Rights to a constitutional convention.

A. Due Process

B. Right to Privacy

C. Equal Protection and Non-Discrimination

D. Civil Jury Trial

E. Freedom of Religion

F. Freedom of Speech and the Press

G. Assembly and Petition

H. Divorce

I. Lotteries

J. Wrongful Death

K. Common Law

L. Rights of Labor and Worker's Compensation

M. Right to Bear Arms

N. Religion as a Factor in Adoption

Chapter 3: CRIMINAL JUSTICE

Issues relating to criminal justice currently receive significant public attention, and numerous proposals for reform have been suggested. In our view, existing constitutional provisions are generally adequate, and the risk of adverse change to existing

provisions in response to political pressure outweighs any potential gain. Certain changes, including a constitutional amendment to permit substitution or dismissal of a deliberating juror under certain circumstances, and action by the Legislature or Executive to improve efficiency in the administration of criminal justice statewide, should be considered but do not warrant a constitutional convention. We would oppose any effort to incorporate any provision concerning the death penalty into the Constitution.

A. Unanimous Jury Verdicts

B. Juries of Less than Twelve (or Six)

C. Grand Jury Presentations

D. Preventive Detention

E. Availability of Parole and Probation

F. Search and Seizure and the Exclusionary Rule

G. Centralized Responsibility for Criminal Justice

H. Death Penalty

Chapter 4: ELECTIONS

Important constitutional and statutory changes are needed in the law governing elections. We support elimination of the constitutional requirement of bipartisan election boards, substitution of the term "domicile" for "residence" in the constitutional residency requirement to conform to current practice, and various other changes aimed at increasing the Legislature's control over election administration. However, these changes are best accomplished by the Legislature itself and do not warrant calling a constitutional convention.

A. Election Administration

B. Domicile

C. Other Recommendations

D. Rejection of Disqualification for Mental Incompetency

Chapter 5: THE LEGISLATURE

Gridlock in the Legislature has raised questions concerning the adequacy of the constitutional provisions governing the structure and function of the Legislature. We support constitutional amendments in two areas: to mandate presentment of new legislation to the Governor for signature within a reasonable time after passage, and creation of an independent commission with responsibility for periodic reapportionment of legislative districts. These changes could be accomplished by the Legislature and do not warrant a constitutional convention. Matters relating to the internal procedures of the Legislature are generally best left to legislative resolution.

A. Measures Relating to the Structure of the Legislature

B. Recall and Term Limits

C. Measures Governing the Enactment of Legislation Generally
   1. Presentment
   2. Legislative Debate, Discharge and Starring

D. Measures Governing the Enactment of Politically Sensitive Legislation
   1. Legislative Salaries
   2. Reapportionment

Chapter 6: THE EXECUTIVE BRANCH

Certain aspects of the Executive Article should be updated. We support adoption of clear provisions for gubernatorial succession, elimination of a Governor's mere "absence from the State" as authority for the Lieutenant Governor to "act as Governor," and clarification of the procedure for filling a vacancy in the office of Lieutenant Governor. However, these changes are not of sufficient urgency to warrant a constitutional convention.

A. Gubernatorial Succession
   1. Temporary Disability
   2. Death or Removal from Office

B. Role of the Lieutenant Governor

C. Joint Nomination of Governor and Lieutenant Governor

D. Filling a Vacancy in the Office of Lieutenant Governor

E. Executive Term Limits

Chapter 7: STATE OFFICERS AND CIVIL DEPARTMENTS

Certain aspects of the constitutional provisions governing public officers and civil departments should be updated. We support clarification of the procedures governing the filling of vacancies in the offices of Comptroller and Attorney General, and elimination of the arbitrary limit of twenty civil departments should be considered. However, these changes are not of sufficient urgency to warrant a constitutional convention.

A. Selection of Comptroller and Attorney General

B. Filling Vacancies in the Offices of Comptroller and Attorney General

C. Limitation on the Number of Departments

Chapter 8: THE JUDICIARY

The Association has long supported merit selection of judges, merger of trial courts of record into a single court, creation of a Fifth Department of the Appellate Division, increasing the monetary jurisdiction of the Civil and District Courts, according Housing Court judges the same status as Civil Court judges, improvement of the procedures for certification and removal of judges, and simplification of the relevant constitutional text, all of which would require comprehensive constitutional reform of the Judiciary Article. The need for constitutional revision in this area is great, and there is little risk of adverse change. Viewed alone, we may have supported a constitutional convention as a method by which needed court reform could have been achieved. Weighed against the risks to other constitutional provisions, however, the need for amendment in this Article is not sufficient to justify calling a constitutional convention.

A. Judicial Selection

B. Merger of Trial Courts

C. Issues with Respect to Particular Courts
1. Appellate Division—The Fifth Department
2. Monetary Jurisdiction of Civil and District Courts
3. Housing Court Judges

D. Other Issues
1. Certification of All Judges
2. Provisions for the Removal of Judges
3. Simplify Article VI

Chapter 9: STATE AND LOCAL FINANCE AND TAXATION

Current constitutional provisions governing State and local finance and taxation are outdated and inadequate, putting New York and its localities at a distinct economic disadvantage. Despite the need for comprehensive reform to these provisions, in the absence of careful study of this complex issue and recommendations for reform, a constitutional convention would have little hope of achieving satisfactory change in this area. We support the creation of a constitutional commission to study these issues and make recommendations for reform by the Legislature or a future constitutional convention.

A. State Budget Process
1. Budget Timetable
2. Budget Balance
3. Long-Range Budget Planning

B. State Taxes and Debt
1. State Tax Issues
2. State Debt Issues

C. Local Taxes and Debt
1. Local Tax Issues
2. Local Debt Issues

D. The 1979 Report of the Committee on Municipal Affairs

Chapter 10: HOME RULE AND REGIONALIZATION

The constitutional provisions governing home rule for local governments are generally regarded as inadequate to regulate effectively the delicate balance between statewide and local interests. Given the state of the present constitutional scheme, there is little risk that a constitutional convention could do worse. However, constitutional reform in this area requires careful study and thoughtful planning, and should not be undertaken without adequate preparation by a constitutional commission to study these issues and make recommendations for reform by the Legislature or a future constitutional convention.

Chapter 11: EDUCATION

The Education Article adequately provides for statewide oversight of public education by a Board of Regents and prohibition of public funding for religious education. There is no need for constitutional change pending the outcome of litigation over the implementation of the constitutional language to effect school finance reform. Moreover, because of the highly politicized nature of the public debate over education, there is a serious risk of adverse change by a constitutional convention.

A. Education Clause

B. The Board of Regents
1. Regents' Authority
2. Appointment of Commissioner of Education

C. The Blaine Amendment

Chapter 12: ENVIRONMENT

The Conservation Article contains strong guarantees for environmental protection that would undoubtedly be at risk if opened to amendment by a constitutional convention. There should be no change to existing constitutional provisions.

SUMMARY AND RECOMMENDATIONS

The New York State Constitution requires a public referendum every twenty years to put before the voters the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] On November 4, 1997, New Yorkers will be asked once again whether it is time to call a State constitutional convention.

There have been nine constitutional conventions in New York's history, held in 1777, 1801, 1821, 1846, 1867, 1894, 1915, 1938 and 1967.[2] Milestones in New York's constitutional history have been achieved by constitutional conventions.[3] The 1777 Convention, convened during the Revolutionary War, yielded New York's first Constitution, a document that predates the United States Constitution by a decade. The Convention of 1801 was called for the limited purposes of increasing the size of the Legislature and resolving a constitutional crisis concerning the power to appoint government officials. In 1821, the Convention drafted a new Constitution that added a Bill of Rights, reorganized the judiciary, made thousands of State offices elective and provided for substantial reorganization of the three branches of government. The impetus for the Convention of 1846 was to rein in legislative power and reorganize government structure in a new Constitution that was ratified, but a separate proposal for equal suffrage for African Americans was rejected. The 1867 Convention proposed a new judiciary article, which was ratified, but other proposed amendments, including additions to the Bill of Rights and provisions for municipal home rule, were rejected. The Constitution in effect today was drafted by the Convention of 1894, which incorporated further additions to the Bill of Rights, legislative reapportionment, education and conservation. The 1915 Convention considered issues of home rule, women's suffrage and reorganization of the judicial and executive branches; its proposals, though rejected by the electorate, were largely adopted in the years that followed. The 1938 Convention, called in the wake of the Great Depression, submitted proposed amendments governing low-income housing, the rights of labor, State funding for social welfare purposes and local debt for New York City, which were ratified; other proposals concerning reapportionment, proportional representation and the judiciary were rejected.

[1] N.Y. Const. art. XIX, § 2.

[2] Three conventions, in 1867, 1894 and 1938, were called pursuant to the automatic referendum; the Conventions of 1821, 1846, 1915 and 1967 were the result of a special referendum posed by the Legislature. The constitutional convention referendum requirement was added to the State Constitution in 1846.

[3] *See generally,* Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* (1996) (hereafter, "*Ordered Liberty*").

The most recent constitutional convention, held in 1967, is remembered as a failure doomed by partisan politics and voter apathy.[4] The Convention drafted a proposed new constitution which repealed the constitutional prohibition against State funding for religious educational institutions, made substantial revisions concerning reapportionment, the judiciary, the environment, home rule and State and local finance and expanded the Bill of Rights. The proposed constitution, which was presented to the electorate as a single package, was soundly defeated at the polls. The last constitutional convention referendum, which appeared on the ballot in November 1977 pursuant to the 20-year referendum requirement, was decisively defeated.

If the upcoming referendum approves a convention, 198 convention delegates would be elected in November 1998.[5] The convention would open in Albany in April 1999 and continue until its work is completed. Proposed constitutional revisions would be submitted to the electorate for ratification as early as November 1999, to become effective, if approved, on January 1, 2000.

In anticipation of the 1997 constitutional convention referendum, former Governor Mario Cuomo created the Temporary New York State Commission on Constitutional Revision, chaired by Peter C. Goldmark, Jr., (the "Goldmark Commission") to evaluate the processes for convening, staffing, holding and acting on the recommendations of a State constitutional convention and to develop a broad-based agenda of issues and concerns that might be considered by a convention. In February 1995, the Goldmark Commission issued its Final Report,[6] identifying State fiscal integrity, State and local relations, education and public safety as areas of particular public concern and calling upon the Legislature and the Governor to take immediate steps to create "Action Panels" of persons of stature and integrity to develop integrated proposals for reform in these areas.[7] A majority of the Goldmark Commission concluded that the success of Action Panels would preclude the need for a constitutional convention, but without immediate and decisive action to achieve wide-ranging re-

[4] *See* League of Women Voters of New York State, *Seeds of Failure: A Political Review of New York State's 1967 Constitutional Convention* (1973) (hereafter, *"Seeds of Failure"*).

[5] Three delegates would be elected from each Senate district, and fifteen delegates would be elected at large by statewide election. N.Y. Const. art. XIX, § 2.

[6] The Goldmark Commission published three reports: *The Delegate Selection Process: The Interim Report of the Temporary New York State Commission on Constitutional Revision* (Mar. 1994) ("Interim Report"); *The New York State Constitution: A Briefing Book* (Mar. 1994) ("Briefing Book"); and *Effective Government Now for the New Century: The Final Report of the Temporary New York State Commission on Constitutional Revision* (Feb. 1995) ("Final Report").

[7] Goldmark Commission Final Report at 12-21.

form, they recommended support for a convention.[8] We supported the Action Panel proposal and urged the Governor and the Legislature to create Action Panels without delay to assure that their efforts would benefit New Yorkers in deciding whether to call a constitutional convention. *See* "Statement in Support of Immediate Appointment of Action Panels, 50 *The Record of the Association of the Bar of the City of New York* 745 (1995) (hereafter, *The Record*). During the past two years there has been no response.

In 1993, the Association of the Bar of the City of New York formed the Task Force on the New York State Constitutional Convention to consider the advisability of calling a constitutional convention in 1997. The Task Force, an ad hoc committee drawn from a cross-section of the bench, bar and legal academic community, was charged with making a recommendation concerning the upcoming referendum based on a substantive assessment of the need for constitutional reform in current provisions of the State Constitution, the likelihood that a constitutional convention could accomplish needed reform and the risk of adverse change.

For the reasons discussed below, a majority of the Task Force is opposed to calling a constitutional convention in the November 1997 referendum. Our recommendation to vote "no" in the upcoming referendum is based on a variety of concerns, many of which are shared by members who voted in the minority as well as the majority.

In June 1995, we issued "Countdown to the Constitutional Convention Referendum: A Report on Delegate Selection, Election and Ethics Issues," 50 *The Record* 748 (1995), a report highlighting the need for these important reforms to improve fairness in the process by which convention delegates would be elected if a convention were called.[9] That report and other reports like it have received little attention from the media, the Legislature and the Governor. In 1996, the Legislature enacted measures to relax certain ballot access requirements,[10] which we applaud as a step in the direction of increasing access to the delegate election process beyond the ranks of political insiders. However, the more essential reforms—a system of limited voting, individual election of at-large delegates and a prohibition against receiving double compensation—have not been addressed by the Legislature.

The failure of the Legislature to reform the process by which convention delegates would be elected has created a fundamental impediment to the electorate's ability to elect a fairly representative body of delegates. The current process—which could have been improved by constitutional

[8] Goldmark Commission Final Report at 22 and prefatory letter from Peter C. Goldmark, Jr., to Governor George E. Pataki.

[9] An updated version of that report is reprinted as Chapter I of this Report.

[10] *See* L. 1996, ch. 709.

amendment and legislation had the Legislature acted in time—dilutes minority representation and favors political incumbents. A convention organized under current delegate selection procedures would likely be controlled by the same forces that now control the political status quo.

As explained in greater detail in Chapter 1, the method by which convention delegates would be elected (three delegates from each Senate district) may dilute minority voting strength in violation of the federal Voting Rights Act by making it easier for the majority in a district to elect all three delegates. A system of limited voting, by which each voter casts one vote instead of three, would provide an opportunity for a minority in a district to elect at least one of the three delegates. If a constitutional convention were called in 1997, delegates would be elected in November 1998 under the present system, thus risking not only a lack of fair representation among delegates to the convention, but also the prospect of costly Voting Rights Act litigation. In addition, the current practice of electing fifteen delegates at-large in slates, rather than individually, unfairly deprives voters of the opportunity to evaluate each candidate. Candidates for delegate at-large should be identified by name on the ballot and elected individually rather than in party-controlled slates. Also of concern is the Legislature's failure to amend the constitutional requirement that every delegate, including sitting legislators and judges, receive a public salary equal to that paid to members of the State Assembly. Current law thus provides an inappropriate incentive—double compensation—for sitting public officials to seek election as convention delegates. In our view, these are fundamental defects that would deprive the electorate of a fairly representative delegate body and taint a constitutional convention.

The responsibility for drafting a new State Constitution should be entrusted only to a delegate body of diverse experience, integrity and genuine concern. The State Constitution is uniquely protective of individual liberties, social welfare, the environment, restrictions on the use of public money, and other precious rights. For example, the Constitution expressly decrees that the Adirondacks and the Catskills "shall be forever kept as wild forest lands,"[11] imposes a mandatory obligation on the State to provide for "the aid, care and support of the needy,"[12] and guarantees the right of all New Yorkers to "freely speak, write and publish [their] sentiments on all subjects, being responsible for the abuse of that right."[13] These and other time-honored provisions, which in many cases afford greater protection than the United States

[11] N.Y. Const. art XIV, § 1.

[12] N.Y. Const. art. XVII, § 1.

[13] N.Y. Const. art. I, § 8.

Constitution,[14] would be opened to amendment or repeal by a constitutional convention. (*See* Chapters 2, 11 and 12, *infra.*)

We are also concerned that the current political climate, characterized by a proliferation of special interests, PAC money and lobbying, promotes "single-issue" politics and could yield convention delegates elected only to pursue a narrow agenda without regard to the overall interests of the State. The death penalty, abortion, funding for religious educational institutions, term limits, welfare, property taxes and gun control, to name only a few, are divisive issues that could derail a convention.

We note, in addition, that there is currently no particular momentum for reform, no consensus concerning what reforms are needed, particularly between the Legislature and the Executive branch, and no substantive preparation for constitutional revision. A constitutional convention, charged with submitting proposals to the electorate for ratification only months after being convened, if called under these circumstances, may be more easily subjected to undue influence of special interest groups than the more deliberative process of constitutional amendment by two successive legislatures. "Single-issue" delegates hoping to advance a particular agenda may engage in "horse-trading." This atmosphere greatly enhances the risk of ill-advised or unwanted constitutional revision by a convention and is not conducive to comprehensive systemic reform.

Finally, where as here a constitutional convention would be unlikely to achieve meaningful positive reform,[15] the expense of holding a constitutional convention cannot be justified. Estimates of the cost to taxpayers of holding an election for convention delegates, paying delegates "the same compensation as shall then be annually payable to the members of the assembly" including reimbursement for travel expenses,[16] providing support staff and facilities for the constitutional convention itself, and presenting its proposals to the electorate for ratification, range from $35 million to $65 million,[17] although no official studies have been done.

[14] In an era of receding federal constitutional law, the State Constitution accords separate, and greater, protection of individual liberties. The New York State Court of Appeals, New York's highest court, has on many occasions construed provisions of the State Constitution more broadly than analogous federal provisions in important areas, including freedom of speech, due process of law, civil liberties, search and seizure and the right to counsel.

[15] We are not of the view that a constitutional convention is never a viable option for effecting meaningful constitutional reform. Rather, the present defects in the constitutional convention process, particularly the infirmities of the delegate selection process and the absence of a comprehensive plan for reform, weigh against a constitutional convention at this time.

[16] N.Y. Const. art. XIX, § 2.

[17] *See* Billy House, "Activists Building Support for Changes in N.Y. Government," Rochester Democrat and Chronicle, July 12, 1996, at 4B (reporting estimates of between $35 million to $65 million); "1997: A New New York," *Rochester Times-Union*, Sept. 9, 1996, at 6A (reporting an estimate of $50 million or more). Thirty years ago the 1967 Convention cost $6.5 million. Cathy Woodruff, "Skeptics Fault Cuomo's Vision," *Daily Gazette*, Jan. 12, 1992, at A1.

Nevertheless, there is little disagreement that the Constitution is genuinely in need of significant reform, particularly in the areas of State and local finance, home rule and court reform. (*See* Chapters 8, 9 and 10, *infra.*) The Legislature has failed, in some cases for decades and longer, to undertake needed reform. Indeed, in certain long-neglected areas, including State and local finance, home rule and even the delegate selection process, the Legislature has demonstrated no inclination to initiate change. Whether this failure is attributable to political gridlock, lack of particularized expertise or institutional self-interest, the Legislature has been incapable of addressing these important problems.[18]

Furthermore, the State Constitution is meant to be tailored to the local needs of the citizens of New York. An integral element of American federalism, a strong and responsive State Constitution is a way to keep government close to the People. The role of State government in New York has evolved tremendously over the past century since the present Constitution was drafted (in 1894) and last substantially revised (in 1938). Current problems in State governance are generally the result of a failure to amend outdated provisions to respond to changed conditions. The Constitution should be updated to address New York's current needs.[19]

We are mindful that the constitutional convention referendum is a guarantee of popular sovereignty that has been a part of our State government for more than a century. Even if a convention fails to enact the important comprehensive reforms that are needed, and if more harm than good is accomplished, the electorate ultimately retains the right to reject the proposed new constitution at the polls. These countervailing concerns are shared, to some degree, by every member of the Task Force.

On balance, we conclude that a constitutional convention should not be called by the November 1997 referendum. Without a mandate for

[18] *See* James Dao, "Constitutional Session Runs Into Opposition: Foes In Albany Unite Against Changes," *N.Y. Times*, Feb. 18, 1997 (reporting that both liberal and conservative political leaders oppose a constitutional convention). The Legislature's avoidance of delegate selection reform in particular may have been a stratagem to increase public opposition to a convention.

[19] New York City's recent debt limit crisis is a good example. Article VIII, § 4, which imposes a debt limit on localities based on market value of taxable real property, was enacted when real estate taxes were the primary, if not the only, form of local taxation. A recent drop in real estate values in New York resulted in a sudden, and unwarranted, decrease in the City's debt limit. *See* Ross Sandler, "On the Road to Ruin," *N.Y. Times* Dec. 11, 1996 at 27; Clifford J. Levy, "Cap on Borrowing Jeopardizes Plans in New York City," *N.Y. Times*, Nov. 29, 1996, at 1.

comprehensive reform, and improvement of the process by which convention delegates would be elected, we have little confidence that a constitutional convention would offer a realistic possibility of achieving satisfactory reform.

We urge the creation of a constitutional commission (or commissions) to lay the necessary groundwork for successful reform by the Legislature or a future constitutional convention. Constitutional commissions have long had a place in New York's history.[20] First implemented in the wake of the failed proposals of the 1867 Convention, constitutional commissions of eminent citizens have been created, with some regularity, by the Legislature, the Governor or both, to develop specific proposals for constitutional amendment by the Legislature.[21] In creating such a commission, the Legislature and the Executive should resolve to consider promptly the commission's recommendations.

At present, we place more confidence in the deliberative process of legislative amendment, which requires adoption of the proposed constitutional amendment by two successive legislatures. Other options for amending the Constitution should be considered (as discussed in Chapter 5, section B), including, in particular, the power to call a constitutional convention with a limited mandate to address a specified issue or article of the Constitution.[22] A limited convention call—used once in New York's history in 1801 to resolve a constitutional crisis—could focus attention on an area particularly in need of reform without the attendant risk of amendment to other parts of the Constitution or potential distraction associated with full-scale constitutional revision.

Other civic groups have studied these issues and taken a variety of positions. The League of Women Voters of New York State, as well as Citizen Action of New York, oppose a constitutional convention in 1997 primarily on account of the Legislature's failure to reform the delegate selection process.[23] On the other hand, former Governor Mario Cuomo publicly supports a convention as an extraordinary opportunity for change

[20] *See* Galie, *Ordered Liberty* at 137-57; Goldmark Commission Briefing Book at 73-79.

[21] Constitutional commissions were established in 1872, 1875, 1890, 1915, 1921, 1936, 1956, 1965, and most recently, the Goldmark Commission in 1993. The Goldmark Commission disbanded in 1995 after issuing its Final Report recommending the creation of Action Panels to develop specific proposals for reform.

[22] This proposal may require amendment of Article XIX, section 2, which authorizes a convention referendum to "revise *the constitution* and amend the same" (emphasis added).

[23] *See* League of Women Voters of New York State, State Board Report (January 1997); Citizen Action of New York, Board Resolution on the Constitutional Convention Referendum (Dec. 13, 1996).

in a gridlocked political system.[24] The Goldmark Commission's conditional recommendation in favor of a convention—contingent upon a failure by the Legislature and the Governor to take prompt action in the direction of needed reform—is now unconditional.[25] Common Cause of New York will remain neutral with respect to the convention call, but has urged reform in the delegate selection process and will serve as a "watchdog" during the delegate elections, if a convention is called.[26] Numerous other groups, including the New York State Bar Association, Queens County Bar Association, New York State Trial Lawyers Association, Citizens' Union, Anti-Defamation League and City Club of New York, to name only a few, also have taken an active interest in the issues raised by the upcoming constitutional convention referendum.

We recognize that, irrespective of our recommendation, a constitutional convention may nevertheless be called in the November 1997 referendum. In the Chapters that follow, we have analyzed the Articles of the State Constitution and highlighted proposals for reform that we support whether or not a convention is called.[27]

[24] *See* Ed Shanahan, "Cuomo Crusading to Rewrite New York State Constitution," *N.Y. Observer*, Feb. 24, 1997.

[25] Goldmark Commission Final Report at 22.

[26] *See* Ed Shanahan, *supra* n.24; James Dao, *supra* n.18.

[27] We are greatly indebted to other Association Committees, upon whose expertise the Task Force relied in analyzing the need for substantive constitutional reform. The following Committees prepared research reports and provided valuable guidance to the Task Force over the past three years: AIDS, Banking Law, Civil Rights, Communications and Media Law, Condemnation and Tax Certiorari, Corporation Law, Criminal Advocacy, Council on Children, Council on Criminal Justice, Council on Judicial Administration, Council on Taxation, Criminal Law, Education and the Law, Election Law, Environmental Law, Government Counsel, Housing and Urban Development, Labor and Employment Law, Land Use Planning and Zoning, Legal Issues Affecting People with Disabilities, Legal Problems of the Mentally Ill, Municipal Affairs, Project on the Homeless, Real Property, Sex and Law, Social Welfare Law, State and Local Taxation, State Courts of Superior Jurisdiction, State Legislation and Transportation. Their reports, which discuss in greater detail the issues addressed in this Report and the constitutional reforms we would support if a constitutional convention is called, are available through the Association.

We are also indebted to our predecessor, the Association's 1967 Special Committee on the Constitutional Convention, which was chaired by Roswell B. Perkins, who also serves as a member of the Task Force. The Special Committee, which was formed to make recommendations concerning proposed constitutional revision in the wake of the November 1965 constitutional convention call, left a valuable legacy of sound proposals for reform which have been of great assistance to the Task Force in many of the Chapters that follow. *See* Reports of the Special Committee on the Constitutional Convention, *Constitutional Convention of 1967* (1967).

Finally, we acknowledge the leadership of Michael A. Cardozo, who chaired the Task Force from its inception until his installation as President of this Association in May 1996. Many others, including our interns, Ariella Reback and Ami Mehta, provided invaluable assistance, support and enthusiasm.

Chapter 1

DELEGATE SELECTION

The Legislature's failure to enact needed reforms to improve fairness in the process by which convention delegates would be elected if a convention is called weighs heavily against calling a constitutional convention. We strongly urge constitutional amendment and new legislation to eliminate dual public salaries for sitting public officials who serve as delegates, relaxation of certain ballot access requirements, implementation of a system of limited voting to increase minority representation at a convention and elimination of slate voting for 15 delegates elected at large in statewide election.

* * *

The New York State Constitution requires that every twenty years the voters of the State vote by referendum whether to convene a constitutional convention. The next occasion for this critically important decision will occur on November 4, 1997, and voters should be in a position to make an informed choice on that question. Not only do voters need to consider the range of current problems that would ultimately be addressed by a convention in the event that one is held, but as a threshold matter it must be decided how the delegates to such a convention would be selected.

Delegate selection rules govern who would be eligible to serve as a delegate, how delegates would be elected and what incentives would be in place to encourage highly qualified candidates, considerations that are essential in the decision whether to call a convention. As discussed below, current rules are problematic and would require important revisions before holding a delegate election. The flaws in the delegate selection process—which could yield a body of convention delegates who do not fairly or adequately represent New York's citizens—weigh heavily against calling a constitutional convention at this time.

We first called upon the Legislature in June 1995 to make the necessary changes[28] and, had the Legislature responded promptly, improvements could have been in place before the 1997 referendum. It is now too late for

[28] *See,* Task Force on the New York State Constitutional Convention, "Countdown to the Constitutional Convention Referendum: A Report on Delegate Selection, Election and Ethics Issues," 50 *The Record* 748 (1995).

our recommendations to be implemented before the referendum vote. We support the measures discussed in this Chapter for future delegate elections, and continue to urge their immediate implementation whether or not a constitutional convention is called.

A. Prohibition of Dual Compensation[29]

Dual compensation of delegates who are also public officials is inappropriate. The Legislature should therefore act to limit:

(1) by constitutional amendment, the combined compensation for legislators and judges;

(2) by new legislation, the salaries of full-time government employees who are delegates, to the higher of the two salaries;

(3) by new legislation, the salaries of full-time government employees who are convention staff to the salary of the staffer's principal position; and

(4) by amendment to existing pension statutes, pension benefits for delegates and staff who are public employees.

A State constitutional convention should not become an opportunity for individuals who are already on the public payroll to enhance their salaries or pensions. Yet, in the absence of corrective measures, elected and appointed public officials may be motivated, or perceived to be motivated, to serve as delegates for precisely that reason.

Article XIX, section 2 provides that a delegate to the convention "shall receive for his services the same compensation as shall then be annually payable to the members of the assembly." Members of the Assembly (and the State Senate) currently earn $57,500 per year. Thus, legislators elected as delegates would double their salaries to $114,000 per year. State Supreme Court Justices now earn approximately $114,000 per year; a Justice elected as convention delegate would earn $171,000 the year of the convention—more than the Governor or any other State official. Similarly, high-ranking appointed officials such as commissioners of State or local government would earn far more than their present salaries.

[29] A related issue is that concerning dual office holding. We address this in section D because our conclusions flow from the discussions in the first three sections of this Chapter.

At the last State constitutional convention, held in 1967, the delegates included twenty-four judges and thirteen legislators. These two groups together accounted for nearly one-fifth of all delegates. In addition to earning dual salaries, those who were nearing retirement enhanced their pensions significantly: pensions are based upon total earnings in the years just before retirement, and State pension law explicitly includes compensation for service at a constitutional convention as a basis for calculating pensions.[30]

We believe that the perception of public officials using the convention to engage in "double dipping" would significantly undermine public confidence in the integrity of the process. The motivation of public officials who seek election as delegates would be subject to question—especially in view of the salary levels involved.

The State Constitution now provides that neither legislative nor judicial salaries may be reduced during the term of office (N.Y. Const. art. III, § 6; art. VI, § 25). We do not propose amending those provisions, which are grounded in sound public policy. However, the provision guaranteeing delegates the same salary as Assembly members (N.Y. Const. art. XIX, § 2) should be amended to limit elected and appointed officials to the salaries for the positions to which they were elected or appointed. (Officials earning less than the $57,500 per year salary of an Assembly member might be entitled to an Assembly member's salary, provided it is paid in lieu of their present compensation and not as a second government salary.)

The Goldmark Commission's Final Report (at 23) notes that the Chief Judge of the State of New York may have the power to prevent a sitting judge from collecting a second State salary as a convention delegate. Similarly, State and local laws could be enacted, and State and local administrative regulations adopted, governing compensation for dual service by appointed State officials (*e.g.*, commissioners, members of various boards, staff of executive and legislative officials, etc.) and by elected and appointed local officials. *See, e.g.*, N.Y.C. Charter § 1115 (prohibiting City office holders from holding any other public office except, where authorized by the Mayor, with respect to an office for which no salary is provided). The Legislature could also amend the pension laws to prohibit use of a convention delegate

[30] Article V, section 7 provides that the benefits of membership in any State or local pension system "shall not be diminished or impaired." Several sections of the Retirement and Social Security Law were amended to cover delegates to the 1938 and 1967 Constitutional Conventions by specifically including their service as "government service" when they were delegates. *See* Retire. & Soc. Sec. Law § 2 (definition of "annual compensation"); § 44 (with respect to 1967 delegates in local pension systems); § 216(a) (regarding re-employment of 1967 delegates); § 302(12)(a)(1) (with respect to members of police and fire pension systems).

(or staff) salary to enhance a pension basis where an elected or appointed official is already drawing a public salary. These and similar steps should be carefully considered.

However, in view of the State constitutional prohibition against reduction of legislators' salaries, "double-dipping" by the legislators themselves probably cannot be eliminated without a constitutional amendment. Unless the Legislature approves such an amendment and presents it to the voters, any convention could be dominated by legislators whose motivation in seeking election as delegates would be subject to considerable public skepticism. A constitutional amendment is therefore imperative.

We note that the Goldmark Commission recommended a similar constitutional amendment in its Interim Report (at 27). Since State constitutional amendments must be passed by two successive separately elected Legislatures before submission to the voters, the Goldmark Commission urged first passage in 1994 to enable second passage by the 1995 Legislature and a referendum in November 1995—prior to the 1997 referendum on the convention itself. Unfortunately, the Legislature failed to act on this recommendation.

Even if a proposed amendment is passed by the present Legislature, it would have to be passed again by a separately elected Legislature and could not be submitted to the voters until November 1999 at the earliest. The electorate will not have an opportunity to vote on the question until after it decides whether to authorize the convention, and indeed not until after the convention, if held, completes its work. Our recommendation, originally made in June 1995 in an effort to spur legislative action in time for the upcoming referendum, is now only a blueprint for future conventions.

The Legislature's inaction on this "double dipping" prohibition is regrettable. Legislative action on this issue would be a significant good government measure that would contribute to ensuring the integrity of the convention process. We therefore recommend that such a measure nevertheless receive first passage during the current legislative session.

B. Ballot Access and Campaign Finance

We endorse recommendations previously made by the Association's Election Law Committee regarding improved access to the primary ballot, primarily by reducing the number of signatures required to run for delegate and eliminating or modifying existing rules governing petitions and signature invalidation. We also urge adoption of reasonable limits on the amount any individual can contribute to any candidate for delegate.

In 1986, the Association's Special Committee on Election Law recommended a number of measures to ease access to the primary ballot.[31] For State Senate districts—the basic unit of election for constitutional convention delegates—the Committee recommended reducing the required number of valid signatures from 1,000 to 500 (and reducing the alternative minimum, based upon a percentage of the enrolled party voters in the district, from 5% to 3%). The Committee also recommended several other important ballot access measures, *e.g.*, permitting registered voters to sign more than one designating petition for the same office, eliminating various rules invalidating signatures or entire petition pages over minor omissions or errors, and providing for a "grace period" allowing certain technical mistakes to be corrected.

We strongly urge enactment of these measures by the Legislature in time for the election of convention delegates in 1998. The Association has long been supportive of Election Law reform, which is in fact long overdue for all elective offices. But nowhere is the present state of the law more objectionable than with respect to elections for delegate to a State constitutional convention—elections in which citizens without political experience should be encouraged to participate.

We also recommend reducing the number of signatures required for independent candidates for delegate in the general election from 3,000[32] to 1,500 (and the alternative minimum, based upon a percentage of votes cast in the State Senate district in the last gubernatorial election, from 5%[33] to 3%). Similarly, the petitioning requirements for election to the fifteen statewide at-large positions should be reduced: for statewide primaries, the number of signatures should be reduced from 15,000[34] to 5,000 (or 3% of the enrolled party voters in the State); for independent candidacies in general elections, it should be reduced from 15,000[35] to 5,000 signatures. The statewide petitioning requirement of at least 100 valid signatures[36] in half the State's congressional districts should also be eliminated.

We do not recommend creation of a public campaign finance system for convention delegate elections only. Such a system would be costly and difficult to administer for a single election in a state that has no state-wide public finance campaign system at present. However, the Legislature should give serious consideration to development of a statewide voters' guide for primary and general delegate elections, building upon the successful model devised by the New York City Campaign Finance Board. In the interest of eliminating unfair disadvantage to candidates outside the political mainstream, we also urge adoption of reasonable limits on the amount an individual or organization may contribute to a candidate for delegate.

[31] *See* Report of the Special Committee on Election Law, 41 *The Record* 710 (1986).

[32] Elec. Law § 6-142(2)(f).

[33] Elec. Law § 6-136(1).

[34] *Id.*

[35] Elec. Law § 6-142(1).

[36] *Id.*

C. Voting Rights Issues

> We concur with the Goldmark Commission's recommendation that a system should be enacted allowing for limited voting for delegates, under which each voter would be entitled to vote for one candidate per Senate District instead of three. The number of delegates elected on a statewide (at-large) basis should remain fifteen, but there should be elimination of slate-voting for these positions, and the names of all fifteen candidates nominated by each party should appear on voting machines.

1. Delegates Elected from State Senate Districts

Most of the delegates to a State constitutional convention would be elected from the sixty-one State Senate districts. Article XIX, section 2 provides, in relevant part, that "the electors of every senate district in the state . . . shall elect three delegates . . . ." Thus, the Senate districts, which are single-member districts for purposes of Senate elections, are converted into multi-member districts for purposes of delegate elections. Historically, each voter has been entitled to vote for three delegates per district.

Although multi-member districts are uncommon in New York State, they are quite common in other jurisdictions and have been the subject of considerable controversy. As noted by the Goldmark Commission (Interim Report at 5), "[m]ulti-member districts are red flags in the voting rights environment and they have been successfully challenged in a large number of voting rights cases." Such districts are suspect under the Federal Voting Rights Act (section 2) because a majority, voting as a bloc, would be able to outvote a minority for all seats even though smaller districts might have produced one or more winners supported by minority voters. In New York, there may well be some State Senate districts in which a candidate favored by African American, Latino or Asian American voters would be prevented from winning because the multi-member electoral system would enable a majority to outvote minorities for all three seats.

Any change in the use of State Senate districts for delegate selection, such as switching to Assembly districts as the basic unit of delegate election or subdividing Senate districts, would require a constitutional amendment. However, as noted by the Goldmark Commission (Interim Report at 9), there is a change that in all likelihood can be enacted by statute: a system of limited voting, under which each voter would be entitled to vote for no more than one candidate instead of three per State Senate district. Such a system enhances the opportunities of racial and language minorities to elect candidates of their choice in multi-member districts, and has been accepted as a remedy in voting rights cases invalidating multi-member districts.[37] A system of limited voting is especially easy for voters to understand—in most elections one vote per office is the rule—and can easily be implemented on voting machines. And, since the electors of each Senate district would as a group still be electing three delegates to the convention, it would be consistent with Article XIX, section 2 and would not require a constitutional amendment.[38]

The Legislature has yet to enact such a measure. Two years have passed since the Goldmark Commission issued its recommendation. Two members of the Commission have since cited the Legislature's inaction on this issue as a basis for opposing a constitutional convention.[39]

A limited voting system does carry with it the risk that single issue

[37] *See* Briffault, *The Election of Delegates to the Constitutional Convention: Some Alternatives*, Goldmark Commission Interim Report, Appendix 3, at 88-89 & nn. 5-7 (citing to limited voting plans adopted as settlements in vote dilution cases in Alabama, Arizona and Georgia). Limited voting has been used in several other jurisdictions, including Connecticut, Pennsylvania and North Carolina; it has also been used in New York City, in 19th-century elections for supervisor and alderman and again from 1963-1982 in elections for Councilman-at-Large from each borough. *Id.* at 87-89.

[38] The limited voting system for New York City Councilman-at-Large, under which each party could nominate only one candidate per borough and each voter could vote for only one candidate in the general election—even though two were elected at large from each borough—was upheld by the New York Court of Appeals against a challenge claiming violation of the right to vote "for all officers" (N.Y. Const. art. II, § 1). *Matter of Blaikie v. Power*, 13 N.Y.2d 134 (1963), *appeal dismissed*, 375 U.S. 439 (1964). The at-large positions were abolished by Charter amendment in 1983, after a federal court invalidated the Charter provision according each borough two at-large Council seats regardless of population. *Andrews v. Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd without op.*, 688 F.2d 815 (2d Cir.), *aff'd sub nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982). That decision, however, was based solely upon the "one person, one vote" requirement of the Fourteenth Amendment of the United States Constitution. In light of *Blaikie*, a limited voting system for constitutional convention delegate elections in properly drawn State Senate districts would be in compliance with both the State and United States Constitutions.

[39] *See* Supplemental Statement by Peggy Cooper Davis, Goldmark Commission Final Report at 30; Supplemental Statement by Margaret Fung, *id.* at 31.

candidates could be more easily elected to a constitutional convention—that is, particular candidates advocating, for example, a constitutional amendment in a specific area such as abortion, the death penalty or gun control. But in our view, the need for a convention to be properly reflective of the ethnic diversity of the State more than outweighs the risk that a change to limited voting will enable single issue candidates to be more easily elected.

We are deeply concerned that any election for constitutional convention delegates be conducted in a manner that is fair to all citizens and gives the appearance of fairness as well. Whether or not a federal court would invalidate the present method of delegate selection in a lawsuit brought under section 2 of the Federal Voting Rights Act, the State should not perpetuate an electoral system that is viewed as unfair to minority communities.

We believe that the limited voting system advocated by the Goldmark Commission makes good sense as a matter of public policy. It would create a more open election in which candidates outside the political mainstream would have a better chance of participating effectively. It would also avoid the risk of protracted voting rights litigation that could cast a cloud over the convention and its work. The Legislature should enact such a system this session.

2. At-Large Delegates

The State Constitution also provides for the election of fifteen delegates on a statewide basis. These fifteen delegates amount to only 7.6% of the 198 delegates to the convention. We agree with the Goldmark Commission (Interim Report at 8) that the statewide seats add a useful perspective to the convention and, being very limited in number, are unlikely to present substantial concerns related to fair minority representation.

However, to make the election of at-large delegates truly meaningful and consistent with its stated purpose, we recommend the elimination of slate-voting for these positions. The names of the fifteen candidates nominated by each party should appear on the voting machines (or, if there is insufficient space, on paper ballots).

For the most recent delegate election, conducted in 1966, the Legislature specifically precluded the appearance of names for at-large delegate on the ballot and made split-ticket voting for the at-large positions extremely difficult. L. 1965, ch. 371. There were numerous reports of irregularities in which those who sought to split their tickets were discouraged or prevented from doing so, or cast ballots that were later destroyed or invalidated. Although the number of at-large delegates is small, the Democratic Party's

success in winning nearly all of the at-large seats in 1966 through slate voting provided the margin of that party's control of the convention.[40]

The Goldmark Commission (Final Report at 23) recommended that the State Board of Elections develop plans to "ease the process of ticket splitting" and "inform voters that ticket splitting is possible" for the at-large delegates. We would go even farther, by eliminating slate voting levers or boxes entirely and requiring that every candidate's name be displayed on the ballot with its own lever or box for marking.

D. Dual Office Holding

> We do *not* recommend adoption of a constitutional amendment that would prohibit public officeholders from serving as convention delegates.

In sections A, B and C we recommend measures that will bring about a more open, fair and inclusive delegate selection process. These measures are designed to encourage maximum participation by all segments of the community regardless of race, ethnicity, language, religion, party or issue identification. If these or similar measures are adopted, we see no need to prohibit participation simply because a candidate for delegate happens to hold another public office, elected or appointed. Nor do we see any need, as some have proposed, to ban past office holders from running for delegate or preclude delegates from seeking office for a period following the convention.[41]

We fully agree with those who advocate a more open process, one that will discourage office holders from seeking to participate in the convention for personal economic gain, and at the same time will provide outsiders with a fair opportunity to contest efforts by office holders to dominate the convention. If the playing field is leveled in this manner, the voting public will have a fair opportunity to determine an appropriate balance between experienced public officials and enthusiastic newcomers at a convention. We prefer to leave the choice to the voters rather than impose it upon them by statutory prohibition.[42]

[40] *See* League of Women Voters of New York State, *Seeds of Failure* at 8 ("... a substantial number of voters who attempted to exercise their constitutional right to vote for the fifteen candidates of their choice for delegates-at-large were effectively disenfranchised. Objections arose all over the State about the 'impossibility' of splitting the ticket. Those present at the canvass of the vote reported that hundreds of ballots were physically destroyed in jammed machines or otherwise invalidated").

[41] *See* Concurring Statement of Malcolm Wilson, Goldmark Commission Interim Report at 33 (advocating a ban on legislators and judges serving as delegates and a ban on all delegates holding elective or appointive office in State or local government for three or five years after the convention).

E. Epilogue

The Legislature has failed to enact virtually all the proposals of this Chapter, which was originally published as an interim report in June 1995. Even if our proposal for a constitutional amendment prohibiting dual compensation for legislators and judges were to gain first passage in 1997, it would have to be passed by a second Legislature, in 1999 at the earliest, and would not be submitted to the voters until November 1999. But by then, as a practical matter, it will be too late. If a majority of the electorate votes for a constitutional convention in 1997, the delegates will be elected in 1998 and will convene on the first Tuesday in April 1999. Thus, if a convention is called in 1997, delegates who are also legislators or judges will receive dual public salaries.

The Legislature also failed to enact our other proposals regarding "double-dipping," including limiting delegates who are also full-time government employees to their government salaries or a delegate's salary, whichever is greater; limiting convention staff who are also full-time government employees to the salaries of their government staff positions; and preventing delegates and staff from using dual salaries to enhance the basis for their pensions. All of these measures could have been enacted by the Legislature without a constitutional amendment. None was passed.

We have also recommended passage of legislation providing for a system of limiting voting for delegates, under which each voter would be entitled to vote for one candidate, rather than three, in each State Senate district. It was hoped that such legislation would ease concerns that the present system of multi-delegate districts may violate the federal Voting Rights Act,

[42] We note that there have been legislative proposals to limit the types of people who can serve as convention delegates. For example, in 1994 then-Senator George Pataki sponsored S. 8118, which would have prohibited as delegates to a constitutional convention people who have served as (1) members or employees of the Senate or Assembly, (2) judges or justices in the court system, (3) registered lobbyists to the Legislature, or (4) political party officials. The bill also included a limitation on campaign contributions to candidates for election as a constitutional convention delegate. This bill was sponsored by Assembly Member Brodsky in 1995 as A. 307. Moreover, State Senator DeFrancisco sponsored a proposed constitutional amendment (S. 1143, introduced Jan. 24, 1995) which would have precluded persons who have served as members of the Senate or Assembly, or as State or local officers (including judges), from becoming convention delegates if their government or judicial service occurred during the calendar year in which the electors voted to approve a constitutional convention.

at least in some Senate districts. Unless such a measure is enacted prior to the November 1997 referendum, those concerns will remain and the electorate may justifiably be reluctant to vote for a convention due to fears of inadequate representation.

At the end of the 1996 session, the Legislature amended the Election Law to relax certain ballot access requirements.[43] However, the measure (which applies to all elections) does not reduce the number of signatures required to get on the ballot or the prohibition against signing more than one petition for the same office—two of the most important reforms advocated by the Task Force and others. The measure instead was limited to less significant reforms, such as elimination of rules invalidating signatures for minor errors and establishment of a grace period during which other technical errors may be corrected.

The Legislature can make a meaningful contribution to the improvement of the selection of convention delegates, in the specific ways identified herein, that will have profound impact on future conventions by increasing public confidence in the process. The Legislature's inaction in this regard weighs heavily against calling a constitutional convention in November 1997.

[43] S. 7856-A, enacted as L. 1996, ch. 709.

Chapter 2

BILL OF RIGHTS

Provisions of New York's Bill of Rights have been interpreted consistently by the Court of Appeals as broad and steadfast guarantees of individual liberty often exceeding federal constitutional protections, and we would oppose any efforts to weaken any of these provisions. The few substantive changes we would recommend if a convention is called—incorporating an express right to privacy, deletion of the criminal libel provision of section 8, broadening the categories of persons protected by the nondiscrimination provision of section 11 and deletion of Article VI, section 32 requiring consideration of religion in adoptions—are insufficient, in and of themselves, to risk opening the Bill of Rights to a constitutional convention.

* * *

The Bill of Rights, found in Article I,[44] affords substantial protection of individual liberties that is in some instances greater than under the United States Constitution, including broader protection under the State due process and freedom of expression clauses.[45] Especially in recent years during which the Supreme Court has retreated from the Warren Court's expansion of civil rights and liberties, the states remain the "principal protectors of individual rights." *See* Judith S. Kaye, "Dual Constitutionalism in Practice and Principle," 49 *The Record* 285, 289 (1987). We would not want to risk dilution of those protections and believe that a convention would encourage attempts to do so. We conclude that the Bill of Rights does not require changes that would warrant a constitutional convention.

There are, of course, some amendments to the text of Article I (and

[44] The Bill of Rights is found in sections 1 through 18 of Article I, but there are only fifteen existing provisions; sections 10, 13 and 15, dealing with certain aspects of real property, were repealed in 1962.

[45] *See, e.g.*, Sol Wachtler, *Constitutional Rights: Resuming the States' Role*, 15 Intergovernmental Perspective 23, 23-24 (1989) (*citing People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553 (1986) (holding State must show that no less restrictive alternatives available before shutting down bookstore for illegal acts of customers committed on premises); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296 (1986) (holding that warrant to seize allegedly pornographic material must describe work in greater detail than that required by United States Constitution), *cert. denied*, 479 U.S. 1091 (1987); *Cooper v. Morin*, 49 N.Y.2d 69 (1979) (holding that pretrial detainees are entitled to contact visits with family), *cert. denied*, 446 U.S. 984 (1980)).

related provisions) that we would support if a convention were held. The proposed changes fall essentially into two categories: (1) textual incorporation of concepts that have been, are being, or can be developed by judicial interpretation of the existing provisions; and (2) "housekeeping" changes that would eliminate duplication of concepts found in the Bill of Rights, coordinate the State Constitution with federal law by adopting some of the language found in the United States Constitution and removing language understood to be preempted by federal law, and removing certain provisions that deal with issues now viewed as more legislative than constitutional. None of these changes is necessary to ensure the adequate protection of individual liberties in New York.

We note in addition that some of the existing provisions of the Bill of Rights, as well as some of our proposed changes, may raise emotionally-charged issues that could prove detrimental to well-reasoned and civil debate at a convention and ultimately result in weakening, rather than strengthening, the State's long tradition of protecting individual liberties.

A. Due Process

Due process protections in the State Constitution are equal to or greater than federal constitutional provisions. One significant difference between the federal due process provisions of the Fifth and Fourteenth amendments and the State constitutional provisions is the absence in the latter of any state action requirement. *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 160 (1978). *Sharrock* struck down as a violation of due process the Lien Law provision permitting a garage operator to conduct an *ex parte* sale of a bailed automobile. Other cases in which the Court of Appeals has relied on the State's due process clauses to enhance civil liberties include *Rivers v. Katz*, 67 N.Y.2d 485 (1986) (holding that State Constitution affords involuntarily committed mental patients fundamental right to refuse antipsychotic medication); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544 (1985) (holding that town zoning ordinance's restrictive definition of family violated due process); *Cooper v. Morin*, 49 N.Y.2d at 69 (holding that pretrial detainees are entitled to contact visits with family); *Group House of Port Washington, Inc. v. Board of Zoning & Appeals*, 45 N.Y.2d 266 (1978) (holding that town must grant building permit to group home consisting of two surrogate parents and seven children in single-family zoned area); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300 (1974) (holding that couple, two natural children and ten foster children constituted "family" for purposes of single-family residence district).[46]

[46] More recently, however, the Court of Appeals overturned the Appellate Division and Supreme Court decisions in *Hope v. Perales*, 83 N.Y.2d 563 (1994), *rev'g* 189 A.D.2d 287 (1st Dep't 1993), holding that the State's provision of pregnancy-related services to needy women above Medicaid eligibility but not providing funding for medically necessary abortions did not violate the State due process clause. The Court of Appeals rejected the lower court's findings that the statute unconstitutionally "steered or pressured low-income women into choosing childbirth, thus abridging their fundamental right to choose." *Id.* at 574. Other states have found a state due process right to Medicaid-funded abortions, *see, e.g., Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Doe v. Maher*, 40 Conn. Supp. 394, 515 A.2d 134 (1986); *cf. Harris v. McRae*, 448 U.S. 297 (1980).

We do not see any need for substantive change in the meaning of due process under the State Constitution. As a housekeeping matter it would make sense to merge the provisions of sections 1 and 6, which both incorporate due process concepts, with the equal protection and non-discrimination provisions of section 11, into a single section.

B. Right to Privacy

Although there is no explicit right to privacy in the current Bill of Rights, the courts have found certain implied privacy rights to be rooted in the due process clause. *See, e.g., In re Marie B.*, 62 N.Y.2d 352, 358 (1984); *Cooper v. Morin*, 49 N.Y.2d at 80-81 (section 6 prohibits State from limiting direct contact visits with pretrial female detainees as illegitimate limitation on family rights and rights of procreation); Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 St. John's L. Rev. 431, 466 (1987) ("in New York, our traditions, which include judicial concern for the right of privacy and personal liberty, make up a vital part of our judges' psyches"); Edward R. Alexander, *The Right of Privacy and the New York State Constitution: An Analytical Framework*, 8 Touro L. Rev. 725, 732-36 (1992).

Five states[47] have constitutional provisions expressly guaranteeing a right to privacy. This is an appropriate provision for a state constitution and we would recommend incorporating one if a constitutional convention were held. However, we are mindful that this is one of the "hot button" issues that could divide a convention and prove more harmful than helpful. Moreover, this provision is not a necessity in light of the prevailing judicial construction of the due process clause.

C. Equal Protection and Non-Discrimination

Section 11 of the Bill of Rights provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof."

[47] Alaska (Alaska Const. art. I, § 22), California (Cal. Const. art. I, § 1), Florida (Fla. Const. art. I, § 23), Hawaii (Hawaii Const. art. I, § 6) and Montana (Mont. Const. art. II, § 10).

The Court of Appeals has consistently construed New York's equal protection clause to be coterminous with its federal equivalent. *Matter of Esler v. Walters*, 56 N.Y.2d 306, 313-14 (1982).

Section 11 additionally prohibits discrimination based on "race, color, creed or religion," an explicit non-discrimination provision not contained in the United States Constitution. Proponents of change to this section have recommended adding ethnicity, national origin, gender, physical and mental disability, age, sexual orientation and marital status to this prohibition. When this guarantee was adopted by the 1938 Constitutional Convention, nondiscrimination on the basis of "race, creed or religion" was progressive, and the Constitution could be updated for the next century to prohibit discrimination for all currently recognized invidious purposes.

We note that the decisions of the Court of Appeals do not consistently accord equal standing to same-sex relationships. In *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201 (1989), for example, the Court held the gay partner of a deceased leaseholder to be a family member with successor rights under the State's rent regulation laws. However, two years later, in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), the Court refused to recognize a right of visitation to the estranged partner of a lesbian mother who had been in the role of "Mommy" for six years. Chief Judge Kaye dissented in *Alison D.*, opining that the Court should interpret the word "parent" to embrace its appropriate meaning given "modern-day realities." *Id.* at 661-62 (Kaye, J., dissenting). Judge Kaye did not, however, base this interpretation on any provision of the State Constitution. *See* Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 Temple L. Rev. 1163, 1177 (1994); Arsenault, Note, *"Family" But Not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 Alb. L. Rev. 813 (1995). Most recently, the Court of Appeals ruled that an unmarried partner of a natural parent (heterosexual or homosexual) has standing to adopt the partner's natural child as a second parent under the Domestic Relations Law. *Matter of Jacob*, 86 N.Y.2d 651 (1995).

Recent anti-gay initiatives in places such as Colorado, Colo. Const. art. II, § 30b, enjoined by *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 116 S. Ct. 1620 (1996), and Cincinnati, Charter of the City of Cincinnati art. XII, upheld by *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) (amendment to city charter barring laws providing protected status for gays and lesbians not in violation of federal constitutional rights of equal protection, First Amendment speech, association, or petition rights, or right to vote), *vacated and remanded*, 116 S. Ct. 2516 (1996), *rev'g* 838 F. Supp. 1235 (S.D. Ohio 1993) (order granting permanent injunction), make manifest the need for State constitutional protection against discrimination based on sexual orientation. *See generally* Suzanne B. Goldberg, *Facing the Challenge: A Lawyer's Response to Anti-Gay Initiatives*, 55 Ohio St. L. J. 665 (1994).

On balance, if a constitutional convention were held, we would support inclusion of the following additional categories of persons entitled to the protection of the nondiscrimination protections of section 11: ethnicity, national origin, gender, physical and mental disability, age, sexual orientation and marital status.

D. Civil Jury Trial

Section 2 provides for a right to jury trial in all civil cases. New York's provision is comparable to the federal Seventh Amendment, which only applies to civil claims at law in *federal* court, and *federal* claims at law tried in state court. The right to jury trial is an integral part of the checks and balances of our civil system of justice.

In 1967, the Association's Special Committee on the Constitutional Convention, which was formed to study the need for constitutional reform in the wake of the November 1965 convention call, recommended elimination of the constitutional guarantee of a jury trial in civil cases "with a view toward future careful legislative study which can identify, from time to time, those areas of civil litigation for which there should be a jury." Special Committee on the Constitutional Convention, Bill of Rights at 4-5 (Apr. 1967). The Association's Civil Rights Committee has reconsidered its 1967 position and would now retain the constitutional requirement. While there is currently much debate over the role of juries in civil cases, we favor retaining this provision and accordingly no constitutional amendment is recommended.

E. Freedom of Religion[48]

Section 3 provides for "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference" so long as such exercise does not "excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state." In contrast to the First Amendment, it "does not speak in absolute terms. Rather, it mandates balancing the free exercise of religious liberty against the interests of the state in preserving the peace and welfare of the community."[49]

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[48] A discussion of issues relating to religion and education appears in Chapter 11, section C of this Report.

[49] Peter J. Galie, *The New York State Constitution: A Reference Guide* 38 (1991) (hereafter, "*The New York State Constitution: A Reference Guide*"). *See Matter of Brown v.*

Section 3 has generally been read in harmony with the Free Exercise Clause of the United States Constitution. In *Matter of Rivera v. Smith*, 63 N.Y.2d 501, 515 (1984), the Court of Appeals decided a religious freedom claim involving Muslim prisoners under the State, rather than Federal, Constitution. The Court affirmed the Appellate Division, which had stated that section 3 "evince[d] a greater concern for religious freedom of inmates than may be found in other jurisdictions." *Id.* at 509.

There is no "establishment" clause similar to that in the United States Constitution. In our view this is an important principle that should be embodied in the State Constitution. Again, however, this is not a pressing necessity, as the Federal Establishment Clause, of course, applies to the states. On balance, we see no need for constitutional change.

F. Freedom of Speech and the Press

Section 8, which contains the State Constitution's analogue to the First Amendment to the United States Constitution, was added to the Constitution by the 1821 convention and has not been amended. Section 8 provides broad rights of freedom of speech and the press, which, unlike the federal constitutional provisions, are not limited to legislative or State action. The Court of Appeals has emphasized the historical breadth of New York's constitutional free speech protections. *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (noting that language and history of section 8 "call for particular vigilance by the courts of this State in safeguarding the free press against undue interference"), *cert. denied*, 500 U.S. 954 (1991). It is now well-established that our State constitutional guarantee is broader than the guarantee of the United States Constitution. *Immuno A.G.*, 77 N.Y.2d at 248-49 (construing protected opinion more broadly than First Amendment); *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 528-29 (1988) (section 8 gives rise to independent qualified reporter's privilege); *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553 (1986) (holding State Constitution protects bookseller from prosecution as a public nuisance where customers engaged in unlawful activity, where First Amendment did not); *Beach v. Shanley*, 62 N.Y.2d 241, 256 (1984) (Wachtler, J., concurring) (noting that State Constitution provides independent right for reporter to refuse to disclose news sources). These are cherished constitutional protections that should not be changed.

However, the second sentence of section 8, which provides for criminal prosecutions for libel, is problematic. Although the clause has its roots in Andrew Hamilton's defense of John Peter Zenger and was at the time of its adoption doubtless thought to be progressive, it is now of questionable constitutionality under the First Amendment, raising as it does the specter of seditious libel. *See generally Tollett v. United States*, 485 F.2d 1087, 1094-96 (8th Cir. 1973) (discussing "the ignominious history of the law surrounding criminal libel"). This anachronism has not given rise to a prosecution in living memory. Indeed, New York repealed its criminal libel statute in 1967.

However, the clause could arguably lend support to the argument that punitive damages should be available in libel cases, a question left open by the Court of Appeals in *Mahoney v. Adirondack Publ'g Co.*, 71 N.Y.2d 31, 41 (1987), and not conclusively resolved in *Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 466 (1993). The Communications and Media Law Committee has expressed the view that punitive damage awards are a constitutionally inappropriate remedy in libel actions and should be prohibited in such cases.[50] This construction, which finds support in the constitutional text, has been accomplished in other states by judicial decision.

These recommendations are not of sufficient urgency to warrant constitutional revision. However, if a constitutional convention were called, we would support deletion of the criminal libel clause from section 8.

G. Assembly and Petition

The first clause of section 9 guarantees the rights to assemble peaceably and to petition the government. The Court of Appeals has interpreted this clause coextensively with the comparable provision of the federal First Amendment. *People v. Nahman*, 298 N.Y. 95 (1948). Accordingly, there is no need for constitutional change. However, as proposed in 1967, as a housekeeping matter this clause could be merged with the free speech and press provisions of section 8.[51]

McGinnis, 10 N.Y.2d 531, 536 (1962) ("freedom of exercise of religious worship is not an absolute but rather a preferred right; it 'cannot interfere with the laws which the State enacts for its preservation, safety or welfare' .... While freedom to believe is absolute, freedom to act is not. The latter is subject to regulation for the protection of society" (citations omitted)); *People v. Woodruff*, 26 A.D.2d 236, 238 (2d Dep't 1966) ("the freedom of the exercise of religious worship is a preferred right in the hierarchy of our constitutional privileges .... But it has been long held that the peace and safety of society may not be interfered with by religious scruples, ... as indeed the State Constitution expressly prescribes"), *aff'd*, 21 N.Y.2d 848 (1968).

[50] Communications and Media Law Committee, "Punitive Damages in Libel Actions," 42 *The Record* 20, 24 (1987).

[51] Special Committee on the Constitutional Convention, *Bill of Rights* at 13 (Apr. 1967).

H. Divorce

The second clause of section 9, which prohibits divorce "otherwise than by due judicial proceedings," was promulgated in 1846 apparently in reaction to legislatively granted divorces in other state legislatures and Parliament. The clause has been held to invalidate divorces granted by religious authorities. *See Chertok v. Chertok*, 208 App. Div. 161 (1st Dep't 1924). Because this is a matter better suited to legislative regulation, there is no reason to retain this provision in the Constitution. Indeed, as noted by Peter Galie, "[T]he phrase 'due judicial proceedings' could raise difficulties for a predominantly or completely administrative handling of divorce." Galie, *The New York State Constitution: A Reference Guide* at 13-14. Procedures and criteria concerning the granting of divorces is not, in our view, of constitutional dimension, and this clause could be deleted and the matter left to the Legislature.

I. Lotteries

The remainder of section 9 authorizes gambling, including lotteries, pool-selling, book-making, bingo and pari-mutuel betting on horse races, as allowed by the Legislature. Regulation of gambling also is not of constitutional dimension, and accordingly this provision could be deleted.

J. Wrongful Death

Section 16, which provides that the right to seek recovery for wrongful death cannot be abrogated or limited by statute, was enacted in 1894 in response to efforts by various groups such as the railroads to limit recovery for wrongful death.[52] One result of this provision is that New York does not apply the law of other jurisdictions regardless of other conflict of law principles so as to limit recoverable damages in wrongful death actions. *See Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 39 (1961); *Rosenthal v. Warren*, 374 F. Supp. 522, 525 (S.D.N.Y. 1974).

This provision articulates a well-settled concept that no longer requires constitutional protection and could be deleted. However, we note the concern of the Civil Rights Committee that removal of the wrongful death provision could encourage the Legislature to abolish or limit recovery for some classes of wrongful death.

K. Common Law

Section 14, which provides that the common law of the State in 1775 is the law until changed, known as the "reception clause," provides the

[52] Galie, *The New York State Constitution: A Reference Guide* at 64.

only basis for according binding precedential value to English common law. Still relied upon from time to time, the pre-revolutionary English common law is, and should remain, the law of New York. Accordingly, we recommend that this provision be retained.

L. Rights of Labor and Worker's Compensation

Section 17, often referred to as the bill of rights for labor, provides that labor is not a commodity, sets wage and hour standards and guarantees employees the right to organize and bargain collectively. These subjects have largely been incorporated into or preempted by federal labor law.[53]

Section 18 authorizes the Legislature to enact worker's compensation laws. While both of these provisions appear currently unnecessary and regulate matters which perhaps should be left to the Legislature, they would afford important protections for laborers should federal protections ever be repealed. There is no compelling reason to delete these provisions at this time.

M. Right to Bear Arms

There is currently no analogue in the State Constitution to the Second Amendment and we see no reason to adopt one. A bill was recently introduced in the Legislature to add a new Article XX providing for a state constitutional right to keep and bear arms. *See* Assembly Bill 2613 (Jan. 27, 1997); Senate Bill 677 (Jan. 13, 1997). If unsuccessful, this proposed amendment could be pressed again at a convention. If raised, we would oppose adoption of a State constitutional right to bear arms.

N. Religion as a Factor in Adoption

Section 32 of Article VI requires a court to place adoptive children, when practicable, "in an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child." In 1967, the Special Committee on the Constitutional Convention recommended repeal of this provision on the grounds that it is inappropriate to single out religion when weighing factors regarding placement of a child, and that standards for placement are appropriately placed in the Legislature, not in the Constitution.[54] We concur and would recommend deletion of section 32 if a constitutional convention is called.

[53] But *see Quirk v. Regan*, 148 Misc. 2d 300, 304 (Sup. Ct. Albany County 1991) (holding that withholding of fourteen days' wages from State court employees violated, *inter alia*, State constitutional collective bargaining provision).

[54] Special Committee on the Constitutional Convention, *Church and State* at 1 (July 1967).

Chapter 3

CRIMINAL JUSTICE

Issues relating to criminal justice currently receive significant public attention, and numerous proposals for reform have been suggested. In our view, existing constitutional provisions are generally adequate, and the risk of adverse change to existing provisions in response to political pressure outweighs any potential gain. Certain changes, including a constitutional amendment to permit substitution or dismissal of a deliberating juror under certain circumstances, and action by the Legislature or Executive to improve efficiency in the administration of criminal justice statewide, should be considered but do not warrant a constitutional convention. We would oppose any effort to incorporate any provision concerning the death penalty into the Constitution.

* * *

The State Constitution contains numerous provisions relating to criminal justice. This Chapter addresses eight issues: (1) unanimous jury verdicts in criminal trials; (2) deliberation by juries of less than twelve; (3) mandatory grand jury indictment for felony prosecution; (4) transformation of bail to permit preventive detention; (5) the availability of probation and parole; (6) search and seizure and application of the exclusionary rule; (7) proposals to centralize the prosecutorial function in a State department of criminal justice; and (8) the death penalty. These issues have attracted more attention than others and are among the most significant issues that would be faced at a convention. Although we would support certain improvements, existing constitutional provisions are generally adequate and the risk of adverse change in this area would outweigh any potential gain at a constitutional convention.

A. Unanimous Jury Verdicts

Article I, section 2 provides: "Trial by Jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever . . . ." This provision has been interpreted to accord the right to a unanimous verdict, by implication, because unanimity was required for all jury verdicts at common law in both civil and criminal trials prior to 1777. The legal change in civil cases permitting a five-sixths verdict in civil cases was interpreted as requiring constitutional amendment. [55]

[55] N.Y. Const. art. I, § 2 (sentence 2) (1935); *see, e.g., People v. Sanabria*, 42 Misc. 2d 464, 469-70 (App. Term 1st Dep't 1964).

Although a state may dispense with the unanimity requirement,[56] only Louisiana and Oregon have done so. Federal due process permits non-unanimous verdicts with the minimum required for conviction under Federal standards set at six.[57]

Some have voiced concern that the constitutional requirement of a unanimous verdict fosters jury nullification and permits the infection of the deliberative process by a lone renegade juror. Those favoring change believe that dispensing with unanimity would promote efficiency by shortening deliberation time and decreasing the incidence of hung juries. Some believe that non-unanimous verdicts would minimize the role of jurors who are prejudiced, "flaky" or closed-minded. Others argue that unanimity is inconsistent with the American concept of majority rule. Those rationales have prompted calls for consideration of a constitutional amendment permitting less than unanimous verdicts.

Supporters of unanimous verdicts contend that the unanimity requirement rests at the heart of the American concept of a criminal jury trial, and that eliminating it would fundamentally alter the nature of the trial and the jury deliberation process, and undermine the requirement of proof beyond a reasonable doubt. They argue that something less than a unanimity requirement might encourage a majority to ignore the minority, to cease deliberating and rush to judgment. They argue further that not only could that lead to unjust verdicts, but it could effectively exclude ethnic and religious minorities from meaningful participation.

We believe that the unanimous verdict requirement is fundamental to the concept of a criminal jury trial as we understand it in New York, and that its elimination poses serious problems without any concomitant demonstrated benefit. The existing provision appears adequate to preserve the unanimity requirement. Accordingly, no constitutional change is recommended.

B. Juries of Less than Twelve (or Six)

In Article I, section 2, the Constitution preserves the right of a defendant to a jury trial. Article VI, section 18 mandates twelve-member juries for trials of crimes prosecuted by indictment. The same section authorizes the Legislature to provide for twelve- or six-member juries in other jury trials, and the Legislature accordingly has specified six-member juries for jury trials not prosecuted by indictment in the local criminal courts.[58]

[56] *See Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

[57] *See Burch v. Louisiana*, 441 U.S. 130 (1979) (invalidating a purported consent to a 5-1 verdict); *Apodaca*, 406 U.S. at 404.

[58] Crim. Proc. Law § 360.10.

Since 1938, the Constitution has permitted a defendant to waive the right to a jury.[59] It is unclear, however, whether a defendant can consent to a jury of less than the required complement, although it is permitted as a matter of federal due process.[60]

Reduction of jury size is a problem that can arise with some frequency. The Criminal Procedure Law permits a judge, prior to the commencement of deliberations, to discharge a juror who becomes "unavailable for continued service," "unqualified" or "has engaged in misconduct" and replace the juror with an alternate, without the consent of the defendant.[61] After deliberations have commenced, the written consent of the defendant is required to substitute an alternate juror and, in the absence of consent or an available alternate, a mistrial must be declared.[62] The common practice in New York courts is to discharge alternate jurors when deliberations commence, since defendants rarely give consent. A mistrial results if a juror subsequently must be discharged, which is now somewhat more frequent because of the recent elimination of the mandatory sequestration of juries in most criminal cases.

An increase in the number of mistrials is a substantial burden on the criminal justice system, economically, administratively and practically. Even if the Court of Appeals were to hold that trial by a jury of less than the required complement, with the defendant's consent, would be permissible under the Constitution, such consent rarely would be given. Apart from reinstating the mandatory sequestration of jurors in all cases (recently eliminated), the only apparent remedy to prevent or reduce the number of otherwise unnecessary mistrials is a constitutional amendment either permitting the judge to substitute an alternate juror for good cause or permitting deliberation by a jury of less than the required complement, or both, without the defendant's consent in either case.

Requiring the deliberation and verdict of a full jury comprised of the required number of jurors in criminal trials is well-grounded in history and the State Constitution.[63] Under federal law, a twelve-member jury has not been considered a fundamental right the elimination of which would result in a repudiation of due process or a denial of basic justice.[64] If a constitutional convention is convened, an amendment permitting juror substitution for good cause or deliberation by less than the full mandated number of jurors, without the defendant's consent, should be considered.

[59] N.Y. Const. art. I, § 2.

[60] *Williams v. Florida*, 399 U.S. 78 (1970) (authorizing six-person jury).

[61] Crim. Proc. Law § 270.35.

[62] *Id.*

[63] *See People v. Page*, 88 N.Y.2d 1, 1 (1996) (reaffirming the fundamental State constitutional right to a jury of twelve for the trial of an indictment).

[64] *See Williams v. Florida*, 399 U.S. at 78.

C. Grand Jury Presentations

Article I, section 6 currently requires indictment by a grand jury as a condition precedent for the prosecution of a felony, but permits defendants, in non-capital felonies, to waive this requirement. Because waiver of indictment is employed in only a small number of cases, usually as part of a pre-indictment plea bargain, grand jury presentation is required in the vast majority of cases that the District Attorney seeks to prosecute as felonies.

Those advocating constitutional change criticize the current system as unnecessarily formal, expensive and time-consuming, merely "rubber-stamping" the District Attorney's wishes. Some recommend replacement with a preliminary hearing requirement where a judge would screen the sufficiency of evidence after cross-examination, thereby minimizing the risk of "over indictment." Others would prefer prosecution by a felony information, *i.e.*, a sworn, non-hearsay affidavit, equivalent to that now used to prosecute misdemeanors, without the expense of either preliminary hearings or grand juries. Opponents of constitutional change point to the grand jury's traditional, successful role as an independent watchdog, screening charges brought by the prosecutor and protecting citizens from potential abuse of authority, with the grand jury's secrecy protecting the privacy of the accused.

Replacement of Grand Juries with preliminary hearings would require the addition of many judges, plus court staff, assistant district attorneys and public defenders. Especially in light of the current city and State budgetary problems, such an expensive change appears impractical. Press coverage of open preliminary hearings may well cause jury selection problems and make it more difficult to have a fair and orderly trial. It might also endanger ongoing investigations and damage the reputations of those cleared at the hearings.

Substitution of a felony information system may well lead to an increase in improvidently prosecuted or overcharged felonies. Grand jury presentation requires the District Attorney to interview witnesses and otherwise conduct an investigation. Even without cross-examination by an adversary, such investigation sometimes reveals that a felony is not provable, that the accused did not commit the crime, that further investigation is needed before pursuing the prosecution, or that felony treatment is not appropriate. Moreover, lack of success in persuading a grand jury is a good bellwether of a trial jury's ultimate reaction and can thus obviate for both sides the work and expense of an unsuccessful prosecution. We therefore

urge retention of the current constitutional provisions requiring indictment by a grand jury.

D. Preventive Detention

Article I, section 5 provides that "[e]xcessive bail shall not be required . . ." but does not create an absolute right to bail under any circumstances. The Criminal Procedure Law, in turn, specifies circumstances when bail or release on recognizance is mandatory, discretionary or prohibited[65] and sets forth criteria for the judge's consideration in setting the amount of bail;[66] the criteria are intended to secure the defendant's appearance in court[67] and do not include potential danger to the community.

Proponents of preventive detention believe that the current standard endangers the public by permitting pretrial release of accused persons who are objectively dangerous to the community. Those opposed to preventive detention argue that it conflicts in theory and practice with the presumption of innocence, that it will lead to unequal treatment via ethnic and class stereotyping, that it will seriously hamper the ability of many defendants to prepare a defense, and that it would worsen prison overcrowding.

Because the current bail criteria are exclusively statutory, any shift to a preventive detention system could be effected legislatively. Indeed, the Legislature has already adopted a limited preventive detention system for certain juveniles in Family Court proceedings[68] and authorized the revocation of bail for adults charged with committing new felonies while out on bail.[69]

We do not advocate changing the criteria for pretrial release, and believe this is an issue that is best left to the Legislature. The excessive bail provision of Article I, section 5 tracks the language of the Eighth Amendment to the United States Constitution. The United States Supreme Court has held that preventive detention is not prohibited by the Eighth Amendment.[70] The Legislature has not gone as far as federal law would allow in authorizing preventive detention, and the Court of Appeals has not addressed the question. Accordingly, at this time we do not advocate any constitutional change with respect to pretrial release.

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65 Crim. Proc. Law art. 530.

66 Crim. Proc. Law 510.30(2)(a).

67 *Id.*

68 Fam. Ct. Act § 320.5(3)(b).

69 Crim. Proc. Law § 530.60(2)(a).

70 *United States v. Salerno*, 481 U.S. 739 (1987).

E. Availability of Parole and Probation

Article XVII, section 5 provides: "the legislature may provide for the maintenance and support of institutions for the detention of persons charged with or convicted of crime and for systems of probation and parole of persons convicted of a crime . . . ." The Penal Law authorizes and limits the availability of probation as a sentence,[71] while the Criminal Procedure Law delineates the conditions that may be imposed and the procedures that govern supervision and revocation.[72] Parole from a prison sentence is available under circumstances set forth in Penal Law section 70.40, while Executive Law Article 12B sets forth the administrative structure and applicable procedure.

The current constitutional provision is purely permissive. The Legislature, if it chose, could curtail or even eliminate the availability of either or both probation or parole. Constitutional change could also accomplish this but is not necessary to do so. Constitutional change would be necessary only to mandate continued availability of either or both devices.

Critics of both devices assert that they permit dangerous criminals to return to the community, that supervision is inadequate to protect the public or to effect any rehabilitative purpose and that they are frequently used as a bureaucratic fix for prison overcrowding without adequate consideration of the dangers of release. Supporters claim that supervision in the community provides sufficient control to prevent recidivism and thereby protects the public in both the short- and long-term, and that it is a more effective and less costly alternative to incarceration. Elimination of alternatives to incarceration would likely discourage pretrial resolution of many cases and thus lead to overtaxing of the courts' trial capacity, and may encourage plea bargains to ineffectual brief jail sentences that would lack either a rehabilitative or protective purpose and that would lead to recidivism in the absence of any post-incarceration supervision.

We believe that judicial discretion in sentencing is an important device for making the punishment fit both the crime and the criminal, and that alternatives to incarceration, particularly under supervision, such as probation and parole, should continue to be available in appropriate cases. We see no need for constitutional change.

F. Search and Seizure and the Exclusionary Rule

Article I, section 12 provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describ-

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71 Penal Law §§ 60.05, 65.00, 70.02.

72 Crim. Proc. Law §§ 410.10 *et seq.*

ing the place to be searched, and the persons or things to be seized." Section 12 further prohibits the "unreasonable interception of telephone and telegraphic communications," a protection that is statutory under the Federal system. This language, which follows the Fourth Amendment to the United States Constitution, was added to the State Constitution in 1938.

The Court of Appeals has interpreted section 12 and the consequences of its violation independently of the Fourth Amendment, and has expressly held that the State constitutional protection against unreasonable searches and seizures affords greater protection.[73]

It has been suggested that the State Constitution be amended to harmonize State and federal standards for excluding evidence obtained as a result of an unreasonable search and, further, to restrict the power of the Court of Appeals to interpret the exclusionary rule independently from the federal constitutional standard.[74]

The right of citizens to be secure against unreasonable searches is a matter of legitimate State concern,[75] and we see no reason to require conformity with the federal constitutional standard. Responsibility for interpreting the scope of State constitutional protections against unreasonable search and seizure, and application of New York's exclusionary rule, is appropriately vested in the State. Further development of New York's exclusionary rule should be left to the courts and, where appropriate, to the Legislature. Accordingly, no constitutional amendment is recommended.

G. Centralized Responsibility for Criminal Justice

Unlike the Federal government and some other states, New York does not have the equivalent of a Department of Justice with a centralized

[73] *See, e.g., People v. Scott*, 79 N.Y.2d 474 (1992) (declining to adopt federal "open fields" doctrine and holding nonconsensual search of posted or fenced land beyond the curtilage unconstitutional under section 12); *People v. Harris*, 77 N.Y.2d 434 (1991) (requiring suppression of statements obtained from an accused following an illegal warrantless arrest although federal law would deny suppression where there is no causal connection between illegality and statement); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296 (1986) (holding that section 12 requires a more exacting standard for the issuance of search warrants authorizing seizure of allegedly obscene materials than the Fourth Amendment), *cert. denied*, 479 U.S. 1091 (1987); *see also* Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 Brooklyn L. Rev. 1, 12-21 (1996).

[74] *See generally* Pitler, *supra*, at 230-32, 312-22 (discussing "substantial discomfort about the process of independent New York State search and seizure constitutionalism").

[75] *See Brown v. State*, 89 N.Y.2d 172, 188 (1996) (noting that New York's prohibition against unlawful searches and seizures is rooted in the common law of the State and statutory law dating back to 1828).

prosecutorial function. It has been suggested by some that the system of law enforcement in New York could be made more efficient or economical and, perhaps, more responsive to the needs of the community if the prosecutorial function in New York were organized more along the lines of the Federal system, including the creation of a department of justice headed by the Attorney General and appointed, not elected, District Attorneys. A constitutional amendment would be required to implement any such proposal.

The Constitution provides that the Attorney General shall be elected at the same time and for the same term as the Governor and Lieutenant Governor.[76] The Attorney General is designated as the head of the Department of Law[77] and is not granted any specific prosecutorial powers or charged with any particular prosecutorial duties in the Constitution.[78] By law, the Attorney General has civil and criminal enforcement responsibilities with respect to consumer fraud, environmental protection and human rights, and compliance with environmental laws, the operation of charitable organizations and the regulation of conditions of employment. In certain specific instances deemed to require enforcement on a statewide level, the Legislature has granted the Attorney General prosecutorial authority, for example, in cases of Medicaid fraud and organized crime.

Prior to 1846, District Attorneys were appointed and the requirement that they be elected was instituted with the adoption of the Constitution of 1846. The present Constitution provides for the election of a District Attorney in each county every three or four years as provided by law.[79] In the Constitution by implication and directly by statute, District Attorneys have general responsibility for the enforcement of State and local laws within their respective counties.[80]

A District Attorney is subject to removal by the Governor, after notice and hearing, for failure to prosecute a person charged with the violation of any provision of Article XIII, such as misconduct or receiving a bribe.[81] By virtue of the Governor's constitutional obligation to "take care that the laws are faithfully executed"[82] coupled with the power of removal, the courts have upheld the Governor's direction to the Attorney General to assume the responsibility for local law enforcement or the Governor's ap-

[76] N.Y. Const. art. V, § 1.

[77] N.Y. Const. art. V, § 4.

[78] N.Y. Const. art. V.

[79] N.Y. Const. art. XIII, § 13.

[80] *See* N.Y. Const. art. I, § 6; County Law §§ 700 *et seq.*

[81] *Id.* at § 13(b); *see* Exec. Law § 63(2).

[82] N.Y. Const. art. IV, § 3.

pointment of a "special prosecutor" to supersede a District Attorney in certain circumstances. The precise delineation of these gubernatorial powers is not specified by statute.

The two primary factors influencing consideration of possible change to the present system for the allocation of prosecutorial responsibility are the potential for increased administrative and economic efficiency and the perceived need for law enforcement responsiveness to local concerns. These factors are sometimes portrayed as inherently inconsistent or in competition with each other, rather than complementary components of the same overall goal of an effective statewide criminal justice system. It is not apparent that any such incompatibility necessarily exists.

Given the diversity of New York State's population, the law enforcement needs of its communities are bound to, and do, vary throughout the state. The local prosecuting authority, whether it be a District Attorney elected by the community or one appointed by the executive alone or in combination with the Legislature, will have to be responsive to perceived local enforcement concerns for the criminal justice system to retain the credibility and respect so necessary to its proper operation and functioning within the community. Centralizing the selection process for District Attorneys will not eliminate the need to address local law enforcement concerns, but may make it administratively more difficult and less economical to respond to those concerns efficiently if their on-going consideration and the allocation of resources is also centralized within a statewide organization such as a department of justice.

Under the present system, District Attorneys are responsive to the law enforcement concerns of the local community or they are not reelected. Although a mechanism for addressing an appointed District Attorney's lack of responsiveness to local concerns would likely be adopted in some fashion, it appears that the process, by its very nature, could not be as directly affected by the local community.

Areas of law enforcement concern with statewide importance or impact have been addressed by the executive and legislative branches through the enactment of legislation and the adoption of policies directed toward such concerns. Because a district attorney has the obligation to enforce State laws, such statewide concerns will concomitantly be enforced by the District Attorneys. Although the influence of the executive over such enforcement will not be as direct as its influence would be if the district attorney were subject to the direction of the Attorney General (even if from a different political party than the Governor), the power of the Governor to supersede a District Attorney certainly has its own indirect influence.

It is not apparent that the theoretical gains in the administration and economical efficiency of the criminal justice system from altering the selection process for district attorneys and centralizing the prosecutorial function in the Attorney General or a department of justice would clearly outweigh the perceived benefits of the direct responsiveness of the elected district attorneys to the law enforcement concerns and resource allocation priorities of the local community. In part because the perception of that responsiveness is a cornerstone of the credibility of the criminal justice system in the local community, as a consequence, there is no pressing need to amend the Constitution with respect to selection of District Attorneys. Other means to improve the administration, efficiency and credibility of the criminal justice system can be considered and implemented by the Executive and the Legislature.

H. Death Penalty

The Association has been a longstanding opponent of the death penalty. In a 1984 report, the Committee on Civil Rights concluded that mistakes are inevitable in its application, and that the death penalty is cruel, barbaric and adversely affects the administration of justice, is discriminatorily applied against the poor and racial minorities, and is inconsistent with our self-respect as a civilized people.[83]

It is perceived by many that a constitutional convention would be unlikely to adopt a provision banning the death penalty and, accordingly, it is unnecessary to hold a convention for that purpose. Because of the historical opposition of the Association to the death penalty, if the death penalty issue were raised at a constitutional convention, we would oppose the adoption of any constitutional death penalty provision.

[83] *See e.g.*, Committee on Civil Rights, "The Death Penalty," 39 *The Record* 419 (1984).

Chapter 4

ELECTIONS

Important constitutional and statutory changes are needed in the law governing elections. We support elimination of the constitutional requirement of bipartisan election boards, substitution of the term "domicile" for "residence" in the constitutional residency requirement to conform to current practice, and various other changes aimed at increasing the Legislature's control over election administration. However, these changes are best accomplished by the Legislature itself and do not warrant calling a constitutional convention.

* * *

Article II, governing Suffrage, sets forth the qualifications of voters and the manner of elections and authorizes the creation of bipartisan Boards of Elections to administer voter registration and oversee elections.[84] Originally adopted at the Constitutional Convention of 1938, the Suffrage Article was the subject of significant proposed revisions during the 1967 Convention. A proposed new Article II, drafted to minimize restrictions on voting and leave to legislative implementation the details of administering voting and elections, was submitted to the voters and defeated with the proposed new constitution.

Article II was significantly amended in 1995 by the Legislature, with the approval of the electorate, to effectuate certain provisions of the National Voter Registration Act (colloquially known as the "Motor Voter Law"). These amendments included lowering the minimum voting age from twenty-one to eighteen, shortening the residency requirement from three months to thirty days, and relaxation of voter registration requirements. These sound amendments had the support of the Association.

We support further amendments (1) to eliminate the constitutional requirement of bipartisan election boards, leaving election administration to the Legislature; (2) to substitute the term "domicile" for "residence" in the residency requirement, to conform to current practice; and (3) to enact certain other recommendations of the Association's 1967 Special Committee on the Constitutional Convention that have not yet been adopted. We oppose attempts to add a provision allowing the Legislature to exclude from voting persons adjudicated to be mentally incompetent.[85]

[84] The Bill of Rights additionally provides that no one shall be disenfranchised or deprived of any of the rights and privileges secured to any citizen "unless by the law of the land or the judgment of his peers," except that the Legislature may provide for dispensing with a primary election whenever there is no contest. N.Y. Const. art. I, § 1.

A. Election Administration

Article II, section 8 requires that all laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, distributing ballots to voters, or receiving, recording or counting votes at elections, shall secure "equal representation" of the two major political parties, and also provides for the appointment of such boards and officers upon the nomination of representatives of said political parties, as directed by the Legislature.

The treatment of election administration in the State Constitution is unique. Although thirteen other states have constitutionally-based organizations to handle the administration of elections and the resolution of disputes arising therefrom, and although five other states authorize partisan membership of boards overseeing elections (typically a prohibition against a single political party having a majority of the members), only the New York and Virginia constitutions provide for an affirmative role in the appointment process by the major political parties. However, New York is alone in requiring "equal representation of the two [major] political parties." N.Y. Const. art. II, § 8. As a result, election boards in the state have an even number of members, equally divided along party lines. This permits either major party to block any official action not to its liking. *Williams v. Salerno*, 792 F.2d 323, 327 (2d Cir. 1986).

Bipartisan boards have been defended as necessary to create an internal check to keep elections impartial. On the other hand, detractors question how impartial these boards are with respect to third parties, or in administering primary elections (in which only one major party may have an interest).

Among the alternatives suggested by critics of the present system is replacement of boards of elections with a corps of professional county and city election administrators. Boards might be retained to exercise any quasi-judicial functions. It should be noted that the constitutional requirement for bipartisanship applies only to matters directly involving the qualification of voters and the voting process itself. Nothing in the constitution, for example, explicitly requires that a bipartisan board determine the validity of designating and nominating petitions. Nevertheless, at least since 1894,

[85] Our recommendations concerning reform to the process by which convention delegates would be elected are set forth in Chapter 1.

the entire election process has been administered by the bipartisan boards. This bears on the likelihood that delegation of authority to the Legislature to determine the nature of election administration would lead to change.[86]

Accordingly, we recommend deletion of the constitutional requirement that the registration of voters and administration of elections be by bipartisan boards of elections. We would replace it by the authority, but not a requirement, to establish boards of elections. This would permit the Legislature to provide for the administration of any or all aspects of the registration and election process by means of a civil service staffed agency headed by a single commissioner, or any other structure as might be selected.

We also recommend that if the Legislature were to continue to authorize administration by election boards, the requirement of equal representation on them by members of the two major political parties should not be retained. We would replace that requirement with a provision that no board may have a majority of members enrolled in the same political party. Finally, we recommend, as did the 1967 Convention, that the political parties not be required to nominate the members of any such board.

B. Domicile

Article II, section 1 provides that to be eligible to vote, a person must have been a "resident" of the State, and of the county, city or village, for thirty days before an election. The term "residence" is defined in the Election Law to mean "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." Election Law § 1-104(22). The Court of Appeals has interpreted the statutory definition of "residence" to approximate the traditional test for domicile. *Palla v. Suffolk County Bd. of Elections*, 31 N.Y.2d 36, 47 (1972) ("residence for the purposes of registration and voting imports not only an intention to reside at a fixed place, but also personal presence in that place coupled with conduct which bespeaks of such an intent"); *Williams v. Salerno*, 792 F.2d at 327.

Because the term "domicile" more accurately reflects the constitutional residency requirement as it has been interpreted by the courts and the Legislature, we recommend that "domicile" should replace "residence" in

[86] A more detailed analysis of the arguments for and against retention of the existing constitutional requirement for bipartisan election administration is contained in the section on Election Administration in "The Right to Vote," Book 4 of the Report of the Temporary State Commission on the Constitutional Convention (1967). The proposed 1967 constitution retained the requirement for bipartisan election administration in highly condensed form, which would have omitted the requirement that members of election boards be appointed upon the nomination of the two major parties.

the constitutional text. We do not believe, however, that a definition of the term "domicile" need be included in the constitution, as recommended by the Special Committee in 1967. Rather, we would leave it to the Legislature to establish reasonable criteria for defining domicile. As "domicile" is consistent with current interpretations of "residence" for voting purposes, we believe that no substantive change would be effected by this clarifying amendment.

C. Other Recommendations

We also support the following recommendations of the Association's 1967 Special Committee on the Constitutional Convention, which have not yet been adopted: (i) that the Legislature be authorized to establish reasonable criteria for defining residence; (ii) that the Legislature be precluded from prescribing property qualifications for voting in an improvement or special district election; (iii) that the provision of Article II, section 7 dealing with the giving or receiving of a bribe or wagering on an election be eliminated and the Legislature be empowered, but not required, to enact laws excluding from voting persons who accept an election bribe, and persons convicted of bribery or a felony; (iv) that the Legislature be required to provide for secrecy in voting in all elections and be granted constitutional authorization to administer elections; and (v) that the Constitution not deal with the subject of the nomination procedures. We would also add a sentence to preserve as much of present Article II, section 9, as necessary to validate the provisions of Election Law § 11-102 dealing with persons who move out of the state within thirty days preceding any presidential election.

D. Rejection of Disqualification for Mental Incompetency

The Constitution is silent concerning whether a person who has been determined to be mentally incompetent may be excluded from voting. Article II, section 5 provides that "Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters." Pursuant to that constitutional grant of authority, Election Law § 5-106(6) provides:

> No person who has been adjudged incompetent by order of a court of competent judicial authority shall have the right to register for or vote at any election in this state unless thereafter he shall have been adjudged competent pursuant to law.

The constitution proposed by the 1967 Convention would have au-

thorized, but not required, the Legislature to exclude from voting persons "determined to be mentally incompetent." Since 1967, the Mental Hygiene Law has been substantially recodified as both society's understanding of mental competence and its sensitivity to due process issues have evolved. Given the absence of any challenge to the Legislature's authority to deal with this issue as it affects the right to vote,[87] and the proposed continuation of the Legislature's power to provide for registration, we would not limit the Legislature's ability to continue to reflect society's evolving understanding of this field by imposing a constitutional reference to a determination that a person is mentally incompetent as a ground for disqualification.

Constitutional amendments to Article II are warranted. On balance, however, we believe that a constitutional convention is not required to effect the recommended changes. These changes could be successfully adopted, like the 1995 amendments, by two successive Legislatures with voter approval.

[87] A 1982 amendment to Election Law § 5-106 struck the disqualification of persons committed to an institution for the mentally ill but not adjudged incompetent.

Chapter 5

THE LEGISLATURE

Gridlock in the Legislature has raised questions concerning the adequacy of the constitutional provisions governing the structure and function of the Legislature. We support constitutional amendments in two areas: to mandate presentment of new legislation to the Governor for signature within a reasonable time after passage, and creation of an independent commission with responsibility for periodic reapportionment of legislative districts. These changes could be accomplished by the Legislature and do not warrant a constitutional convention. Matters relating to the internal procedures of the Legislature are generally best left to legislative resolution.

* * *

The Constitution broadly defines the composition and structure of the Legislative branch of the State of New York as well as the process by which legislation (including amendments to the Constitution itself) can be enacted. Within these broad constitutional contours, statutes and the rules of the Legislature itself determine how the legislative process functions.

Consideration of the desirability of a constitutional convention to address the Legislature will be informed by the voters' sense of whether the legislative process succeeds. Critics argue that the Legislature is too often hampered by gridlock, institutional self interest, and the agendas of powerful leaders and interest groups. Further, they assert that many legislators are underpaid, and that much legislation is ill-conceived in hasty, last-minute deliberations.

Whatever the ebb and flow of the depth and breadth of such criticisms, the preferred solutions are also controversial. In this Chapter, we consider the desirability of constitutional measures that have been proposed to reform the Legislature and legislative process.

A. Measures Relating to the Structure of the Legislature

In 1967, the Association's Special Committee on the Constitutional Convention made recommendations relating to the fundamental structure of the Legislature.[88] These included recommendations regarding reapportion-

[88] *See* Special Committee on the Constitutional Convention, *Legislative Apportionment* (Apr. 1967).

ment (see section E.2, *infra*) and a recommendation that Senators should be elected for longer than two years. Proponents argued that varying the term lengths for the two chambers of the Legislature and avoiding having the entire Legislature run for election at the same time, would promote more meaningful bicameralism. After giving consideration to and rejecting a unicameral alternative, the Special Committee supported a longer term for the Senate of four or six years to allow at least one legislative body to have a point of view that was not shaped by the prospect of a virtually immediate re-election campaign.

The Special Committee also recommended that the size of the Senate be constitutionally fixed within a range (approximately 50 to 60) and that the Legislature fix the number within the range. The size of the Assembly, in turn, would be a fixed multiple of the size of the Senate. The suggested ratio was either three or four members of the Assembly for each Senator.

We favor the structural reforms that were supported by the Special Committee in 1967. They are obviously constitutional in dimension and, in the event that there is a constitutional convention, they should be enacted.

B. Recall and Term Limits

Article III, section 2 establishes two-year terms for members of the Senate and the Assembly. There is no provision for voters to remove legislators during their elected term (recall), or a limit on the number of terms that a legislator can serve. The enactment of a recall mechanism and the establishment of term limits would require constitutional change. We believe that these constitutional changes are unwarranted and do not provide a justification for a constitutional convention.

With regard to recall, the typical process which is initiated by petition, followed by vote, makes little sense in the context of a relatively brief, two year term. The fear of launching a recall movement may chill legislators from making hard choices early in their terms. Moreover, the Association generally opposes the application of recall to public officials, particularly elected members of the judiciary. Recall movements are often products of single, highly emotionally charged issues. The threat to independent, principled decision making outweighs the benefit of more frequent, direct participation by the voters.

The legislative term limit movement has enjoyed recent strength, buoyed by the argument that too many legislators have served for too long, losing touch with their constituents. Proponents of legislative term limits argue that career politicians become beholden to well-funded special interests. They point out that nearly half of the states and most of the nation's largest cities impose legislative term limits, and that other jurisdictions have been experimenting with limits of varying lengths.[89]

In general, the practical effect of term limits upon legislators is unknown because of their recent vintage. Moreover, previous experience with executive turnover provides only limited guidance. An executive officer upon taking office assumes control of a bureaucracy and has the prerogative of appointing a new cabinet of commissioners to lead the government. Support and continuity typically are provided by middle management and civil service workers who remain through political changes.

A legislature, however, may be less equipped than the executive branch to handle large-scale turnover.[90] Some opponents of term limits argue that long-term representatives, familiar with the legislative system, are more effective and better able to appreciate the complexity of law-making. On the other hand, some supporters of term limits argue that long-serving legislators become the captive of special interests who finance their campaigns. Incumbent advantages, they argue, make long-term legislators unbeatable and less responsive. As there is a lack of significant practical experience with legislative term limits, the wisdom of their adoption cannot easily be judged.

At this time we believe that legislative term limits may turn out to be a poorly-designed remedy because they can take away the voters' option to return an effective and popular legislative incumbent to office and deprive a legislative body of valuable experience and institutional continuity. Unlike executive term limits, legislative term limits are relatively novel, have not been tested over time, and require further study and analysis. The Association has not yet taken a position with respect to legislative term limits.[91] Whatever the ultimate determination, we believe a constitutional convention would not effectively address this issue at this time.

C. Measures Governing the Enactment of Legislation Generally

There is an inherent tension between the rights of a majority party and its leadership to control the affairs of a legislative body and the rights of the minority party and the public to have access to the decision-making

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[89] *See* Committee on Government Ethics, "The Proposed Term Limits Amendment," 51 *The Record* 740, 745 (1996).

[90] Some jurisdictions with legislative term limits have staggered legislative terms, thereby avoiding wholesale turnover.

[91] *See* Committee on Government Ethics, "The Proposed Term Limits Amendment," 51 *The Record* 740, 744-45 (1996); *see also* Committee on Government Ethics, "Repeal Term Limits in New York City?" 51 *The Record* 283, 285 n.5, 287 (1996).

process. The structure of New York's legislative process—the Legislature's internal rules concerning debate, discharge and starring, and the majority party's conference (which is exempted from open meetings requirements)—at times yields undemocratic results. For example, a majority of the majority party conference can prevent the consideration of legislation that would have the support of a majority of the members of a legislative chamber.[92] The leadership, frequently working with the Governor, using powers granted by the Constitution (*e.g.*, message of necessity, presentment) and the Legislature's rules, can determine which bills will be considered, when, whether members will have adequate time to review the bill before voting on it, and whether the Governor will be required to act within ten days of enactment or be allowed a greater—sometimes dramatically greater—period of time.

While the legislative process in New York would benefit from significant modification to ensure informed discussion and debate, we recommend detailed study by the Association and are not now prepared to urge constitutional or statutory change. As discussed below, we do not believe that it would be appropriate to raise these issues at a constitutional convention.

1. Presentment

Article IV, section 7 provides, in relevant part, that: "Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor." The constitutional presentment requirement has been interpreted by the New York Court of Appeals to bar the Legislature from "recalling" bills once presented and to require that once passed by both chambers of the Legislature, the bills must be presented to the Governor and not delayed. *Matter of Campaign for Fiscal Equity, Inc. v. Marino*, 87 N.Y.2d 235, 237 (1995).

Once presented, Article IV, section 7 requires the Governor to sign the bill or return the bill with objections (veto it) within ten days (Sundays excepted) or the bill automatically is enacted (unless the Legislature has finally adjourned, in which case the bill only becomes law if the Governor signs it within thirty days of such adjournment).

In recent years, the Legislature has tended to pass the vast majority of legislation toward the end of its session. In 1995, 570 of 693 enacted bills received final legislative action in the final month of the session. Because the Legislature now only recesses, and never technically adjourns, the Governor is often presented with a large volume of legislation on which action is required within ten days.

[92] This would happen to a bill supported by a minority of the majority party and a majority of the minority party.

We do not favor a constitutional amendment that would override the Court of Appeals decisions that require bills to be presented to the Governor when passed, and which bar the recall of bills once presented. *See Matter of Campaign for Fiscal Equity, Inc.*, 87 N.Y.2d at 237. The constitutional power to recall or indefinitely withhold legislation once passed is inconsistent with the smooth functioning of government processes. Lobbyists would be given a continuing opportunity to influence or derail legislation, even after it is passed. If there is a constitutional convention, we would support eliminating any ambiguity with respect to the presentment requirement, mandating that a bill be presented to the Governor within a reasonable time after it has passed both chambers of the Legislature.

As to the crush of business created by the ten-day window, we believe that Article IV, section 7 should be amended to give the Governor a reasonable time to act on bills that have been passed by the Senate and the Assembly and which are presented just prior to a lengthy recess or adjournment. In particular, the language in Article IV, section 7 could be amended to allow the Governor thirty days to act on bills presented just prior to the Legislature's summer recess.

2. Legislative Debate, Discharge and Starring

The Constitution does not establish rules limiting the time for legislative debate or the process by which legislation is discharged from consideration by committee. These procedures are governed by legislative rules, as follows:

Debate: In the Assembly, the leadership can strictly control the scope and manner of debate. For example, as a general matter, no member may without recognition by the Speaker speak more than twice on any question, or speak more than fifteen minutes at a time. In the Senate, once a measure has been considered for two hours, a Senator may move to close debate. If the motion to close debate wins the support of a majority of Senators present, then the pending measure takes precedence over all other business.

Discharge: In the Assembly, a standing committee may be "discharged" from consideration of a bill or resolution only after (i) at least sixty days after the bill or resolution was referred to the committee and (ii) a motion is made with support from a majority of the Assembly. Furthermore, at any time on or after the second Tuesday in April, no such motion may be made except with unanimous consent of the members or, if notice is given prior to the second Tuesday in April, at the discretion of the Speaker. No motion to discharge may be considered unless it has been on the calendar for a period of five legislative days, and then only one motion is allowed per legislative day. Motions to discharge may only be made by the sponsor of the bill or resolution.

In the Senate, a standing committee may not be "discharged" from consideration of a bill or resolution until a vote of the majority of the Senate. In addition, any motion to suspend the rules for the purpose of discharging a standing committee from consideration of a bill, resolution or question, for the purpose of reading, passing and transmitting the same to the Assembly out of its regular order, shall only be made after three calendar legislative days' notice thereof in writing, and shall not be in order, without the unanimous consent of the Senate, after the second Tuesday in April.

Starring: Starring is the process by which the majority leader or a sponsor of a Senate bill can prevent debate on the bill. In the Senate, Rule VIII, section 7 provides that "a bill appearing on the calendar may be 'starred' only at the direction of the Temporary President (Majority Leader or designee) or by or on behalf of the introducer, whereupon all further action on such bill shall be suspended. . . . A star placed on a bill by the Temporary President may be removed therefrom only at the direction of the Temporary President."

These practices give considerable power to the leadership of each chamber to control the flow of legislation. "Starring" actually allows the majority leader to prevent anyone who is out of step with the leadership from bringing legislation to the floor. In 1990, the Association's Committee on State Legislation strongly recommended that the Senate discontinue this practice,[93] and we continue to support that position. Nonetheless, a constitutional convention should not be called to impose constitutional constraints on the power of the Legislature to set its own rules or make trade-offs that are best left to the Legislature itself.

D. Measures Governing the Enactment of Politically Sensitive Legislation

1. Legislative Salaries

Article III, section 6 provides in relevant part that "each member of the legislature shall receive for his services a like annual salary, to be fixed by law." This section goes on to preclude the increase or decrease of a member's salary "during and with respect to, the term for which he shall have been elected." Subject to these constitutional parameters, the salary of legislators is set by statute (the current level is $57,500 per annum, established effective 1989).

[93] *See* Letter dated March 21, 1990 from Henry T. Berger, Esq., Chair of the Committee on State Legislation, to Honorable Ralph J. Marino, Temporary President, New York State Senate.

We oppose constitutional measures that would provide for an automatic process for increasing legislative salaries. While there are convincing arguments to support depoliticization of legislative salary determination, measures that address this objective can be implemented without constitutional change. For example, legislative salary increases can be tied to those of other governmental workers or pegged to increases in the Consumer Price Index or other economic indicators. Similarly, the Legislature could establish a "salary commission" to determine appropriate salary increases. So long as mid-term adjustments were precluded, such measures would satisfy the Constitution and could depoliticize the process.

The Association has long supported the enactment of measures to depoliticize the process of setting salaries for the judiciary. We favor similar reform with regard to legislative salaries. The pursuit of these laudable objectives, however, does not require constitutional change and does not justify a constitutional convention.

2. Reapportionment

The Constitution mandates that both the Senate (Article III, section 4) and the Assembly (Article III, section 5) be reapportioned every ten years following the taking of the federal census such that the districts are as equal in population as possible and "in as compact form as practicable." Thus, the Legislature is charged with performing the reapportionment, subject to State and federal judicial review. In 1964, New York's reapportionment provisions (sections 3 and 5) were declared unconstitutional under the Fourteenth Amendment to the United States Constitution for failing to adhere to the one-person, one-vote principle by structuring legislative districts based on considerations other than strict equality of population. *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964). Although reapportionment was addressed by the 1967 Convention, the proposed new constitution failed at the polls and the stricken constitutional provisions have never been amended.

Critics charge that the process of drawing district lines is inherently political and that gerrymandering has been particularly rampant in New York. They point to the inherent conflict of interest associated with giving the majority party the power to design the shape of voting districts. Defenders of the status quo argue that legislators are best suited to reflect the public will and are uniquely accountable for their decisions.

The proposed alternatives focus on the establishment of an "independent commission" to reapportion legislative districts. Various versions either allow or preclude legislators from serving on the commission and make the commission's decisions subject to legislative and/or judicial re-

view or give it binding effect (presumably still subject to constitutional and Voting Rights Act scrutiny).

Since each of these options would alter the constitutional mandate that the Legislature perform reapportionment, an effort to depoliticize reapportionment through the use of a commission would require constitutional change. In 1967, the Association's Special Committee on the Constitutional Convention supported the creation of an independent commission with responsibility for periodic reapportionment, which would submit reapportionment plans for judicial review or, in the alternative, to the Legislature for enactment subject to judicial review. *See* Special Committee on the Constitutional Convention, *Legislative Apportionment* (Apr. 1967). Vesting responsibility for reapportionment in an independent commission removes the process from the Legislature which, it was noted, is inherently biased in matters affecting district boundaries.

We support the establishment of an independent commission with powers similar to those urged by the Special Committee in 1967.

Chapter 6

THE EXECUTIVE BRANCH

Certain aspects of the Executive Article should be updated. We support adoption of clear provisions for gubernatorial succession, elimination of a Governor's mere "absence from the State" as authority for the Lieutenant Governor to "act as Governor," and clarification of the procedure for filling a vacancy in the office of Lieutenant Governor. However, these changes are not of sufficient urgency to warrant a constitutional convention.

* * *

Article IV, which addresses the executive branch of government, defines the qualifications, powers and duties of the Governor and Lieutenant Governor and provides for gubernatorial disability and succession. As discussed below, while a number of provisions in Article IV might be considered for amendment, none of them individually or cumulatively warrants a constitutional convention.

A. Gubernatorial Succession

Article IV provides for the orderly transfer of power from the Governor to the Lieutenant Governor in the event of death, disability or other incapacity of the Governor. Section 5 and portions of section 6 apply in cases of temporary disability of the Governor, whereas section 6 provides for succession to the office of Governor and replacement of other executive officers in cases of death or removal from office.[94] While not of sufficient urgency to warrant a constitutional convention, certain aspects of the succession provisions should be updated.

1. Temporary Disability

Section 5 provides that the Lieutenant Governor shall "act as Governor" if the Governor "is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of his office," until the inability ceases or the term expires. Section 6 contains a similar provision authorizing the Temporary President of the Senate to act as Governor

[94] Article XIII, section 5 authorizes the Legislature to make provision for removal of elected (non-judicial) public officers for misconduct.

should the Governor and Lieutenant Governor both become unable to serve.

Historically, a Governor's absence from the state might have prevented the Governor from discharging the duties of the office, particularly in cases of emergency. Improvements in telecommunications and transportation have changed the significance of a Governor's absence from the state. With the advent of e-mail, telecopiers and the Internet, the Governor may attend to the business of the State from anywhere in the world. Furthermore, modern air travel permits the Governor to return to New York within one day from almost anywhere. Accordingly, the constitutional provision allowing the Lieutenant Governor (or Temporary President of the Senate) to "act as Governor" whenever the Governor is simply absent from the state is now outdated. The potential for mischief by a self-serving Lieutenant Governor, legislators or others inherent in this provision renders it more than simply obsolete, and it should be deleted.

2. Death or Removal from Office

Sections 5 and 6 set forth the procedures for filling vacancies in the offices of Governor and Lieutenant Governor resulting from death, resignation or removal from office and the devolution of duties until the vacancies are filled. The Lieutenant Governor is first in line of succession to the office of Governor. If the office of Lieutenant Governor were also vacant, a Governor and Lieutenant Governor would be elected to fill the unexpired terms. The Temporary President of the Senate would act as Governor until the election could take place. In cases of a vacancy in the office of Lieutenant Governor, the Temporary President shall perform the duties of that office during the period of the vacancy. The next in line of succession is the Speaker of the Assembly. In any case not provided for in the Constitution, the Legislature is authorized to provide for the devolution of duties.

An examination of the history of the office of Governor of New York and other states, and the Presidency, reveals that the risk of an inability to serve is not insignificant. For instance, the United States Constitution lacked clear procedures for temporarily transferring power from a disabled President prior to ratification of the Twenty-Fifth Amendment in 1967. Before that time, our nation was temporarily leaderless as a result of disabilities during at least eleven presidencies.[95]

[95] Several of these disabilities were for extended or recurring periods. For example, President Garfield lingered for eighty days after being shot before he succumbed, and President Wilson was considered an invalid for approximately seventeen months during his second term. More recently, President Dwight D. Eisenhower was incapacitated three separate times by heart attack, an operation and a stroke during his Administration. Because of the lack of a formal mechanism for dealing with Presidential disabilities, President Eisenhower gave Vice President Nixon a letter providing that if he were to become disabled again, the Vice President was instructed to act as President until the disability had passed. While this procedure was preferred by Presidents Kennedy and Johnson when they took office, the Kennedy assassination served as the catalyst for the adoption of the Twenty-Fifth Amendment. The urgency of the issue was heightened by the fact that President Johnson had suffered a heart attack during his prior service as a United States Senator. Michael Nelson, *A Heartbeat Away: Report of the Twentieth Century Fund Task Force on the Vice Presidency* 86-88 (1988) (hereafter, *"A Heartbeat Away"*).

Outside of New York, Governors have suffered extended disabilities. Two well-known examples are the disputed mental disability of Earl K. Long of Louisiana during May and June of 1959 and the disability of Henry Horner of Illinois between the years of 1938 to 1940. John Feerick, *From Failing Hands: The Story of Presidential Succession* 287-29 (1965) (hereafter, *"Presidential Succession"*). Internationally, Russian President Boris Yeltsin has apparently been ailing for more than a year and recently underwent cardiac by-pass surgery. "Yeltsin's Illness: Causes, Treatments, Puzzles," *N.Y. Times*, Oct. 27, 1995 at A12, col. 1; "Yeltsin's Illness Stirs Succession Pretensions," *Washington Post*, Sept. 24, 1996, at A1, col. 1; "An Impatient Yeltsin Strains at Leash but Doctors Urge Him to Slow Down," *Wall S. J.* Nov. 8, 1996. (Cardiac by-pass surgery was performed on November 5, 1996. Until Yeltsin resumed his office on November 7, he had temporarily transferred power to the Prime Minister.)

[96] U.S. Const. amend. XXV, § 4.

Not covered by the State Constitution are cases in which a disabled Governor is unable or unwilling to declare his or her inability to serve. The Twenty-Fifth Amendment would be an appropriate model. Section 3 of the Twenty-Fifth Amendment provides that where the President is "unable to discharge the powers and duties" of office and knows it, the President provides written notification to the Speaker of the House and the President pro tempore of the Senate of inability to serve. Until the President supplies a written notification to the contrary, the powers and duties of the President are to be performed by the Vice President as Acting President.

Where the President is disabled and unable to give the prescribed written notification, the Vice President and a simple majority of the cabinet are authorized to transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives written notification that the President is unable to discharge the powers and duties of the President's office. The Vice President thereupon shall assume the powers and duties of the President as Acting President. Should the President recover from the disability, the President may send written notification to the Speaker of the House and the President pro tempore of the Senate declaring that no inability exists.[96]

Where the Vice President and a majority of the cabinet believe the President is disabled, but the President is unwilling to send the required notification, the Twenty-Fifth Amendment provides that Congress shall de-

termine within three weeks of receiving written notification from the Vice President and Cabinet whether the President is unable to serve. If Congress determines, by a vote of two-thirds of both Houses, that the President is unable to discharge the powers and duties of the office, the Vice President shall discharge the duties of President as Acting President; otherwise, the President shall resume the powers and duties of office.[97]

There is often room for disagreement concerning the existence of a disability that renders the executive unable to discharge the duties of office, and the Twenty-Fifth Amendment does not provide a definition. However, it is clear from the legislative history that inability is not unpopularity, incompetence, laziness, or even conduct that would warrant impeachment. Congress intended to leave that term undefined so that those charged with determining whether the executive is truly unable to serve would be able to make that determination on a case-by-case basis.[98]

Accordingly, if a convention is called, section 6 should be amended to incorporate the provisions of the Twenty-Fifth Amendment providing for cases of disability. However, this is not a matter of sufficient urgency to require a constitutional convention.

B. Role of the Lieutenant Governor

Section 6 requires the Lieutenant Governor to possess the same qualifications of eligibility for office as the Governor. The Constitution defines only two duties of the Lieutenant Governor. As discussed above, section 5 provides that the Lieutenant Governor shall "act as Governor" in the event the Governor becomes unable to serve for the duration of the disability or the expiration of the term. Section 6 provides that the Lieutenant Governor shall also serve as president of the Senate, with the power to cast a vote only in the event of a tie. Further definition of the role of the Lieutenant Governor is left to the Governor's discretion. We note that there have been calls for eliminating the office entirely, on the ground that the position holds little power and few responsibilities.[99]

The office of Lieutenant Governor serves the essential function of

[97] *Id.*

[98] Michael Nelson, *A Heartbeat Away* at 88.

[99] Dennis Duggan, "Tainted Political Baubles," *Newsday*, June 16, 1996, at E3 ("in most states, [a lieutenant governor] is an afterthought, a political bauble that is all shine and no substance"); Mark Humbert, "New York State's No. 2 Post Has Stormy History: McCaughey Ross is the Latest to Find Herself on Thin Ice," *Buffalo News*, Feb. 4, 1996, at A3 (quoting former Lt. Gov. Alfred Del Bello, "[t]here is nothing to do when you are lieutenant governor.... They ought to eliminate the job altogether or give it some power").

providing a clear line of succession to the office of Governor by a public officer elected at a statewide election who meets the qualifications for Governor. If the office serves no other function, we nonetheless recommend retaining it.

Creating new constitutional duties for the Lieutenant Governor would reduce the Governor's flexibility to assign duties to the Lieutenant Governor, a function that is appropriately left to executive discretion.[100] A flexible approach allows the Governor to utilize the Lieutenant Governor in a variety of roles depending upon the circumstances at the time. In our view, the Lieutenant Governor's role should depend on the personal and professional relationship between the Governor and Lieutenant Governor, the skills and experience of each and the needs of the State, matters which cannot and should not be provided for in the Constitution. Accordingly, no constitutional amendment is recommended.

C. Joint Nomination of Governor and Lieutenant Governor

Section 1 requires that the Governor and Lieutenant Governor be elected jointly. However, the Constitution makes no provision for joint nomination of candidates, a process conducted by New York's political parties. For many years candidates for these offices were nominated at statewide conventions, which traditionally selected a candidate for Lieutenant Governor who would be acceptable to the gubernatorial candidate. In 1970, New York's political parties began holding statewide primaries for the selection of candidates, a process that can result in nomination of candidates for Governor and Lieutenant Governor who might be politically incompatible.

Although it may be preferable for candidates who are elected jointly to be nominated jointly, this is a matter of political party governance that is inappropriate for constitutional regulation. Accordingly, no constitutional amendment is recommended.

D. Filling a Vacancy in the Office of Lieutenant Governor

Section 6 provides that in the case of a vacancy in the office of Lieutenant Governor or inability of the Lieutenant Governor to serve, the

[100] N.Y. Const. art. IV, §§ 5, § 6; *see also* Galie, *The New York State Constitution: A Reference Guide* at 104-05. An examination of the history of the federal experience in this area supports our recommendation that the Lieutenant Governor should have no other duties than those already specified in the Constitution. The success of two United States Vice Presidents who were formally assigned specific positions—Henry Wallace, who chaired the Board of Economic Welfare, and Nelson A. Rockefeller, who served as head of the White House Domestic Council—has been questioned. Michael Nelson, *A Heartbeat Away* at 65-66.

Temporary President of the Senate "shall perform all the duties of lieutenant-governor during such vacancy or inability." Article XIII, section 3 provides generally that "[t]he legislature shall provide for the filling of vacancies in office, and in the case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy." These provisions led to a two-year vacancy in that position after Lieutenant Governor Alfred Del Bello resigned in 1986 to take a private sector job.[101] Governor Cuomo and the Legislature reached a tentative agreement to allow the Governor to nominate a successor, subject to confirmation by a majority vote of a joint session of the Senate and Assembly. The Constitution, however, was never amended.

The Twenty-Fifth Amendment to the United States Constitution provides that a vacancy in the Vice Presidency is filled through appointment of a successor by the President subject to confirmation by both Houses of Congress.[102] This would be an appropriate model for amending the State Constitution. Appointment of a successor is superior to holding a special election due to the preference for compatibility between the Governor and Lieutenant Governor, which cannot be assured if a statewide election for Lieutenant Governor were held. Under the circumstances, the high cost of holding a special election is not justified. Requiring separate approval by both chambers of the Legislature, after nomination by the Governor, is an appropriate safeguard in light of the fact that the appointment takes the place of a statewide election.

Accordingly, an amendment which provides for the appointment of a Lieutenant Governor by the Governor subject to confirmation by each chamber of the Legislature in the event of a vacancy should be considered. Like the other succession provisions discussed above, this, also, is not of sufficient urgency to warrant a constitutional convention.

E. Executive Term Limits

The Constitution does not limit the number of terms that the Governor and Lieutenant Governor may hold office and, although most other

[101] "See Picking a Backup Governor," *Newsday*, June 25, 1986.

[102] U.S. Const. amend. XXV, § 2. This section was enacted because of sixteen vacancies in the office of Vice President of the United States prior to its enactment. Half of those vacancies occurred as a result of succession to the Presidency. Another seven vacancies were caused by the death of the Vice Presidents themselves. The sixteenth vacancy was caused by the resignation of another Vice President. A seventeenth vacancy caused by resignation has occurred since the passage of the Twenty-Fifth Amendment. John Feerick, *Presidential Succession* at 316.

states and the federal government[103] limit the terms its executives may serve, executive term limits should not be added to the State Constitution.

Proponents of executive term limits point out that executive term limits have long been the law in most states, major cities and the federal government. As a policy matter, term limits constrain the executive in the exercise of broad discretionary powers, such as judicial and other appointments, allocation of governmental resources and control of police forces. Moreover, an executive who is able to consolidate power over time may become entrenched, ineffective, or worse. On the other hand, critics argue that in the absence of term limits, the electorate retains control over the number of terms an executive may serve, and that voters can, and do, remove longstanding incumbents.

The Association has not yet taken a position with respect to executive term limits.[104] Whatever the ultimate determination, there is no need to call a constitutional convention to address this issue.

[103] *See* U.S. Const. Amend. XXII.

[104] *See*, Committee on Government Ethics, "The Proposed Term Limits Amendment," 51 *The Record* 740, 744-45 (1996); *see also* Committee on Government Ethics, "Repeal Term Limits in New York City?" 51 *The Record* 283 (1996).

Chapter 7

STATE OFFICERS AND CIVIL DEPARTMENTS

Certain aspects of the constitutional provisions governing public officers and civil departments should be updated. We support clarification of the procedures governing the filling of vacancies in the offices of Comptroller and Attorney General, and elimination of the arbitrary limit of twenty civil departments should be considered. However, these changes are not of sufficient urgency to warrant a constitutional convention.

* * *

Article V sets forth the duties and responsibilities of the Comptroller and Attorney General, provides for the creation and organization of civil departments and defines the functions of department heads, civil service appointees and other public officers. As discussed below, although minor adjustments to Article V should be considered if a constitutional convention is held, none of the proposed changes is of sufficient urgency to warrant a convention.

A. Selection of Comptroller and Attorney General

Under Article V, section 1, the Comptroller and Attorney General are chosen at the same general election as the Governor, hold office during the same term and possess the qualifications required for Governor and Lieutenant Governor in section 2 of Article IV. There has been some support for filling these positions by appointment rather than election.

The Comptroller and Attorney General are the only two department heads elected directly by the people. "This provides them with an independence deemed necessary by virtue of their function as watchdogs of the law and treasury, respectively."[105] As noted during the 1915 Constitutional Convention, these officers have a "peculiar relation" to the People that warrants selection by the People in a statewide election.[106]

The Attorney General, the State's chief legal officer, heads the Department of Law and is responsible for supervising the legal affairs of State government. This includes prosecuting and defending actions and proceedings on behalf of the State, prosecuting certain criminal defendants, rendering opinions concerning the effect of proposed constitutional amendments, investigating matters concerned with the public peace, safety, or justice, and enforcement of legislation regulating consumer fraud, environmental protection and human rights. Finally, the Attorney General is permitted to appear in any legal proceeding in which the constitutionality of a statute is brought into question.[107]

The Comptroller, chief fiscal officer of the State, heads the Department of Audit and Control. The Comptroller's powers and duties include supervision of the State's expenses and revenues and the assessment and taxation of real property.[108] Under section 1, the Comptroller must maintain the accounts of the State, pay the State payroll and other bills, audit the financial practices of all State departments and divisions and public authorities, as well as the fiscal affairs of all units of local government, and invest the funds of and other monies held by the State.

The importance of an independent Comptroller is underscored by the fact that although section 1 allows the Legislature to assign some functions of the Comptroller, it prohibits others as infringing on the Comptroller's discretion. Indeed, in interpreting the Comptroller's duties, the courts have stressed that the independence of elected officials must not be compromised.[109]

The Attorney General's role as an investigator, and the Comptroller's role as the State's financial watchdog strongly suggest, if not mandate, that these officers remain independent of appointment by the Governor and approval by the Legislature.[110] Independence is best maintained by continuing to have the office of Comptroller, as well as the office of Attorney General, filled through statewide election and not through gubernatorial appointment. Therefore, we recommend against constitutional amendment of the duties of the Attorney General and Comptroller.

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105 Galie, *The New York State Constitution: A Reference Guide* at 110-11.

106 Revised Record of the 1915 Constitutional Convention, Vol. III, at 3328-30.

107 *New York State Redbook* 702-03 (93d ed. 1996).

108 N.Y. Const. art. V, § 1.

109 Galie, *The New York State Constitution: A Reference Guide* at 111. Specifically, section 1 lists the various powers possessed by the Comptroller and authorizes the Legislature to pass implementing legislation and to assign certain additional specified powers to the Comptroller. The Legislature is prohibited from assigning to the Comptroller "any administrative duties except those incidental to the performance of the specified functions." N.Y. Const. art. V, § 1. Article X, section 5 gives the Comptroller the additional discretionary power to supervise the accounts of any public benefit corporation but not the power of pre-audit. Any attempt by the Legislature to mandate that obligation impermissibly infringes on the Comptroller's authority, thus compromising the independence of an elected official. *Patterson v. Carey*, 41 N.Y.2d 714 (1977).

110 Galie, *The New York State Constitution: A Reference Guide* at 110-11.

B. Filling Vacancies in the Offices of Comptroller and Attorney General

Under section 1 of Article V, "the legislature shall provide for filling vacancies in the offices of comptroller and of attorney-general. No election of a comptroller or an attorney-general shall be had except at the time of electing a governor." Article XIII, section 3 further provides that "[t]he legislature shall provide for filling of vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy." These provisions came to the attention of the public in 1993 when Attorney General Robert Abrams resigned and the office remained unfilled. The extended vacancy received some public criticism.[111] In 1993, the Senate and Assembly considered, but did not pass, proposed amendments to the Constitution and the Election Law to provide for an election to fill vacancies in the offices of Comptroller and Attorney General at the first general election following the vacancy.

There is an apparent inconsistency between the specific provision for filling vacancies in the offices of Comptroller and Attorney General in Article V and the vacancy provision for public officers generally in Article XIII. Article XIII authorizes the Legislature to make an interim appointment until the "commencement of the political year next succeeding the first annual election after the happening of the vacancy."[112] Article V authorizes the Legislature to "provide for" filling vacancies in the offices of Comptroller and Attorney General and requires that "[t]he comptroller and the attorney general shall be chosen at the same general election as the governor." If the specific provision is construed to take precedence over the general provision, the Legislature has the power to appoint a successor to fill a vacancy in these offices to serve the entire unexpired term.

In light of the unique status of these officers as the only publicly-elected department heads and the special need for independence in the performance of their duties, we believe successors to fill a vacancy should be elected at the first opportunity, consistent with other public officers under Article XIII, section 3. The cost of holding a special election, although not inconsiderable, is outweighed by the benefits to be gained by maintaining

[111] M. Nozzolio, *Blame it on the Assembly*, Newsday, Sept. 23, 1993, at 106; *Resignation Setting Off Political Maneuvers*, N.Y. Times, Sept. 9, 1993, at B9, col. 1; *Koppell named Interim Attorney General*, N.Y. Times, Dec. 17, 1993; Robin Schimminger, *When Officials Resign, Let the Voters Decide*, Buffalo News, Sept. 23, 1993, at C2.

[112] The "political year" is the calendar year. N.Y. Const. art. XIII, § 4.

the independence of the offices of Comptroller and Attorney General and the infrequency of an unexpected vacancy.

The proposed change is not of sufficient urgency to warrant a constitutional convention. However, if a constitutional convention were held, an amendment to provide for a special election to fill a vacancy in the office of Comptroller or Attorney General, to be held at the next general election day after the vacancy occurs, should be considered.[113]

C. Limitation on the Number of Departments

Article V, section 2 provides: "There shall be not more than twenty civil departments in State government, including those referred to in this constitution. The Legislature may by law change the names of the departments referred to in this constitution."[114] This limitation, while apparently arbitrary, has given rise to little controversy since its enactment.[115]

In 1915, when a constitutional limitation on the number of executive departments was first considered, New York's departments and bureaus numbered 152.[116] During the 1920s, the number reached 187. Because departments had overlapping and even duplicative responsibilities, the system was inefficient and it was often difficult to hold anyone accountable. In 1925, a constitutional amendment was approved by the electorate to consolidate this vast array of entities into eighteen departments. A 1943 amendment added the Department of Commerce (later replaced by the Department of Economic Development) and a 1959 amendment added the Department of Motor Vehicles, bringing the total number of departments to twenty. The Legislature is free to alter the names and functions of the departments.[117]

As the twentieth century has progressed, the size, role and scope of State government has continued to expand. The constitutional limit of twenty departments has necessarily resulted in a large increase in the size and breadth of responsibilities of some of these departments. Today there is a prolifera-

[113] If Article XIII, section 3 were to be amended, a conforming amendment to Article V, section 1 would be required.

[114] N.Y. Const. art. V, § 2.

[115] By contrast, a similar limitation in New Jersey's Constitution has given rise to difficulties in connection with the proposed creation of a Department of Veterans Affairs. Janet Gardner, Veterans' Cabinet Agency Unlikely, N.Y. Times, Nov. 22, 1987, section 11NJ at 28.

[116] *See Capelli v. Sweeney*, 167 Misc. 2d 220, 226 (Sup. Ct. Kings County 1995), *aff'd sub nom. Beyer Farms v. Oak Tree Farm Dairy, Inc.*, __ A.D.2d __, 646 N.Y.S.2d 454 (2d Dep't 1996).

[117] N.Y. Const. art. V, § 2; *see New York State Redbook* 449-50 (93d ed. 1996).

tion of agencies, boards, commissions, councils, divisions and offices that come under the umbrella of the Executive Department alone.[118] Because they are not departments, the appointees that head these units are not confirmed by the Senate, a constitutional requirement for heads of the twenty departments. As a practical matter, exemption from the Senate confirmation requirement for heads of agencies and bureaus that function as departments shifts power from the Legislature to the Executive.

If the need for a new department should arise, the Legislature has a number of options, including amending the Constitution on a case-by-case basis, creating a temporary commission or public authority instead of a department, and eliminating or consolidating one or more existing departments. However, the constitutional limitation to twenty departments is arbitrary and easily evaded. Accordingly, if a constitutional convention is called, elimination of this limitation should be considered, but it is not a matter of sufficient urgency to warrant a constitutional convention.

[118] The following thirty-three entities are under the aegis of the Executive Department: Adirondack Park Agency; Office of the Advocate for the Disabled; Office of Aging; Office of Alcoholism and Substance Abuse Services; Council on the Arts; Division of Budget; Consumer Protection Board; State Commission of Correction; Council on Children and Families; Crime Victims Compensation Board; Division of Criminal Justice Services; Developmental Disabilities Planning Council; Office of Emergency Management; Office of Employee Relations; Financial Control Board; Office of General Services; Division of Housing and Community Renewal; Division of Human Rights; Inspector General; Interdepartmental Traffic Safety Committee; Division of Lottery; Division of Military and Naval Affairs; Office of Regulatory Management Assistance; Office of Parks, Recreation and Historic Preservation; State Board of Parole Probation and Correctional Alternatives; State Commission of Quality Care for the Mentally Disabled; New York State Racing and Wagering Board; Real Property Services; State Liquor Authority; Division of State Police; Division of Veterans Affairs; Division for Women; Division for Youth. *New York State Redbook* 451-52 (93d ed. 1996); *see also* Official Directory of the City of New York 370-85 (1995).

Chapter 8

THE JUDICIARY

The Association has long supported merit selection of judges, merger of trial courts of record into a single court, creation of a Fifth Department of the Appellate Division, increasing the monetary jurisdiction of the Civil and District Courts, according Housing Court judges the same status as Civil Court judges, improvement of the procedures for certification and removal of judges, and simplification of the relevant constitutional text, all of which would require comprehensive constitutional reform of the Judiciary Article. The need for constitutional revision in this area is great, and there is little risk of adverse change. Viewed alone, we may have supported a constitutional convention as a method by which needed court reform could have been achieved. Weighed against the risks to other constitutional provisions, however, the need for amendment in this Article is not sufficient to justify calling a constitutional convention.

* * *

Article VI, the Constitution's article on the judiciary, is substantially more comprehensive and detailed than any other part of the Constitution. It is therefore not surprising that virtually any significant change regarding the judiciary requires constitutional amendment. While efforts to make some of these changes have been made over decades, the Legislature has been reluctant to consider constitutional amendments which would effect significant change in the way judges are selected or courts are organized. Judicial selection and court reorganization (*e.g.*, merger of trial courts) are the Association's primary interest in this area. Other issues involving Article VI, some of which require or merit constitutional change and others of which do not, are also discussed in this Chapter. The 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.[119]

[119] On March 19, 1997, Chief Judge Judith S. Kaye announced a new proposal for merger of the State's trial courts into a two-tiered system, creation of a Fifth Judicial Department and other court reforms, which the Association is now studying. Our longstanding support for merger of trial courts into a single court is discussed in section B of this Chapter. Our support for the creation of a new Fifth Department is set forth in section C.1.

A. Judicial Selection

We believe that the Constitution should be amended to provide for the merit selection of all judges of court of record.[120] By "merit selection," we mean 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. The list of nominees would be presented to a responsible and accountable public official or body, who would be required to make an appointment from the list within a limited time period. That choice should be subject to some sort of popular check, preferably by retention election or confirmation process.

"Merit selection" is different from "merit screening" and what some have termed "merit election." In the case of merit screening, a nominating committee transmits to the appointing authority the names of all candidates found to be qualified. In the case of merit election, a nominating committee proposes a limited number of names to a partisan political body for its nomination or endorsement, but the initial choice is made by political leaders or nominating convention delegates and the ultimate choice is made by the electorate.

One of the prime reasons behind the establishment of this Association in 1870 was dissatisfaction among members of the bar as to the method of selection of judges, namely by the political "leadership" of Boss Tweed and Tammany Hall. In the intervening 127 years, the nature of the concern has changed somewhat, but the underlying defect still remains: the system is susceptible to selection of judicial candidates for reasons other than merit.

Those men and women who have been elected as Justices of New York's general jurisdiction trial court, the Supreme Court, were chosen to run by judicial nominating conventions. All other elected judges[121] are subject to party primaries. Once nominated, by whatever process, these judicial candidates must seek support from the electorate in a general election. Neither of these methods is designed to select the best possible judges and both discourage well-qualified individuals, not previously active in politics,

[120] "Courts of record" is meant to include all courts other than town and village courts (many of whose judges are not attorneys) and most city courts, especially those with part-time judges.

[121] The following judges are elected: Judges of the County Court, Surrogate's Court, Family Court outside New York City, New York City Civil Court, District Court, town courts and most city and village courts. N.Y. Const. art. VI, §§ 10(a), 12(b), 13(a), 15(a), 16(h), 17(d).

from seeking judicial office, unnecessarily limiting the pool of potential judges.

In most parts of the state, judicial nominees are chosen by party leadership, frequently as rewards for past public or party service and, at best, with ancillary concern as to qualifications. Even in those places where screening committees must pre-clear nominees, once potential nominees are approved, political considerations, rather than relative merits among the approved group, become the motivating factor in the choice of the nominee. The most powerful party faction, or coalition of factions, will control a convention's choice. New York's arcane election laws, with their rigorous petition requirements, make support by party leadership or access to substantial financial resources virtual requirements for primary election success as well.

In the general election, one political party frequently dominates to such an extent that nomination is equivalent to election. In primary elections and in those few areas where general elections are truly contested, money must be raised—primarily from lawyers—to finance election campaigns. In these campaigns, candidates pronounce broad platitudes since the Canons of Judicial Ethics forbid a judge or a candidate for judge from speaking on issues likely to come before the court. Unless a judicial contest has attracted significant press or editorial page attention, those voters who bother to cast their ballots appear to do so on the basis of party, gender, perceived ethnicity or race, and impressions created by campaign advertisements and literature, rather than on the basis of qualifications, as to which they have minimal information.

At the end of a term, the judge, who has been required to abstain from politics, is required to reenter the political sphere and convince the current party leadership to renominate him or her for another term. In order to encourage renomination at the end of a term, some spouses of judges become regular attendees at and contributors to party and candidate fundraising events, years before their spouse's term is due to expire. Some judges, especially those elected to courts of limited jurisdiction, routinely declare their own candidacies for other elective judicial office without any expectation of success, so that they may themselves attend political functions. A change in party leadership, the need to satisfy powerful constituencies or factions, or changes in partisan political enrollment can result in an incumbent judge losing renomination and reelection. None of it bears any relationship to the judge's qualifications or performance.

Additionally, the possibility that the current method of judicial selection violates the federal Voting Rights Act, a claim currently in litigation in federal District Court, highlights the failings of the elective system. We strongly disagree with the remedy sought by the plaintiffs—election of jus-

tices from small judicial districts, rather than from county-wide and larger districts—and believe that it would result in a system subject to the same inappropriate political and monetary influences as the current selection method.

There are five courts the members of which are regularly filled by appointment: the Court of Appeals, Appellate Divisions of the Supreme Court, Court of Claims, New York City Criminal Court and the Family Court within New York City. Additionally, the Governor, Mayor of New York City and boards of supervisors (now county legislatures) in Nassau and Suffolk counties have the power to fill interim vacancies on all elected benches (except city, town and village courts) until the next general election.

Of all of these, only the selection process for the Court of Appeals is mandated by either the Constitution or statute.[122] The Commission on Judicial Nomination for the Court of Appeals, added to the Constitution by the voters in 1977, is composed of twelve members appointed by the Governor, Chief Judge and four legislative leaders. Despite periodic tension between the Commission, the Governor and the Legislature concerning the number of names to be submitted to the Governor by the Commission, which number has been established by the Legislature, the Legislature has held fast to the original concept of the Commission as a merit *selection* process rather than a merit *screening* process. We believe that the merit selection process has been successful and that those persons nominated by the Commission, as well as those chosen by the Governor, have been well-qualified, of diverse backgrounds, gender, race and ethnicity, and held in high esteem. The independence of the Commission historically has allowed it to attain those goals.[123]

It is for these reasons that we believe that there should be constitutionally established merit selection procedures for the appointment of all

[122] Judges of the Housing Part of the New York City Civil Court, who are not judges established under Article VI, are appointed by the Chief Administrator upon nomination by the Advisory Council for the Housing Part. NYC Civil Court Act § 110(f). We believe that they should become Article VI judges, chosen by a merit selection process. *See* section C.3, below.

[123] *See, e.g.*, Daniel Wise, "Pataki Action is Denounced by City Bar; Appointment of Counsel to Judicial Panel Scored," N.Y.L.J., Sept. 13, 1996, at 1 (reporting Association's opposition to appointment of Governor's counsel to the Commission on the ground that "The appointment of an official so intimately involved in the selection process undermines the independence" of the Commission) (quoting President Michael A. Cardozo); *see also* Council on Judicial Administration, "Report on the Continued Use of the Temporary Judicial Screening Committee," 52 *The Record* 222 (1997) (criticizing Governor Pataki's delay in establishing permanent judicial screening panels); Council on Judicial Administration, "Report on Nomination and Confirmation of Court of Claims Judges," 52 *The Record* 227 (1997) (calling for a 30-day public comment period after nomination and before confirmation of Court of Claims judges).

judges to the courts of record in the State of New York. Those procedures should require broad-based panels of both lawyers and non-lawyers, appointed by multiple authorities with due regard to political and demographic diversity, charged with the responsibility of nominating a limited number of the best qualified individuals to an appointing authority.[124] Qualification for judicial selection should be determined on the basis of experience, ability, accomplishments, temperament and diversity. We believe that the appointing authority should be dispersed among the Governor, mayors, county executives (where they exist) and county legislatures. We further believe that there should be some method by which appointments should be reviewed, preferably by a retention election within the first few years of a judge's term, or, alternatively, by a confirmation process.

B. Merger of Trial Courts

We believe that virtually all of the trial courts of record[125] should be merged into one trial court, with all judges having the same term of office and receiving the same compensation.

Anyone who has tried to describe the eleven different trial courts[126] in New York knows that there is little justification, other than historical accident, for our various courts. The multiplicity of courts inevitably leads to confusion among litigants and attorneys, increased administrative expense and additional administrative procedures required to assign judges where and when they are required. The fragmentation of jurisdiction frequently prevents litigants from obtaining relief in one forum.

The most extreme examples of fragmentation occur in domestic matters. The Supreme Court has sole jurisdiction over divorces, while it shares jurisdiction over custody, visitation and support with Family Court.

[124] In New York City, the Mayor's Advisory Committee on the Judiciary (and its predecessors) have functioned well on this model for approximately twenty years. The current system, however, is voluntary, and its continuance depends on each mayor's decision to continue it. We recommend a permanent structure that would be independent of the will of any individual executive.

[125] We would restrict merger to Supreme Court, County Court, Court of Claims, Surrogate's Court, Family Court, District Court, New York City Civil and Criminal Courts and the largest of the city courts outside New York City. While Judiciary Law § 2(10) includes all city courts as courts of record (prior to 1988, only eighteen of the sixty-one city courts outside New York City were included), we do not believe it appropriate or necessary to include city courts in the smaller cities, especially those with part-time judges.

[126] Supreme Court, County Court, Court of Claims, Surrogate's Court, Family Court, District Court, New York City Civil Court, New York City Criminal Court, city courts, town courts and village courts.

Incidents of domestic violence can be addressed in family offense proceedings in Family Court and, if serious enough, in criminal prosecutions in a local criminal court (Criminal Court, District Court, or a city, village or town court), County Court or at the Criminal Term of Supreme Court, as well. If the monied spouse stops paying rent or if the level of domestic violence is such that the landlord contends it breaches the lease, issues relating to the possession of real property may need to be resolved in Housing Court. Finally, arrearages in maintenance and child support can be sought by separate lawsuits in Civil Court.

A merged, single trial court of general, unlimited jurisdiction would not lose the skills and expertise of judges or non-judicial personnel who had been serving in specialized courts, since it is inevitable that a merged court would establish those parts necessary to deal with specialized matters. It does mean that if there is not enough work to keep a judge occupied full-time on trust and estate matters, for example, he or she would be available to preside over general civil or criminal matters. It also means that a new judge whose expertise had been trust and estate matters could be assigned to work on those matters, together with the judge who had been working on them, even if prior to merger that county had only one Surrogate.

The current fragmentation of courts has led to a hierarchy where much of the litigation involving litigants at the lower end of the socio-economic ladder is heard in courts with fewer resources and where judges and non-judicial personnel are paid less than in those courts where wealthier litigants have their disputes resolved. There is, however, no necessary correlation between the court and the complexity of a case. Merger would bring us a step closer to "Equal Justice Under Law."

Merger, even in the absence of merit selection, would also mean that all judges of the merged court would be eligible for designation to the Appellate Division. The current requirement that designation be limited to elected Supreme Court justices deprives the Governor of the ability to choose from the most qualified of all judges, not merely those with sufficient political support to achieve Supreme Court election.

While at one level merger will increase costs for salaries and benefits, it is an investment in the future of a truly unified court system which will reduce current inefficiencies for lawyers and litigants adversely affected by the current fragmentation. As part of the inequality among our trial courts, judges and non-judicial personnel performing similar work or work of similar complexity in different courts receive differing compensation depending solely on the status of a particular court in the hierarchy. Historically, budgets for libraries, technology, furniture and supplies have varied as well. Increases in salaries to achieve parity could be phased in over several years to deal with the fiscal impact. Moreover, merger should, over time, result in efficiencies and cost-savings as all personnel and facilities are available for full utilization. We believe that merger's costs can be made acceptable and that its benefit to litigants is worth the expected fiscal impact.[127]

C. Issues with Respect to Particular Courts

1. Appellate Division—The Fifth Department

Given the current overwhelming and imbalanced case load among the existing four Departments, we believe that the Constitution should be amended to permit the Legislature to establish a Fifth Department.[128] The boundaries of a new Department are properly a matter of political concern best left to the Legislature. Although we are concerned with the costs necessarily involved in creating another Department, we believe that the additional cost is justified. Funding for a new Fifth Department should not result in insufficient funding in existing courts, appellate and otherwise.

2. Monetary Jurisdiction of Civil and District Courts

In November 1995, by a narrow margin, the electorate declined to approve an amendment to the Constitution which would have increased the monetary jurisdiction of the New York City Civil Court to $50,000 from $25,000 and of the District Court, which is only in Nassau and Suffolk Counties, to $50,000 from $15,000. We believe that New York's current crazy-quilt of trial courts should be merged into one trial court of general jurisdiction; pending achievement of that goal, the jurisdiction of those courts should be increased to reflect the impact of inflation, last dealt with in 1983.

3. Housing Court Judges

Although called judges, those individuals who preside in the housing parts of the New York City Civil Court are not constitutional judges under Article VI. The responsibilities they exercise and the workloads they carry do not justify treating them differently from Civil Court judges presiding in other parts of the Civil Court. They should be made full constitutional judges, appointed pursuant to a merit selection system which would

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127 *See* Press Release, Committee for Modern Courts, June 9, 1987 (reporting total basic cost of court merger to be $33.9 million in 1987 according to study by Ernst & Whinney).

128 Association of the Bar of the City of New York, Committee on State Courts of Superior Jurisdiction, *A Fifth Department of the Appellate Division: Is it Time for a New Approach?* (May, 1994).

continue the current requirements of section 110 of the New York City Civil Court Act as to particular requirements of experience and knowledge.[129]

D. Other Issues

1. Certification of All Judges

If New York's trial courts were merged into a single court of general jurisdiction, all judges of that court would be eligible for certification until the year in which their seventy-sixth birthday is reached. Currently, only judges of the Court of Appeals and justices of the Supreme Court are eligible to be certificated, and only to sit in Supreme Court. N.Y. Const. art. VI, § 25(b). Even if merger does not occur, we believe that all judges of the County Court, Court of Claims, Surrogate's Court, Family Court, Criminal Court, Civil Court and District Court[130] should be eligible for certification after retirement at age seventy, subject to numerical limitations to be imposed by the Legislature.

Mandatory retirement at age seventy deprives the courts of talented and experienced men and women, many of whom are serving as Acting Supreme Court Justices when they reach retirement age. The issue should be the ability to perform the required work, not chronological age. There certainly is no justification to distinguish between judges of the Court of Appeals and Supreme Court and all other judges.

At the same time, we are aware that it might not be practical to certificate all seventy-year old judges who desire and are capable of continued service. We suggest that the Constitution be amended to permit certification of all judges and that the Legislature be required to set an annual numerical cap, without regard to court, on the number of judges who can be certificated annually. Judges should be assigned where needed, not solely to the court on which they sat prior to reaching age seventy. Additionally, we believe the current system for certification should be strengthened by legislation which would set forth in greater detail the criteria and methods used to determine the granting or denial of certification.

2. Provisions for the Removal of Judges

The Constitution currently provides three methods for the removal

[129] Association of the Bar of the City of New York, Committee on Housing Court, *Proposed Amendments to the New York City Civil Court Act* (March, 1990).

[130] These are the only judges who are permitted to be assigned to courts of greater jurisdiction. N.Y. Const. art. VI, §§ 26(b)-(h).

of judges: The Commission on Judicial Conduct,[131] impeachment[132] and a third procedure, called "removal."[133] We believe that the latter two procedures should be combined into a single procedure for impeachment.

Judges are the only constitutional officials who can be removed from office by three separate means, and we see no reason for this multiplicity of methods. The provisions regarding removal of judges of all courts other than the Court of Appeals and the Supreme Court are especially peculiar, requiring the Governor to recommend removal and the Senate to concur by a two-thirds vote of all of its members. It is the only process which includes participation by the Governor (the Governor has no role in the removal of a judge of the Court of Appeals or the Supreme Court, or in the impeachment of any judge) and which excludes the participation of the Assembly.

We do believe that there should be a method to remove judges in addition to the Commission on Judicial Conduct, as judicial discipline should not be insulated completely from scrutiny from the popularly-elected arms of government. However there is no justification, other than murky history,[134] for two methods of removal in addition to the Commission on Judicial Conduct.[135]

With respect to impeachment, we suggest that the members of the Court of Appeals not be included in the court for the trial of impeachment as the Constitution currently provides. Given the Court's role in the judicial discipline process, the possibility that it might be called on to determine issues of law with respect to impeachment and the political nature of the impeachment process, we believe that required participation by the Court of Appeals in the trial of impeachments is inappropriate.

3. Simplify Article VI

Merger of all trial courts would result in the simplification of the Judiciary Article, as there would no longer be a need to specify in great

[131] N.Y. Const. art. VI, § 22.

[132] N.Y. Const. art. VI, § 24.

[133] N.Y. Const. art. VI, § 23. Judges of the Court of Appeals and Justices of the Supreme Court can be removed by concurrent resolutions of the Legislature upon a two-thirds vote of each house of the Legislature. N.Y. Const. art. VI, § 23(a). Judges of other courts may be removed by a two-thirds vote of the Senate on recommendation of the Governor. N.Y. Const. art. VI, § 23(b).

[134] The last time that the removal provisions of the Constitution were successfully used was in 1872. *See generally* Task Force on Judicial Selection and Court Merger, "Judicial Accountability and Judicial Independence: The Judge Lorin Duckman Case Should Not Be Referred to the State Senate," 51 *The Record* 629 (1996).

[135] The Association is presently studying the role and function of the Commission on Judicial Conduct.

detail the jurisdiction of "inferior" courts. Even in the event that merger is not achieved, we believe that Article VI should be substantially simplified, giving the Legislature the authority to determine issues of monetary and geographic jurisdiction. As the Constitution currently stands, certain courts have their monetary jurisdiction set out in Article VI (*e.g.*, the Civil Court), while the jurisdiction of other courts is subject to legislation (*e.g.*, the District Court).

The Constitution need do no more than establish courts, set forth minimal descriptions of their composition and jurisdiction and provide for the method of selection of the judges of those courts. The rest should be left to the Legislature and administrators of the unified court system for their determination as situations and needs evolve over time. There is no reason the Judiciary Article should be more than one-quarter of the Constitution's entire length.

Chapter 9

STATE AND LOCAL FINANCE AND TAXATION

Current constitutional provisions governing State and local finance and taxation are outdated and inadequate, putting New York and its localities at a distinct economic disadvantage. Despite the need for comprehensive reform to these provisions, in the absence of careful study of this complex issue and recommendations for reform, a constitutional convention would have little hope of achieving satisfactory change in this area. We support the creation of a constitutional commission to study these issues and make recommendations for reform by the Legislature or a future constitutional convention.

* * *

The State Constitution abounds with detailed provisions intended to secure the fiscal health of the State (Article VII) and its localities (Article VIII). For many years, substantial concern has been expressed as to whether the complex procedural and substantive formulae contained within the Constitution accomplish their purpose or, on the other hand, artificially encumber fiscal planning with outdated political constraints. Critics cite perennially late State budgets, the State's low credit rating and relatively high taxes (when the State income tax is considered in conjunction with fees, business taxes and local taxes). Additionally, the massive amount of "non-guaranteed debt,"[136] the unfilled infrastructure needs at the local level and the lack of long-term planning are taken as indications that the current provisions, taken as a whole, do not work. *See, e.g.*, Goldmark Commission Final Report at 13-14.

In April 1967, the Association's Special Committee on the Constitutional Convention issued reports considering the need for constitutional reform in the areas of Local Government and Finance, and State Finance, Taxation and Housing and Community Development. Those reports examined in detail the constitutional provisions relevant to these topics and the historical development of those provisions. The Special Committee concluded that many of the provisions, including restrictions on the gift or loan of State money and credit, State and local debt and State and local taxation, required amendment, and made a number of specific recommendations for change. *See*, Special Committee on the Constitutional Convention, *Local*

[136] This term is used to refer to debt secured by revenues that derive from user fees or other sources devolved by legislation to quasi-governmental issuers, or which are dependent upon ongoing legislative appropriation, to avoid express constitutional restrictions.

Government and Finance at 15-24 (Apr. 1967); Special Committee on the Constitutional Convention, *State Finance, Taxation and Housing and Community Development* (Apr. 1967).

Similarly, in 1979 the Association's Committee on Municipal Affairs issued a report that included a detailed proposal for revisions to Article VIII. *See* Committee on Municipal Affairs, "Proposals to Strengthen Local Finance Laws in New York State," 34 *The Record* 58 (1979). The Committee highlighted the need for reform in connection with the gift and loan provisions, State-secured debt, debt limits, deficit financing, bond anticipation notes and regionalization.

We have considered the Reports of the 1967 Special Committee, the 1979 report of the Municipal Affairs Committee and reports by numerous individuals, groups and other Association Committees. We wish to acknowledge in particular the work of Frank Mauro of the Fiscal Policy Institute and articles by Professor Richard Briffault[137] and Robert Kerker.[138] We have concluded that change is advisable, as described below, but that the change would best be developed by an interdisciplinary task force of professionals—attorneys, accountants, financial experts and government officials—who could deliberate without the time pressures and competing demands necessarily imposed at a constitutional convention. The task force should then propose to the Legislature a package of separate constitutional amendments that would enable the State and its localities to strengthen or, where necessary, regain fiscal health.

The provisions respecting State and local finance are, of course, interrelated but for purposes of this analysis we have categorized them as follows: State budget process, State taxes and debt, and local taxes and debt.

A. State Budget Process

Unlike most states, the legal framework for New York State's budget process is set forth in great detail in the Constitution (Article VII, sections 1 through 7). The Governor is required to submit annually to the Legislature a budget along with bills for proposed appropriations and revenues.[139] This has been implemented through the adoption of five separate appropriation bills, known as "budget bills":[140]

(1) State Operations (appropriations for the operation of executive branch departments and agencies);

[137] Briffault, *Intergovernmental Relations,* Goldmark Commission Briefing Book at 119.

[138] Kerker, *State Government Finance,* Goldmark Commission Briefing Book at 157.

[139] N.Y. Const. art. VII, §§ 2, 3.

[140] State Fin. Law § 24.

(2) Legislative and Judiciary Budget;
(3) Debt Service;
(4) Aid to Localities (appropriations to localities, schools and other public benefit corporations); and
(5) Capital Projects Bill (appropriations for capital construction by the State).

In addition, the Governor submits a number of bills, known as "Article VII bills," containing legislative proposals designed to raise revenues or describe program modification or reorganizations necessary to implement the budget.

Budget bills must be submitted at the beginning of the calendar year.[141] There is no constitutional deadline for adoption of a budget. However, the State Finance Law[142] sets April 1st as the beginning of the fiscal year. This means that appropriations authorized the previous year may not be utilized without re-authorization or a new appropriation.[143] In effect, the State loses its authority to spend money unless action is taken. Further, the Constitution specifies that the Legislature may not pass or consider any appropriation bill of its own until it has acted upon the Governor's appropriation bills, unless upon a message of necessity from the Governor.[144]

The Governor's proposed budget must be balanced upon submission,[145] but there is no requirement that it be balanced upon passage or throughout the year.[146] If the State incurs an operating deficit, it may borrow to close

[141] The Constitution requires that the budget be submitted to the Legislature by the second Tuesday after the first day of the Legislature's first meeting of the year—which is the first Wednesday after the first Monday in January (N.Y. Const. art. XIII, § 4)—but in a year following a gubernatorial election, by February 1st. Amendments may be sent by the Governor within thirty days after submission.

[142] State Fin. Law § 3.

[143] N.Y. Const. art VII, § 7 ("No money shall ever be paid out of the state treasury or any of its funds or any of the funds under its management, except in pursuance of an appropriation by law"). This includes not only State funds but federal monies passed through the State as well. *Anderson v. Regan,* 53 N.Y.2d 356 (1981).

[144] N.Y. Const. art. VII, § 5. It is unclear what constitutes final action on the budget. Theoretically, both houses of the Legislature could vote against the Governor's proposals and, thereafter, be free to pass appropriation bills.

[145] N.Y. Const. art. VII, § 2.

[146] Technically speaking, the Legislature does not enact the budget. The Legislature enacts, with or without modification, some or all of the appropriation bills, the revenue bills and the Article VII bills. The "budget" is a separate document that explains the net effect of the various bills, as proposed by the Governor, upon the treasury. Legislators may agree or disagree with the budget proposal, but they do not vote or act upon it.

the gap.[147] On the other hand, if the Governor foresees an operating deficit, he or she may *not* unilaterally impound funds or refuse to implement a program carrying an appropriation.[148]

The budget bills must contain itemized appropriations, not lump sums.[149] The Legislature may not alter an item of appropriation within a bill submitted by the Governor, but may reduce, strike out or add a separate item of appropriation. If one or more additions are made, the Governor retains a "line item veto" power by which to strike any one or more of the additions.[150] Any legislative alteration (other than a reduction or deletion) of an item submitted by the Governor is null and void.[151]

Several major criticisms of the State budget process have been articulated.

1. Budget Timetable

Although the Governor is required to submit an Executive Budget and budget bills at the beginning of the calendar year, the Legislature is not required to adopt or amend the budget bills by a specific date. However, the State operates on a fiscal year beginning April 1st[152] and there are no provisions for the operation of the government if the budget bills are not adopted by April 1st. In recent years, enactment of the required budget bills has frequently occurred after the start of the fiscal year. The delayed adoption that has occurred in most fiscal years causes problems at both the State and local levels: there is no ability on the part of State agencies to plan ahead and local officials are unable

147 *But see Wein v. State of New York,* 39 N.Y.2d 136 (1976) and *Wein v. Carey,* 41 N.Y.2d 498 (1977). Short term indebtedness such as Bond Anticipation Notes, Revenue Anticipation Notes and Tax Anticipation Notes must be covered by honest, good faith estimates of matching revenues lest the constitutional prohibition against incurring long-term debt without voter approval be violated. In every year, as the year progresses, there is either an unanticipated deficit or a surplus. Deficits may be closed by short-term debt. The practice is forbidden only when estimates are dishonest. Such notes can be protected by a certificate ("Wein Statement") indicating that the revenue projections are made in good faith.

148 *County of Oneida v. Berle,* 49 N.Y.2d 515 (1980).

149 *Saxton v. Carey,* 44 N.Y.2d 545 (1978); *People v. Tremaine,* 281 N.Y. 1 (1939). Each "item" describes an object or purpose and authorizes expenditures up to "an amount necessary" to fulfill the described program. Details, if needed, are frequently fleshed out by schedules and memoranda of understanding which accompany the legislation.

150 N.Y. Const. art. IV, § 7.

151 N.Y. Const. art. VII, § 4. *See New York State Bankers Ass'n v. Wetzler,* 81 N.Y.2d 98 (1993) (added language by Legislature conditioning appropriation for Governor's proposed bank audit program upon collection of fees from the banks to pay for the audits was without force and effect).

152 State Fin. Law § 3(1).

either to adopt their budgets or to borrow money based on anticipated State revenues. Many small not-for-profit organizations dependent upon State aid are particularly hard-pressed since they find it difficult, if not impossible, to borrow to meet payroll obligations or other operating expenses. Outside the State's five largest municipalities,[153] school budgets are put to voter approval without assurance that critical State aid will meet anticipated levels. Out of necessity, the State has periodically, and consistently, enacted temporary spending bills authorizing some, but not all, necessary payments during delays.[154]

Various proposals have been suggested to deal with this problem, including automatic adoption of a baseline budget, an austerity budget or the Governor's Executive Budget, adoption of a biennial budget, and imposition of penalties on the Governor and/or the members of the Legislature. Each has pros and cons and, as stated above, each should be evaluated. We take no position on any of the specific proposals.

Additionally, a strong case can be made for altering the fiscal year to give the Legislature and Governor more time to come to an agreement. Under current law, the Governor's final proposal may be submitted as late as March 2nd.[155] This could result in a schedule of fewer than thirty days in which a Legislature of more than 200 members must examine and approve several hundred pages of detailed budget proposals and thousands of pages of necessary supporting documents. Even if a complete budget were submitted at the earliest prescribed moment—a rare occurrence—the Legislature still would have less than ten weeks to complete negotiation and passage. No other major state in the country gives its legislature such a short period to consider its budget. In contrast, the California Legislature has approximately twenty weeks to review the executive budget proposal.[156]

Amending the budget timetable is a complex process requiring consideration of differing federal, State and local fiscal years, capital market considerations, impact on the economy, current debt obligations and workforce contract issues. A simple constitutional amendment, standing alone without concomitant statutory change and careful planning, would do more harm than good. As noted above, we are of the opinion that an interdisciplinary

153 City school districts with populations of 125,000 or more—the "Big Five" of New York City, Buffalo, Rochester, Syracuse and Yonkers—cannot levy their own taxes and do not have direct control of their budgets. Educ. Law §§ 2550, 2576.

154 Interim appropriation bills may be enacted upon a message of necessity by the Governor even in the absence of an emergency. *Schulz v. Silver,* 212 A.D.2d 293 (3d Dep't), *appeal dismissed,* 86 N.Y.2d 835 (1995) and 87 N.Y.2d 916 (1995).

155 In a case where "30-day bills" are submitted after a February 1st budget submission in a gubernatorial year.

156 *Reinventing Budgeting in New York State,* The Legislative Commission on Government Administration (Oct. 1995).

task force should be convened to analyze and prepare a comprehensive solution to this difficult problem.

Finally, a frequent complaint concerning the budget process concerns the interplay between program agenda items and action on the budget bills. Obviously, all budget actions are closely interrelated to program objectives, broad public policy issues and, necessarily, politics. This is not a cause for complaint. However, on occasion, major changes in policy direction with significant changes in substantive law are "tied" to enactment of the budget. Fiscal projections are made based upon untested assumptions that one policy or program is not only "better" but also more "cost-effective." We make no judgment as to the wisdom of any particular program, policy or project advanced during budget negotiations over the past twenty years. At the same time, we recognize that there is a critical need to facilitate the budget process with respect to a large part of the budget on which there is often consensus while preserving opportunities for further debate over proposed shifts in substantive programs.[157]

2. Budget Balance

There is no requirement that the budget adopted by the Legislature be balanced or that a budget, even if balanced when adopted, remain in balance throughout the fiscal year. A constitutional mandate for a balanced budget has been proposed, but there is no universal agreement either in principle or in how it could be effected. For example, opponents argue that such a provision would eliminate flexibility in recessionary times. Nor is there agreement on the accounting standards that should control, with some observers proposing that Generally Accepted Accounting Principles should be utilized and others arguing that accounting standards should not be written into the Constitution.

Moreover, because of the differences in format between spending authorization in budget bills, the proposed executive budget and the financial plan, it would be a mistake to call for a "balanced budget" without coming to a consensus agreement upon terms and format.[158]

[157] This is not a call for constitutional amendment on this point. We note, however, that the recent decision by the Court of Appeals in *New York State Bankers Ass'n, supra,* 81 N.Y.2d at 98, may have inadvertently aggravated the problem. In that case the Governor and the Legislature were in apparent agreement as to a condition that should be placed upon an appropriation. By striking the agreement, the Court left the parties with a more difficult choice: either delete the program from the budget bill and hope for later agreement, or enact the appropriation with an expectation that the fee agreement would find its way into later legislation. We see no harm in an amendment addressing the impact of the case by allowing the Governor and the Legislature to agree upon conditions and limitations of proposed appropriations within the budget bill itself.

[158] It has been observed that:

> The format and content of the executive's budget appropriation bills bear little resemblance to the executive budget document presented to the public. Crosswalking the bills to the executive budget is a difficult exercise, because while the executive budget document is organized *by agency and program* with all proposed appropriations for state operations, capital projects and local assistance enumerated under the agency and program, the budget bills are organized by *category, e.g.*, State Operations, Aid to Localities, Capital Projects, Debt Service, and Legislature and Judiciary. Hence, it is very difficult and time consuming to reconcile the budget presentation document with the five budget bills that contain the information detailing what has actually been proposed and ultimately enacted.

Reinventing Budgeting in New York State, supra.

A corollary issue concerns the difference between *cash* accounting and *appropriation* authority. As discussed above, the Legislature enacts budget bills which allow expenditures up to a specified limit in an amount necessary to accomplish the program. At approximately the same time that the budget bills are adopted, fiscal staffs agree upon a financial plan. This plan offers realistic estimates of the amount of money required in the current fiscal year. Appropriation authority, of necessity, must exceed the anticipated cash outflow. For example, an experimental or start-up program may well carry an appropriation which is overly optimistic in terms of its ability to "get off the ground." In simple terms, if one were to add up all the appropriations authorized and compare the result to the financial plan, there would appear to be a severe imbalance.

Finally, the absence of a process or a date by which projected revenues should be certified has been cited as a reason for protracted disagreements over the State budget. It has been suggested that the Comptroller have a role in this process. The Comptroller might certify that projected revenues are correctly stated or that the budget is in balance. The State Senate has made similar recommendations, including requiring earlier submission of the executive budget, requiring consensus revenue forecasting by the Governor and Legislature, lengthening the Governor's discretionary amendment period, requiring submission of an austerity budget to be implemented on April 1 if the State budget has not been enacted, and disallowance of routine appropriation bills after April 1 if a budget has not been passed.

3. Long-Range Budget Planning

There is no constitutional requirement for long-range planning. Without a requirement that the Governor present a long-range financial plan—such as the one imposed on New York City in 1975 during its fiscal crisis—the budget might be balanced in ways that present significant future problems. If there were to be such a mandate, either the Constitution would have to set forth provisions respecting the impact of the plan or the Legislature would have to be given the authority to enact legislation that would provide for the impact of the plan.

B. State Taxes and Debt

1. State Tax Issues

Constitutional provisions respecting the imposition of State taxes afford the Legislature great flexibility. Some critics of the State's taxing system have proposed that new taxes or tax increases be subject to more stringent tests, such as supermajorities of one or both houses of the Legislature; referenda; caps tied to tax capacity; earmarking of revenue sources; or provisions requiring equality and uniformity. In determining whether one or more of these limitations should be adopted in New York State, it would be useful to analyze the impact such limitations have had in other states in which they have been implemented.

2. State Debt Issues

Over the years, the constitutional provisions respecting the issuance of debt have drawn criticism because they constrain State fiscal policy in a manner that damages the State's economic health:

(1) Article VII, section 11 provides that the State may not incur debt unless such debt is authorized by law for a single work or purpose and such law is approved by public referendum. By limiting a bond issue to a single work or purpose, the Constitution inhibits comprehensive planning and may limit the government's ability to finance its various projects in an economically sound manner. By requiring approval by public referendum, it encourages the use of "non-guaranteed debt," *see* note 1, *supra,* or bonding through moral obligation bonds or lease agreements that do not require approval of the voters, for projects that are necessary but unpopular. The 1997-1998 Executive Budget reflects aggregate fiscal year 1996 State-supported debt service expenditures of approximately $2.842 billion, of which approximately $749 million was attributable to general obligation debt and approximately $2.093 billion was attributable to public authority debt.[159] These numbers do not reflect all public authority debt, but only State-supported debt.

Suggested alternatives include (i) eliminating the referendum requirement in favor of legislative authorization, perhaps with supermajority approval requirements; or debt limits based on outstanding debt or debt service as a function of various State revenue sources; (ii) creating exceptions to the referendum requirements for specified items; (iii) authorizing the submission of more than one debt proposition at an election or inclusion of more than one "work or purpose" in a bond issue; and (iv) including a requirement that the Governor and Legislature agree on a multi-year capital plan that would facilitate a sensible allocation of State resources.

[159] New York State 1997-1998 Executive Budget, Appendix II, at 216.

(2) Article VII, section 16 provides a first call on all State revenues for the holders of State debt. This provision is generally interpreted to provide that the State may issue only "full faith and credit" debt, not revenue bonds. The 1967 Special Committee on the Constitutional Convention, in its report on State Finance, described how this provision, together with Article VII, section 11, led to the growth of public authorities and "non-guaranteed debt." While revenue bonds would seem to undermine the soundness of general obligation bonds, some consideration should be given to granting the State limited authority to issue revenue bonds, while bringing moral obligation bonds within the framework of whatever limitations are established for State debt.

(3) Article VII, section 12 requires that State long-term debt be repaid, or funded through sinking funds, in annual installments. This provision, like Article VIII, section 2 discussed below, constrains governmental efforts to meet the requirements of the financial markets and ultimately costs the taxpayers money. Drafted to assure that one government would not defer the repayment of obligations in an irresponsible manner, the provision could be modified so that it assures fiscal responsibility without unduly limiting flexibility. These provisions also further the growth of authorities, because these entities have total flexibility in connection with their bond issuances. Because authority debt is not considered State debt, authorities are not constrained by the above constitutional provisions and their decisions are effectively unreviewable.

(4) Article VII, section 1, the "gifts and loans" provision, is perceived to be less of a problem today than it was in 1967. A series of court decisions allows the State to use funds to aid private entities as long as it is deemed to be for a public purpose. The prohibition on the lending of credit has become less significant with the growth of moral obligation debt. The provision still precludes the State from entering into certain joint ventures with private enterprise that might spur economic growth. The pros and cons of any change in this provision would have to be carefully considered in light of changes proposed in the other provisions of Article VII.

C. Local Taxes and Debt

1. Local Tax Issues

Pursuant to a constitutional amendment to Article VIII adopted in 1938, it is the duty of the Legislature "to restrict the power of taxation, assessment, borrowing money, contracting indebtedness, and loaning the credit of counties, cities, towns and villages, so as to prevent abuses in taxation and assessments." Thus, only those taxes that are specifically authorized by the Legislature may be levied by a local government. *See, e.g.,* Tax Law art. 29, § 1201. As a practical matter, these provisions effectively vitiate the home rule provisions of the Constitution (Article IX) because localities are not free to cre-

ate appropriate mechanisms to fund the operation of local government.[160]

There are no limits on the aggregate amount of local taxation from all sources, only on real property taxes. Numerous proposals for revising the constitutional provisions respecting local taxation have been raised for consideration, including a requirement that real property tax assessments for commercial and residential property be based on fair market value, a prohibition against retroactive application of new or increased taxes, a prohibition against ad valorem taxes on tangible and intangible personal property, a check on the power of the Legislature to enact new taxes, such as a referendum or supermajority requirement, and a limitation on the power of the Legislature to enact State tax laws geared to federal legislation. Simplification of the provisions governing taxation, and incorporation of tax provisions into a single article have also been recommended.

New York City, and indeed every other municipality throughout the State, is faced with ever-shrinking financial support from the federal and State governments. In light of this enormous problem, it could be argued that localities should be free to create the appropriate mechanisms required to fund the operation of local government. An argument could also be made that it is contrary to the principle of home rule to require localities to seek State legislative approval in order to impose the taxes necessary to fulfill the obligations of local governments. If home rule is to have any real meaning in this state, and if local governments are to be independent on issues of purely local concern, local governments must have the concomitant, independent authority to levy taxes.[161]

If the power of the Legislature to control local taxation were to be reduced or eliminated, other mechanisms to assure fiscal responsibility could no doubt be enacted. These might take the form of limits or they might involve the establishment of a control board to assure that revenues and expenditures are in balance.[162]

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[160] Article IX defines the scope of these "home rule" powers to include the authority to enact local laws relating to the "property, affairs or government" of the locality. A local government also has the authority to adopt local laws pertaining to specified subjects such as the transaction of its business, the incurring of its obligations and the government, protection, order, conduct, safety, health and well-being of persons or property. Thus, the essence of the home rule principle embodied in the Constitution is that matters of fundamentally local interest, as opposed to matters of statewide concern, should be determined by the local governing structure. The home rule provisions of Article IX are discussed in greater detail in Chapter 10.

[161] Issues relating to municipal home rule are discussed in greater detail in Chapter 10.

[162] In order to ensure local fiscal responsibility, if the restraint on local autonomy is lifted, a mechanism similar to the New York State Financial Control Board could be used to monitor a locality's tax structure. The Financial Control Board was created by the Legislature, in part, pursuant to Article VIII, "to prevent abuses in taxation and assessments" by New York City. Under the Act, the Financial Control Board can assume significant control over New York City's spending and borrowing upon the occurrence of certain events. Among the triggering events is the failure of the City to pay principal or interest on any of its notes or bonds when due and payable, and the incurring of a deficit of $100 million in the expense budget during a given fiscal year. *See* New York State Financial Emergency Act for The City of New York, L. 1975, ch. 868, as amended; Act to Assist the City of Troy, L. 1994, ch. 721, as amended. Using this legislation as a model, appropriate triggering events could be identified to allow the State to step in to oversee a locality's tax structure to insure that overall fiscal stability is maintained and that the independent ability to levy taxes is not abused. Such a mechanism could be utilized to enable the State to intervene to prevent a municipality that is experiencing fiscal distress from seeking protection under federal bankruptcy laws and thereby potentially injuring the credit market access of other State entities and local governments.

2. Local Debt Issues

Constitutional provisions respecting the issuance of local debt parallel in many respects the provisions respecting the issuance of State debt. Localities may not issue revenue bonds, they may not lend their credit to public or private entities, and their debt must be repaid in accordance with provisions that preclude the issuer from taking full advantage of opportunities in the bond markets. All of these provisions present the same issues and are susceptible to the same solutions as the State provisions.

In one respect, the provisions for local debt differ from the provisions regarding State debt. Article VIII, section 4 substitutes debt limits based on the average full valuation of taxable real estate in a locality for the referenda required for issuance of State debt. These provisions are not so much ineffective as they are out of date. Enacted when property taxes were the primary, if not the only, form of local taxation, the debt limits vary with the fortunes of real estate. For many localities, real estate values are not the main determinant of fiscal health.[163] A diminution in real estate values could result in a sudden decrease in the debt limit, not justified in the context of total tax revenues. This has occurred recently in New York City, rendering the City unable to fulfill its capital program as scheduled. It is thus arguable that debt limits based on total tax capacity would more accurately reflect the ability of a particular locality to pay debt service. The precise basis for local debt limits should be the subject of a study that reviews the borrowing experience of other jurisdictions, as well as the taxing patterns of New York State.[164]

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[163] For example, of the $31.4 billion that the City of New York receives and collects, only $7.2 billion is raised by real property taxes. Another $10.7 billion is raised by other taxes and fees, and another $13 billion comes from other sources. While much of this revenue is State and federal, and is in the form of restricted grants, estimates of real property tax revenue collections are a poor gauge of the City's ability to meet debt payment obligations. Citizens' Budget Commission, "Five-Year Pocket Summary of New York City and New York State Finances—Fiscal Year 95-96" (48th ed. Oct. 1995).

[164] In Fiscal Year 1992 the amount of debt owed by New York City stood at $30

D. The 1979 Report of the Committee on Municipal Affairs

In 1979, the Association's Committee on Municipal Affairs issued a report as part of a Local Finance Project. *See* Committee on Municipal Affairs, "Proposals to Strengthen Local Finance Laws in New York State," 34 *The Record* 58 (1979). In that report the Committee proposed an amendment based on the following principle:

> Local governments can give or loan their money, property or credit only when authorized by the legislature for a public purpose.

This provision would permit the Legislature to authorize direct financial support to private entities when necessary to achieve a public purpose. With regard to "gifts and loans" the Committee view was that the prohibitions—established in 1846—upon public ownership of private corporate stock and upon loans, or guarantees of loans, to public and private corporations were "ill-suited to the demands of contemporary society."[165] As previously noted, however, this is a problem for general obligation bonds, but not authority or public benefit corporation borrowing.

The Committee also proposed, as a "principle" that "Debt limits should reflect the ability to pay debt." The Committee proposed that debt limits should be set by the Legislature as a percentage of local government revenues. Only self-supporting and voter-approved debt would be excluded from the limits.

In addition the Committee made the following recommendations:

> • Indebtedness should not be contracted for longer than the period of probable usefulness of the object or purpose for which such indebtedness is to be contracted;
>
> • There should be a constitutional limitation on the amount of real property taxes that may be raised for operating purposes; and
>
> • The Legislature should have the power and duty further to restrict the power of taxation, assessment, borrowing money, contracting indebtedness and loaning credit so as to insure sound fiscal practices and abuses.

billion. In Fiscal Year 1996, the total gross funded outstanding debt of New York City amounted to approximately $38 billion. This number has been increasing every year. *Id.*

[165] *See* N.Y. Const. art. VII, § 1. Such an amendment was included in the proposed 1967 Constitution. In addition, in 1971, a similar change was proposed in the "Community Development Amendment," but was rejected by a vote of almost two to one.

The effect of the 1979 Committee proposal would be to undo restrictions imposed in the 1894 Constitution. Prior to 1894, the Legislature had the authority to set such limits. However, the limitations were set following a period of railroad expansion, speculation and collapse.[166]

The 1979 report was written in the immediate wake of the financial crisis in New York City. Since then, as a result of cooperation with the Financial Control Board, the City's access to the bond market has been restored. It would be useful to re-examine their proposals in light of subsequent experience.

* * *

The foregoing is not a complete listing of the issues presented by the constitutional provisions affecting State and local finance. Substantial constitutional revision is needed in this area. Such revision can be successfully accomplished only through a deliberative process bringing to bear the expertise of many disciplines. We therefore recommend that these complex issues be addressed by an interdisciplinary task force comprised of professionals with experience and knowledge in the subject areas described in this Chapter. That task force should be charged with formulating a comprehensive proposal for constitutional and legislative change. Unless such long term preliminary work is available to a constitutional convention, we have little confidence in the ability of a convention to effect meaningful improvements.

[166] A minority report, opposing the lifting of debt limits, stated:

> The danger inherent in eliminating the debt limit is that when operating expenses again become overwhelming, a Ponzi style effort to capitalize them will once again be presented to the Legislature by desperate local officials. A legislature should not be pressured under such circumstances to permit unwise borrowing.... We are convinced that efforts to facilitate borrowing are ill-advised. Moreover, we believe, it remains essential for the people themselves to participate in authorizing public borrowing. Improvement and modernization of the existing provisions is desirable, but not at the expense of elimination of public participation.

See Symposium, *The Fordham Symposium on the Local Finance Project of the Association of the Bar of the City of New York*, 8 Fordham Urb. L.J. 1 (1979).

Chapter 10

HOME RULE AND REGIONALIZATION

The constitutional provisions governing home rule for local governments are generally regarded as inadequate to regulate effectively the delicate balance between statewide and local interests. Given the state of the present constitutional scheme, there is little risk that a constitutional convention could do worse. However, constitutional reform in this area requires careful study and thoughtful planning, and should not be undertaken without adequate preparation by a constitutional commission to study these issues and make recommendations for reform by the Legislature or a future constitutional convention.

* * *

The issue of State-local relations in New York is something of a paradox. The cities, and New York City in particular, do not have enough "home rule," or self-determination.[167] Yet effective regional planning can be, and often is, handicapped by the jealously-guarded home rule prerogatives of smaller local governments.

Briefly, the Constitution in principle leaves to local governments control over their "property, affairs or government" (N.Y. Const. art. IX, § 2). Decades of case law have demonstrated the inadequacy of this purported protection of the rights of localities. It is undermined not only by narrow judicial construction of the constitutional language, but also 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.[168]

The Legislature may act in relation to "property, affairs or government" by general law applicable statewide or upon receipt of a home rule message.[169] Under the current system, the Legislature decides whether a home

[167] Thus, New York City's consent was not required to an act of the Legislature which authorized the commitment of public funds and other public resources to conduct studies, hold hearings and prepare legislation that would effectuate Staten Island's secession from the City. *City of New York v. State of New York*, 76 N.Y.2d 479 (1990).

[168] *See, e.g., Town of Islip v. Cuomo*, 64 N.Y.2d 50 (1984) (upholding State legislation regulating solid waste disposal in Nassau and Suffolk counties on the ground that protection of the sole source aquifer for those counties and part of Queens was a matter of legitimate State concern); *cf. City of New York v. Patrolmen's Benevolent Ass'n*, 89 N.Y.2d 380 (1996) (holding unconstitutional law granting control over New York City police contract disputes to State board).

[169] A request by two-thirds of the local legislative body or by the chief executive with the concurrence of a majority. N.Y. Const. art. IX, § 2(b)(2).

rule message is necessary with respect to particular legislation. This legislative judgment is effectively unreviewable and may upset the balance intended by the Constitution between statewide and local interests.

The Legislature is not better suited, and indeed may be less well-suited, 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.[170]

Constitutional amendment is desirable to assure a rational and equitable balance between State and local power, a balance that will restrain the Legislature's interference in purely local matters and enable local governments to deal competently with their own affairs. The processes by which effective home rule can be achieved should be clarified, recognizing that large municipal governments have needs that may differ greatly from the needs of smaller localities. This all requires skilled drafting in revising Article IX.

One suggestion for home rule reform is to draft a new enumeration of areas where local governments may act free of legislative interference, and those areas in which power is shared or reserved to the State. Or better still, as Professor Richard Briffault has suggested, "the complex structure of Article IX" might be replaced by "a provision—similar to that in several other states—that simply grants to local governments all legislative powers not specifically denied to local governments by the legislature" (Goldmark Commission Final Report at 62). This would clarify that local governments presumptively have the power to act. A similar broad delegation of legislative power (except taxes) to local governments, subject to the Legislature's power to limit local legislative authority by general law, was proposed at the 1967 Constitutional Convention (Goldmark Commission Briefing Book at 136).

On the other hand, strong home rule power among smaller municipalities can hinder goals such as effective environmental protection, which often requires regional, not local, planning and regulation. Under the present constitution, counties are able to adopt regional regulations only if approved by a double or even triple referendum, requiring majorities in all cities, all villages, and all non-city areas that would be affected.

Twenty years ago the Court of Appeals chided the Legislature for not "foster[ing] the development of programs designed to achieve sound regional planning" so as to provide a rational context for the exercise of local planning and zoning power. *Berenson v. Town of New Castle*, 38 N.Y.2d

[170] Also, local governments are unrealistically constrained by outdated State constitutional debt limit provisions and other impediments to their ability to raise revenue. This issue is addressed in Chapter 9, section C of this Report.

102, 111 (1975). Sound regional planning would enhance public transportation, the availability of affordable housing, the enforcement of environmental protections and other areas of governmental responsibility. Yet the Legislature has not acted. New York is lagging behind the many states that are enforcing state and regional planning goals.

There is a variety of proposals for constitutional reform in this area. One matter ripe for constitutional reform is the unique complexity of the number and layers of local government in New York State. This has led to inefficiency and unnecessarily high costs of furnishing municipal services, notwithstanding the existing provisions of Article IX for joint action and other cooperative measures, and for transfer of functions to the county subject to referenda. It is suggested that a radical consolidation of local governments within existing counties or groups of counties or local governments would overcome the proven rigidity of present requirements. The home rule powers of these fewer, larger local governments could be strengthened without compromising regional planning goals. At the same time, any reform to be successful must be democratic and participatory, respecting tradition and local values.

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. A carefully drafted amendment need not incapacitate the State in setting statewide policies or ignore the inescapable State budgetary constraints.

One way to proceed may be to establish the Action Panel on State-local relations proposed by the Goldmark Commission in its Final Report. That could lead to the adoption of guiding principles for constitutional amendment, including a process for designing, debating, securing approval for and implementing a local government structure appropriate to the challenges of the next century. Whatever process is chosen to resolve these issues, there is little room for debate that the home rule provisions of Article IX are clearly in need of revision, and given the current state of home rule there is little risk of adverse change. Although we have concluded that a constitutional convention is inadvisable at this time, we urge constitutional revision in the area of home rule.

Chapter 11

EDUCATION

The Education Article adequately provides for statewide oversight of public education by a Board of Regents and prohibition of public funding for religious education. There is no need for constitutional change pending the outcome of litigation over implementation of the constitutional language to effect school finance reform. Moreover, because of the highly politicized nature of the public debate over education, there is a serious risk of adverse change by a constitutional convention.

* * *

Current provisions of the State Constitution concerning education that have generated debate in the past and are likely to be addressed if a constitutional convention were convened are:

- Article XI, section 1 (the "Education Clause")
- Article XI, section 2 and Article V, section 4 (the Board of Regents)
- Article XI, section 3 (the "Blaine Amendment")

Education is a controversial political subject, certain to be vigorously debated if a convention were held. This is especially true for the Education Clause, which raises issues about education and money, and the Blaine Amendment, which does the same for education and religion. The battle over the proposed repeal of the Blaine Amendment was largely responsible for voter rejection of the constitution proposed by the 1967 Constitutional Convention. Both of these topics are today part of a larger, active, and decidedly vocal national debate.

It is our view that these sections do not warrant a call for a constitutional convention, and if a convention were to be held, there should be no change to them. We also recommend that if modification or repeal of the Blaine Amendment were recommended by a convention, it should be submitted to the voters as a separate issue.

A. Education Clause (N.Y. Const. art. XI, § 1)

Article XI, section 1, the so-called "Education Clause," provides that "[t]he legislature shall provide for the maintenance and support of a

system of free common schools, wherein all the children of this state may be educated."

This clause should be viewed in the context of the school finance reform movement, which has provided the impetus for litigation and legislative action across the country.[171] The controlling case in New York is *Board of Educ. v. Nyquist*, 57 N.Y.2d 27 (1982), *appeal dismissed,* 459 U.S. 1138 (1983), in which plaintiffs failed to convince the court that the State's educational financing system was unconstitutional, despite disparities in school district expenditures. In so ruling, the Court acknowledged that the Education Clause ensures the availability of a "sound basic education" to all children in the State.

More recently, the Court of Appeals reaffirmed this concept of a "constitutional floor with respect to educational adequacy" in *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 315 (1995) ("*CFE*"). The Court's opinion upheld the basic rights of children to obtain "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." *Id.* at 316. To the extent that this standard makes explicit the State's responsibility for ensuring that a sound basic education is provided, it deserves support. In *CFE*, the Court held that plaintiff's claim, that State funding for New York City's schoolchildren is so inadequate as to be violative of the Education Clause, could proceed to trial. A trial is scheduled for later this year. If in fact a judicial solution is possible, changing the constitutional standard at this juncture could set back school finance reform for years to come.

Moreover, while we believe that the minimal guarantees of the Education Clause could be expanded, the risk of adverse change is too great. It is likely that the kind of change that would find support at a constitutional convention would not add to the guarantees afforded schoolchildren, but rather limit them, either directly or indirectly (*e.g.*, through caps on State taxes). The history of amendments to education clauses in state constitutions lends support to this view. In recent years, attempts to weaken educational guarantees in state constitutions have become common in the wake of school finance decisions in other states such as New Jersey. At this juncture, the wisest course would be to await the result of the *CFE* litigation.

[171] Since the early 1970's, eighteen states have had their school finance systems ruled unconstitutional by the state's highest court, among them California (1971 and 1977), Connecticut (1977), Kentucky (1992), Massachusetts (1993), New Jersey (1973, 1985, 1990 and 1997), Texas (1989), Ohio (1997) and Vermont (1997). New York is among eighteen states that have defended their current school financing systems in court and won. Recent decisions of the highest courts in three states have distinguished prior decisions for defendants or found for plaintiffs on other grounds, and new challenges seeking to reverse prior rulings are pending in three other states. *Center for the Study of Education Finance: Status of School Finance Constitutional Litigation* (1994); Rebell and Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Scheff v. O'Neill—And a Proposed Solution*, 29 Conn. L. J. 1115 (1997).

B. The Board of Regents (N.Y. Const. art. XI, § 2; art. V, § 4)

Governance and oversight of the State's educational system by the Board of Regents derives from the constitutional status of the Regents under these provisions. Of potential significance to a constitutional convention would be the continuation of the Regents as a constitutional body. A corollary to that would be the Regents' authority to appoint a Commissioner of Education.

1. Regents' Authority

Article XI, section 2[172] provides:

> The corporation created in the year [1784], under the name of the Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents.

The Board of Regents is a venerable institution, dating back to 1784; its constitutional status dates back to 1894. The Regents have various oversight and supervisory responsibilities for elementary and secondary education, colleges and universities, professional and technical schools, licensing and disciplining the professions, certification of teachers, vocational and educational services for individuals with disabilities, libraries, museums and historical societies, public radio and television and the State museum, library and archives.

Efforts to eliminate the Board of Regents point to the breadth of the Board's responsibilities and its inability to focus effectively on its central mission of setting educational policy. Supporters laud the Regents as playing an important role in determining policies and standards for the education of New York's schoolchildren.

From a practical point of view, there is no need to remove the Regents' statutory powers. The Legislature has express constitutional author-

[172] There is some confusion concerning numbering of this section. This section, originally numbered Article IX, section 2, was changed to Article XI, section 2 in 1938.

ity to limit the Regents' powers and it exercises that authority. The Legislature has granted relief over the past few years through a variety of "mandate relief" measures. Moreover, both the Legislature and the Governor retain substantial power to shape education and educational policy through the budgetary process and through legislation.

2. Appointment of Commissioner of Education

Article V, section 4 provides in part:

> The head of the department of education shall be the Regents of the University of the State of New York who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department.

Under the constitutional framework, the Board of Regents functions as a policy-making body, exercising legislative functions, and the Commissioner of Education performs the executive function.

This structure is designed to help keep education isolated from the political realm. The Regents' power to appoint the Commissioner serves to keep the appointment from direct political or partisan influence. Recent Commissioners have been professional educators, highly regarded by both parties. This independence has served New York well, allowing the Commissioner to speak forcefully for children and education without fear of political retribution.

C. The Blaine Amendment (N.Y. Const. art. XI, § 3)

Article XI, section 3, the "Blaine Amendment," provides:

> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

The Blaine Amendment's prohibition on financial aid to religiously-affiliated institutions invokes strong sentiment both for and against. The constitution proposed by the 1967 Constitutional Convention was defeated at least in part because of opposition to repeal of the Blaine Amendment.

Were a convention to be held, without doubt the merits of this section would once again be at the forefront of debate, overshadowing many other worthwhile proposals for change.

Despite the relatively straightforward prohibition on direct and indirect aid, assistance to private sectarian schools has been upheld in various forms, including textbooks and reimbursement for State-required testing and reporting.[173] Transportation is expressly authorized by the constitutional language. Children in sectarian schools also receive various publicly-financed remedial and support services at neutral sites.[174] Those who advocate repeal of the Blaine Amendment seek to provide aid to families with children attending non-public and sectarian schools in the form of tuition assistance or vouchers. In this regard, the relationship of the Blaine Amendment to the Establishment Clause bears comment. It is unclear whether such assistance would be allowed under the Establishment Clause, in the absence of the Blaine Amendment.[175] It is also unclear whether the Blaine Amendment provides greater restrictions on State support for tuition assistance than the First Amendment.[176]

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[173] *Board of Educ. v. Allen*, 20 N.Y.2d 109 (1967), *aff'd*, 392 U.S. 236 (1968); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

[174] Other forms of assistance which have not met either State or federal constitutional scrutiny include direct aid to non-public schools and a tuition grant program and reimbursement for reporting teacher-prepared tests. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973). Public school programs administered in the private schools have also been held to violate the Establishment Clause. *Aguilar v. Felton*, 473 U.S. 373 (1985).

[175] Prior rulings against sectarian assistance are grounded in the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 756; *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. at 472. However, recent United States Supreme Court rulings reflect a more accommodationist approach. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a Minnesota statute authorizing tax deductions for private education. And in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), the Court found a deaf language interpreter for a child attending a sectarian school to be neutral aid, of a type available to all students and not violative of the Establishment Clause.

Moreover, the three-pronged test developed in *Lemon* that provided the foundation of earlier decisions has been called into question. In *Board of Educ. v. Grumet*, 512 U.S. 687, *aff'g* 81 N.Y.2d 518 (1994), the creation of a special school district for a community populated almost exclusively by one religious sect was declared unconstitutional, but the *Lemon* test was not used by the majority in reaching its decision. Justice O'Connor's concurring opinion noted that *Lemon*'s unitary approach would no longer suffice for each Establishment Clause question.

[176] In *Grumet v. Board of Educ.*, 81 N.Y.2d 518, 531-32, *aff'd*, 512 U.S. 687 (1994), the Court of Appeals did not reach the State constitutional issue, but noted that Article XI, section 3 "is based on a provision significantly different from the Establishment Clause, both in text and history . . . ." In *Grumet v. Cuomo*, 164 Misc. 2d 644 (Sup. Ct. Albany

What is clear, however, is the vehemence with which opposing sides state their respective positions. Those who favor modification or repeal argue that it is unfair to impose on poor children the "burden of attendance" at inadequate public schools. Those who oppose any change cite separation of church and state and support for the public school system.

In 1967, repeal of the Blaine Amendment was the most emotionally charged issue faced by the Convention and indeed had been a major factor in the public debate calling for a convention. Although the Convention voted to repeal the Blaine Amendment by a margin of 132 to 49, stormy debate within the Convention halls was accompanied by vicious politicking and anti-Catholic rhetoric in the larger public battle that was given at least partial credit for subsequent rejection of the proposed constitution by the voters.

We believe that the lessons of 1967 have relevance today. In 1967, the Association made no recommendation with respect to the Blaine Amendment and urged that if repeal was recommended by the convention, it be submitted to the voters as a separate issue. The Blaine Amendment is no less controversial today. We recommend that it not be changed. However, should a convention be held, we recommend that any proposed modification or repeal of the Blaine Amendment be submitted to the voters as a separate issue.

County 1995), *rev'd on other grounds*, 225 A.D.2d 4 (3d Dep't 1996), *aff'd*, 1997 N.Y. LEXIS 740 (May 6, 1997), Supreme Court held that plaintiffs' claims were no stronger under the State Constitution than under the Establishment Clause.

Chapter 12

THE ENVIRONMENT

The Conservation Article contains strong guarantees for environmental protection that would undoubtedly be at risk if opened to amendment by a constitutional convention. There should be no change to existing constitutional provisions.

* * *

One of the strongest conservation measures in the United States, Article XIV, section 1 designates forest preserve land in the Adirondack and Catskill Parks to be "forever wild" and prohibits its use for any purpose other than forest land in its natural state. 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.

Section 5 of Article XIV, which authorizes citizen suits to restrain violations of the Conservation Article only with the consent of the Appellate Division and on notice to the Attorney General, has been interpreted to afford injunctive relief only, precluding other remedies, including damages. If a constitutional convention were held, this provision should be amended to eliminate the need for prior court approval and to authorize other remedies, including the recovery of money damages, which would bring the State provisions in line with federal citizen suit provisions. In addition, the constitutionality of State-operated campgrounds in the preserve, which is presently ambiguous in the Constitution, should be clarified.

The "forever wild" provision is important and uniquely protective of the environment, and should be retained in the constitution. We recognize that these provisions might be challenged at a constitutional convention, particularly if attempts are made to strengthen the citizen suit provision or to enact an "environmental justice" provision.

The Constitution does not currently provide for an equal right to a clean environment, providing for the just allocation of environmental benefits and burdens among the citizens of New York, a concept also known as "environmental justice." If a constitutional convention were called, proponents of this concept would support an amendment to Article XIV, section 4 to declare that promoting a clean environment is State policy and that the Legislature shall include adequate provision for the just allocation of environmental benefits and burdens among the People of the State.

However, the proposal leaves unresolved several important issues. These include: 1) whether low income and minority populations bear a dis-

proportionate share of the burden of environmental degradation; 2) whether the proposed amendment might be construed to be self-executing even if intended to be subject to legislative discretion; 3) whether it could be construed to create an absolute right to a clean environment that would take precedence over, rather than be balanced with, other rights and considerations; and 4) whether it could be deemed to give rise to a private right of action. Moreover, it is unclear: 5) whether the proposed amendment is intended to create a right of geographical or political parity; 6) whether the requirement of just allocation of environmental benefits would give rise to a right to require affirmative development in a community; and 7) whether the proposed amendment would be a limit on State action, local action and/or private action. Indeed, the proposed amendment might serve as a basis for challenging zoning determinations, public projects and similar developments.

In any event, such a provision need not be of constitutional dimension. Consideration of "environmental justice" could be included in the environmental impact process or in appropriate legislation. On balance, we conclude 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.

Chapter 13

SOCIAL WELFARE

The Social Welfare Article imposes mandatory obligations on the State to care for the needy and provide for the public health. These provisions, which would be at risk of amendment by a constitutional convention, should be preserved. We have concluded that the State's existing obligations to care for the mentally ill and provide for low income housing should also be made mandatory, the provisions governing mental illness and public health generally should be merged, and an express right to assistance of counsel in certain civil disputes should be considered. However, the risk of adverse change to the more essential provisions of this Article outweighs any potential gain that might be achieved by a convention.

* * *

New York's Constitution is one of only six state constitutions that explicitly recognize an obligation to care for the poor.[177] Article XVII imposes mandatory obligations on the State to provide for aid to the needy and to provide for the public health. Other provisions declare that the care of the mentally ill, and housing for low income persons, are matters of State concern.

These unique provisions, a precious legacy of the 1938 Convention, guarantee to the citizens of New York important protections that are not secured by the United States Constitution. These provisions would be at risk if a constitutional convention were called now in the present climate of political attacks on the poor. If, however, these provisions are considered at a constitutional convention, we would recommend that the mental health and housing clauses be made mandatory, subject to implementation in the discretion of the Legislature, consistent with the aid to the needy and public health clauses.

Critics of the mandatory nature of New York's constitutional social welfare provisions point to the potentially significant fiscal impact on the State. However, legislative discretion to define who is needy and how much aid is required is sufficiently broad, in our view, to obviate those concerns.

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[177] Another eleven state constitutions contain provisions concerning aid to the poor. *See* Melanie B. Abbott, *Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?*, 22 Fordham Urban L. J. 1, 30-31 (1994).

See Hope v. Perales, 83 N.Y.2d 563, 578 (1994) (recognizing that aid to needy and public health clauses "expressly accord to the Legislature discretion to promote the State's interest in aiding the needy and promoting public health 'in such manner, and by such means as the legislature may from time to time determine'"). The constitutional social welfare provisions represent a policy determination to provide a safety net and for that reason properly belong in the Constitution. We would oppose any effort to limit or remove these provisions from the Constitution.

A. Aid to the Needy

Article XVII, section 1 provides that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." This provision was adopted during the Great Depression by the Convention of 1938, which proclaimed this as a "charter of human protection for the underprivileged, the destitute and the handicapped of our state."[178] New York's social welfare provision is among the strongest of any state constitution.[179] *See Tucker v. Toia*, 43 N.Y.2d 1, 7 (1977) (section 1 is "indicative of a clear intent that State aid to the needy was deemed to be a fundamental part of the social contract").

Despite the fact that the Constitution accords discretion to the Legislature in defining who is needy,[180] in determining the means by which the needy are to be provided for and in determining how much they require,[181] this provision "unequivocally prevents the Legislature from simply refusing

[178] *See* Goldmark Commission Briefing Book at 235 (quoting from Revised Record of the Proceedings of the New York State Constitutional Convention of 1938 at 2125).

[179] *Id.* at 238. Montana, however, has interpreted its provision to prohibit the limitation of benefits to needy recipients. *Id.* at 238-39 (*citing Deaconess Med. Ctr. v. Department of Soc. & Rehabilitative Servs.* 222 Mont. 127, 131-32, 700 P.2d 1165, 1168 (1986) and *Butte Community Union v. Lewis*, 219 Mont. 426, 429-33, 712 P.2d 1309, 1311-13 (1986)).

[180] *See Lovelace v. Gross*, 80 N.Y.2d 419 (1992) (upholding Social Services law provision deeming income of grandparent with whom infant lives available for determining Home Relief eligibility). In *Aumick v. Bane*, 161 Misc. 2d 271, 278 (Sup. Ct. Monroe County 1994), the court struck down durational residency requirement resulting in lower level of Home Relief benefits for individuals who had been residents for less than six months and who came from states with lower public assistance benefits as exceeding the Legislature's authority to determine who is needy. *But see also Childs v. Bane*, 194 A.D.2d 221 (3d Dep't 1993) (upholding regulation limiting benefits to needy persons who had failed to sign public assistance repayment agreement), *appeal dismissed*, 83 N.Y.2d 846, *appeal denied*, 83 N.Y.2d 760 (1994).

[181] *See Couch v. Perales*, 78 N.Y.2d 595, 606 (1991); *Bernstein v. Toia*, 43 N.Y.2d 437 (1977); *Matter of Barie v. Lavine*, 40 N.Y.2d 565, 570 (1976).

to aid those whom it has classified as needy." *Tucker*, 43 N.Y.2d at 8; *accord Minino v. Perales*, 79 N.Y. 2d 883, 885 (1992) (striking down provision of social service law that required sponsor's income be deemed available to alien applicant for AFDC benefits).

Recently there have been efforts in Albany to amend this language to make it permissive, rather than mandatory, or to repeal it entirely.[182] We believe that the guarantee should be preserved. In addition, given recent assaults on the federally-funded Legal Services program, we would recommend, if a convention were called, that an express right to the assistance of counsel in at least certain categories of civil disputes[183] be considered.

B. Protection of the Public Health

Article XVII, section 3 declares that "[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means, as the legislature shall from time to time determine." Under current law, the Legislature has discretion in determining how to meet these obligations. This provision is under attack in the same bills that would amend section 1.[184] For the reasons stated in discussion of section 1, it is essential that this provision be preserved.

C. Care of the Mentally Ill

Article XVII, section 4 declares that "[t]he care and treatment of persons suffering from mental disorder or defect and the protection of mental health of the inhabitants of the state may be provided by state and local authorities and in such a manner as the legislature may from time to time determine." The Court of Appeals' decision in *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 166 (1973), alluded to the State's responsibility for the "'care, treatment, rehabilitation, education, and training of the mentally ill[,]'" but based its decision—invalidating the statute that authorized the State to transfer dangerous civilly-committed mental patients to a hospital operated by the

[182] *See, e.g.*, A. 1681 (Jan. 24, 1995); A. 5824 (Mar. 7, 1995) (would amend Article XVII, § 1 to provide that "[t]he aid, care and support of the needy are public concerns and *may* be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine") (emphasis added).

[183] *E.g.*, immigration, landlord/tenant, custody, matrimonial and public benefits.

[184] *See, supra*, n.6 ("The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor *may* be made *for* the state and *for* such of its subdivisions and in such manner, and by such means as the legislature *may* from time to time determine") (emphasis added).

corrections department—upon the due process clause and equal protection clauses of the State Constitution. *See also* Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 Loyola L. Rev. 1249, 1283-92 (1987) (discussing *Rivers v. Katz*, 67 N.Y.2d 485 (1986)).

In the event a constitutional convention is called, we recommend that section 4 be made mandatory (as are sections 1 and 3 of Article XVII) to impose an explicit duty upon the State to provide appropriate care and treatment for the mentally ill. We would also support the merging of section 3 (public health generally) and section 4 (mental illness), so that mental health and health generally are not treated as conceptually different.

D. Housing for Low-Income Persons

Article XVIII, section 1 provides: "[s]ubject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing and nursing home accommodations for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental and appurtenant thereto." Consistent with Article XVII, sections 1 and 3, we recommend that this provision also be made mandatory.[185]

[185] Article XVIII is discussed in greater detail in Chapter 14 of this Report.

Chapter 14

HOUSING AND ECONOMIC DEVELOPMENT

The Housing Article incorporates concepts relevant to State and local finance, home rule and regional planning, areas in which we support comprehensive constitutional revision. In particular, we support extending the powers of this Article to county governments and broadening the scope of the Article to facilitate community and economic development. Such changes, however, require thoughtful preparation and comprehensive recommendations by a constitutional commission.

* * *

Article XVIII, the Housing Article of the Constitution, was proposed by the 1938 Constitutional Convention to provide a blueprint for a comprehensive State program to clear slums and house the poor. It was an area in which the State of New York had pioneered in the 1920s and 1930s, and the New Deal followed suit in 1937 with historic federal legislation.

Sixty years later, the detailed provisions of the Article have largely become irrelevant. In the proposed constitution rejected by the voters, the 1967 Convention recommended repeal of Article XVIII in favor of a broad provision on economic and community development folded into the articles on State and local finance. Several issues of constitutional dimension, highlighted below, have arisen in connection with Article XVIII, but none is of sufficient urgency to warrant calling a constitutional convention.

A. Authority for the Counties

Repeated references are made in Article XVIII to "any city, town, village or public corporation," omitting reference to counties. For many years this omission frustrated county governments seeking to participate in programs for affordable housing. In 1992, a State Attorney General's opinion declared that counties had this very power under the Local Government Article of the Constitution. N.Y. Const. art. IX. Legal doubt persists concerning whether counties may act in this area. *See County Powers in Assisted Housing Programs: The Constitutional Limits in New York*, 20 Fordham Urban L. J. 109, 139-48 (1993).

Proponents of constitutional amendment point to the need to address housing, community and economic development on a regional basis, making counties logical actors. They believe that the failure of Article XVIII

to empower counties provides a further obstacle to progress toward this goal.[186] We favor an amendment that would expressly include counties in Article XVIII.

B. The Housing Scope of the Article

"Housing" in the title of Article XVIII means only rental housing and the housing needs of low-income persons and families. Incremental expansion by the Legislature and the courts of the meaning of "low-income" has expanded significantly the reach of the Article. Nevertheless, proponents of change contend that any limitation unnecessarily chokes off the possibility of a broad concept of public use and public purpose which would free policy makers to devise creative solutions to the State's persistent housing problems.

C. Community and Economic Development

Article XVIII provides financial and legal powers for "the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas." This emphasis on physical renewal ignores the social and economic factors which are now considered integral to the revival of neighborhoods. The Legislature has in fact authorized a number of programs for purposes of community and economic development without serious constitutional challenge. Proponents of amendment claim that a broader and more flexible text in the Constitution would provide a more helpful environment for dealing with these areas.

[186] These issues are considered more fully in Chapter 10 of this Report.

Chapter 15

MEASURES GOVERNING AMENDMENT OF THE CONSTITUTION

The current options for amending the Constitution should be supplemented by additional methods designed to permit more flexibility without sacrificing due deliberation. In particular, we support constitutional amendment to provide for a limited convention call to permit a constitutional convention to address a subject particularly in need of revision without opening the entire constitution to amendment. Other alternatives, such as passage by a supermajority vote of a single session of the Legislature possibly coupled with gubernatorial approval prior to ratification, should be considered. These changes can best be accomplished by the Legislature itself and do not warrant a constitutional convention.

* * *

The Constitution provides two methods for constitutional change. The first is amendment through legislative proposal and the second is revision or amendment by constitutional convention. Article XIX, section 1 provides that a proposal may be initiated in either the Senate or the Assembly. After a proposal is introduced, it is required to be approved twice by a majority of both chambers in successive legislatures separated by an intervening general election. The proposal must be published for at least three months before the second legislature acts and the versions approved by each legislature must be identical. On approval by the second legislature, the proposal must be submitted to the people for ratification at either a special or regularly scheduled election.

Article XIX, section 2 provides that revision or amendment may be initiated by constitutional convention. Every twenty years the question of whether to hold a convention must be put to the voters. If the vote is affirmative, three delegates from each senatorial district and fifteen delegates at large are elected at the next general election. The Legislature establishes the procedures for the nomination, designation and election process. The delegates have free rein in running the convention, but the Constitution requires that all proposals be approved by a majority of the delegates before they are presented to the people for ratification. A limited call is not permitted under current law. Article XIX, section 2 authorizes a convention referendum to "revise *the constitution* and amend *the same*" (em-

phasis added). Accordingly, the entire Constitution would be on the convention's agenda.

While constitutional amendment is infrequent, the route of legislative proposal is more frequently employed than that of a constitutional convention. Since 1894, only six amendments have been enacted by a convention (all in 1938). Critics of the current process for amending the Constitution contend that its cumbersome nature has yielded a Constitution with a set of antiquated provisions that is immune from effective reform. Critics assert that the Constitution has not evolved to keep pace with the changes experienced by the State.

In light of our opposition to a constitutional convention at this time, coupled with our recognition throughout this Report that a number of constitutional provisions need revision, serious consideration must be given to supplementing the procedures for bringing a proposed constitutional amendment to the voters. Among the proposed reforms is the addition of alternative methods of amendment, *e.g.*, passage by a single session of the Legislature by a supermajority vote, perhaps followed by gubernatorial approval prior to submission to the voters for ratification. We believe these and other proposals aimed at expediting the amendment process and making it more reflective of the public will should be the subject of further study. Consideration of any streamlining proposals should be tempered by appropriate deference to the purpose of the requirement that proposed amendments be approved by successive legislatures, which ensures a highly deliberative process that respects the enduring and venerable quality that is the essence of a constitution and insulates constitutional change from short-term swings in public opinion.

We also favor an amendment that would authorize the Legislature to place a referendum on the ballot for a constitutional convention to address a limited, specified agenda or particular article of the Constitution. This option would allow a convention to focus on areas generally acknowledged to require revision, thus permitting it to work on solving identified problems. This procedure would avoid the risks inherent in a full-scale constitutional convention, including unwanted or unintended amendment to satisfactory provisions of the Constitution or potential distractions arising from the prospect of wholesale constitutional revision.

Although we oppose the present call for a convention, we strongly favor the reforms urged in Chapter 1 that would improve fairness in the delegate selection process for any future convention. If there is a convention, consideration should be given to delegate selection reform and streamlining the legislative amendment process, keeping in mind the concerns expressed above.

Notwithstanding our support for further study of measures that would

streamline the amendment process, we do not believe that constitutional amendments should be initiated by voter petition. Seventeen states currently allow constitutional initiatives to be presented to the voters as a result of petitions executed by between five and fifteen percent of registered voters. Some petition proposals include the safeguard of a requirement of between 100,000 and 200,000 signatures and include requirements that the Attorney General participate in the drafting of appropriate language and that the Secretary of State certify the sufficiency of the petitions. Even these proposals are fatally flawed, however, because constitutional initiatives by petition are too susceptible to manipulation by well-financed, well-organized special interests and because petition-based initiatives are less likely to be the result of a reasoned, broad reaching debate. Accordingly, we believe that constitutional initiatives by petition should be rejected as a means for initiating constitutional change.

Chapter 16

OTHER PROVISIONS

Constitutional provisions governing land use regulation, corporations, canals and the State militia are adequate and do not require revision. The "Takings" clause, which regulates the delicate balance between private property and public use, may be at risk of adverse change by a constitutional convention.

* * *

A. Private Economy

1. Property Rights vs. Land Use Regulation

Article I, section 7(a), the "Takings" clause, provides that "[p]rivate property shall not be taken for public use without just compensation." The Constitution also requires the State to protect the environment (N.Y. Const. art. XIV, § 4) and delegates to the Legislature the sovereign power to provide for the public health, safety and general welfare (N.Y. Const. art. IX, § 2(c)(10)). The courts have struck a balance between private property ownership and use, and the legitimate State interest in regulating its use for the public good. The courts have used a fact-specific analysis of the purposes, benefits and impacts of the regulation at issue. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

The Court of Appeals has announced, following United States Supreme Court decisions under the Fifth Amendment, that regulation of private property will be invalidated as an unconstitutional taking of private property "(1) if it denies an owner economically viable use of his property, or (2) if it does not substantially advance legitimate State interests,"[187] and that there must be a "close causal nexus" between the challenged regulation and the public purpose.[188] Applying this standard, the Court of Appeals has recently invalidated a local law prohibiting the demolition or conversion of single room occupancy housing units and requiring the owners to restore such units to habitable condition and lease them at controlled rents;[189] invalidated a regulation according not-for-profit hospitals the right to renew a rent-regulated lease where the leased units were sublet to affiliated personnel;[190] and upheld a regulation enlarging the definition of "family member" entitled to succeed to a rent regulated apartment.[191]

These recent judicial interpretations of the Takings clause suggest a trend toward greater protection of private property rights at the expense of land use regulation. This apparent trend also threatens environmental protection to the extent accomplished by land use regulation. However, we believe that seeking a constitutional amendment to reverse this trend, or to articulate a more definite standard for defining an unconstitutional taking, would be unwise.

There is a risk that a constitutional convention might open the door to undesirable amendments such as a "direct compensation" amendment, which would require the payment of compensation to private property owners to redress a mere diminution in property value resulting from government regulation, or the payment of compensation to induce a property owner to forego a particular use of the property. Similar proposals are currently under consideration in other state legislatures and have been the subject of public referenda. Such amendments would not only effect a burdensome and potentially limitless drain on the public fisc, but they would also upset the delicate balance between private and public interests that has evolved over time.

Such amendments seek to accord greater protection to private property owners at the expense of the public interest. In fact, closer examination reveals that they are just as likely to undermine property values as to protect them. The practical effect would be to raise the cost of land use regulation to a prohibitive level, effectively discouraging regulatory activity, including those protections of land, air and water on which depends the peaceful enjoyment of one's home.

There is a serious risk that the power of State and local government to enact regulations affecting property to protect the public health, safety and general welfare could be curtailed or eliminated at a constitutional convention. Further development of the appropriate balance between the right of private ownership and use and the legitimate State interest in land use regulation and environmental protection, is more appropriately left to the Legislature.

2. Automobiles vs. Mass Transit

Advocates in favor of abolishing the Metropolitan Transit Authority could be successful at a constitutional convention. The MTA has been

[187] *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 107, *cert. denied*, 493 U.S. 976 (1989).

[188] *Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156 (1993), *cert. denied*, 512 U.S. 1213 (1994).

[189] *Seawall, supra*, 74 N.Y.2d at 107.

[190] *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385 (1994), *cert. denied*, 115 S. Ct. 1961 (1995).

[191] *Higgins, supra*, 83 N.Y.2d at 174.

targeted because of its policies on fare increases and service reductions, which are claimed to discriminate against the low income and minority population in the metropolitan area. Abolition of the MTA or any modification to its structure or function is not, however, of constitutional dimension.

B. Corporations

Our research revealed no significant public debate concerning Article X, which provides for the formation of public and private corporations and defines their powers and duties. Section 5, which was enacted in 1938 in response to the creation of public authorities, explicitly empowers public authorities to issue bonds and incur debt, but prohibits the State fromassuming their debt obligations.

Section 5 has been invoked in constitutional challenges to "backdoor bonding" by the State through public authorities to circumvent constitutional limitations on contracting State debt. *See Schulz v. State of New York*, 84 N.Y.2d 213 (1994) (holding plaintiffs failed to demonstrate unconstitutionality beyond a reasonable doubt), *cert. denied,* 115 S. Ct. 936 (1995). As noted by the Court of Appeals, "[i]f . . . modern ingenuity, even gimmickry, have in fact stretched the word of the Constitution beyond the point of prudence, that plea for reform in State borrowing practices and policy is appropriately directed to the public arena . . . ." *Schulz*, 84 N.Y.2d at 251. Issues relating to constitutional reform in the area of State debt are addressed in Chapter 9, section B of this Report.

C. Canals

The Constitution currently prohibits the Legislature from selling or otherwise disposing of New York's canal system. N.Y. Const. art. XV, § 1. Although the canals are no longer used for commercial trade as they once were, they have become one of New York's great historic and scenic tourist attractions. The fact that the canal system is under unified State control is important to its success as an attraction for boaters, who can travel unimpeded throughout the system. These constitutional provisions thus have continuing vitality in protecting the canal system.

We recognize that other provisions of Article XV, including the prohibition against tolls and the regulation of contracts for work or material on the canals, are not of constitutional dimension and could more properly be left to the Legislature. We are aware that efforts are underway to amend these provisions without a convention. On balance, there is no need for constitutional revision or for a constitutional convention to address these issues. If a convention were held, there appears to be little risk of adverse change to this Article.

D. Defense

Our research revealed no significant public debate concerning Article XII, which provides for "[t]he defense and protection of the state and of the United States" by authorizing the Legislature "to provide for the discharge of this obligation and for the maintenance and regulation of an organized militia." N.Y. Const. art. XII, § 1. Adopted in its present form in 1962, Article XII has not required judicial interpretation since that time and remains an uncontroversial provision.

Accordingly, we conclude that constitutional amendment of this Article is not warranted.

Conclusion

For the reasons set forth in the preceding Report, we recommend a "no" vote in the November 1997 constitutional convention referendum. We support the enactment of the constitutional and legislative reforms discussed in this Report and urge the creation of constitutional commissions to lay the groundwork for amendment, whether by the Legislature or by a constitutional convention if a convention is called.

June 1997

Further Reading

Burton C. Agata & Eric Lane, eds., *State Constitutions: Competing Perspectives*, 1 Hofstra Law & Policy Symposium 1-153 (1996).

Gerald Benjamin & Henrik N. Dullea, eds., *Decision 1997: Constitutional Change in New York* (Rockefeller Institute Press/The Brookings Institution Press 1997).

Henrik N. Dullea, *Charter Revision in the Empire State: The Politics of New York's 1967 Constitutional Convention* (Rockefeller Institute Press/The Brookings Institution Press 1997).

Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* (Fordham University Press 1996).

Peter J. Galie, *The New York State Constitution: A Reference Guide* 38 (Greenwood Press 1991).

League of Women Voters of New York State, *Seeds of Failure: A Political Review of New York State's 1967 Constitutional Convention* (1973).

League of Women Voters of New York State, "Shall We Sow More Seeds of Failure?: A Primer on the Constitutional Convention Process," *New York State Voter: The Newsletter of the League of Women Voters of New York State*, Vol. 73, No. 4, pp. 7-8 (Spring 1997).

Task Force on the New York State Constitutional Convention, "Statement in Support of Immediate Appointment of Action Panels," 50 *The Record of the Association of the Bar of the City of New York* 745 (1995).

Task Force on the New York State Constitutional Convention, "Countdown to the Constitutional Convention Referendum: A Report on Delegate Selection, Election and Ethics Issues," 50 *The Record* 748 (1995).

Temporary New York State Commission on Constitutional Revision, *The Delegate Selection* Process: The Interim Report of the Temporary New York State Commission on Constitutional *Revision* (Mar. 1994).

Temporary New York State Commission on Constitutional Revision, *The New York State Constitution: A Briefing Book* (Mar. 1994)

Temporary New York State Commission on Constitutional Revision, *Effective Government Now* for the New Century: The Final Report of the Temporary New York State Commission on *Constitutional Revision* (Feb. 1995).

Special Committee on the Constitutional Convention, *Reports of the Special Committee on the Constitutional Convention: Constitutional Convention of 1967*:

Selection of Judges (March 1967);
Removal of Judges (March 1967);
Court Structure and Management (March 1967);
Bill of Rights (April 1967);
Suffrage and Elections (April 1967);
Legislative Apportionment (April 1967);
State Finance, Taxation and Housing and Community Development (April 1967);
Local Government and Finance (April 1967);
Constitutional Simplification (April 1967);
Church and State (July 1967);
Final Report (October 1967).

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* Dissents from the recommendations set forth in Chapter 5, section C.2 (procedures and rules of the Legislature) and Chapter 15 (petition-initiated referenda, insofar as they affect the Legislature itself) of the Report.

** Dissents from the recommendation set forth in Chapter 1, section C.1 of the Report.