

## CONSTITUTIONAL “STUFF”: HOUSE CLEANING THE NEW YORK CONSTITUTION—PART I

*Peter J. Galie\* & Christopher Bopst\*\**

*In the fall of 2012, an intensive effort was launched to examine every surface of the New York State Capitol and identify and implement a series of cleaning projects. Work crews labored to remove multiple layers of wax that had built up on the marble and granite floors and baseboards over the last forty years. They cleaned masonry and intricate stone carvings that were stained with decades-worth of emissions from coal furnaces once used to heat the Capitol, and cigarette and cigar smoke. Even brass railings and kick plates sparkle after a half-century of neglect. No detail too small, evidence of the Capitol’s renaissance can be seen throughout the building.*

*The cleaning of the elaborately carved granite and sandstone arches and columns, and other decorative stonework was a significant undertaking. A specially trained team of employees from the Office of General Services used a latex cleaning product that was applied to the stone. As the latex dried, it captured dirt from crevices in the stone and was then peeled off as an elastic film, removing the dirt with it.<sup>1</sup>*

*—Restoring a Landmark: The New York State Capitol*

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\* Professor Emeritus, Canisius College, Buffalo, New York.

\*\* Partner, Goldberg Segalla LLP, Buffalo, New York.

<sup>1</sup> STATE OF N.Y., RESTORING A LANDMARK: THE NEW YORK STATE CAPITOL, *available at* <http://www.ogs.ny.gov/esp/ct/tours/Docs/RestoringaLandmark.pdf>.

*The Capitol was in many ways for me a metaphor of turning government around, of cleaning government up, of making it work . . . . In management they say, "Come up with a series of short-term goals that you can focus on and achieve" . . . . So we had a short-term goal: we're going to get the building done.<sup>2</sup>*

—Governor Andrew Cuomo

The quotations above describe the meticulous cleaning the 115-year old New York State Capitol received as part of a decade-long restoration project. While the Capitol building has been restored to its architectural grandeur, the New York State Constitution, which predates the building by five years, remains in need of a meticulous cleaning. The oddities, anachronisms, redundancies, archaic language, and incoherencies found in the State's fundamental charter constitute the stuff that clutters and expands the document, making it barely readable, let alone understandable. A half-century ago, the Temporary Commission on the Revision and Simplification of the Constitution wrote that the New York State Constitution was "not a constitution in a proper constitutional sense. It is a mass of legal texts, some truly fundamental and appropriate to a constitution, others a maze of statutory detail, and many obsolete or meaningless in present times."<sup>3</sup> The current document is a bloated, disorganized, fifty thousand-word behemoth.<sup>4</sup> Although occasionally the cause of embarrassment and target of cartoon

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<sup>2</sup> Jesse McKinley, *A Jewel in Albany Regains its Luster*, N.Y. TIMES, Mar. 10, 2013, at MB8.

<sup>3</sup> THE TEMPORARY COMM'N ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION, FIRST STEPS TOWARD A MODERN CONSTITUTION, N.Y. Leg. Doc. No. 58, at 1 (Dec. 31, 1959) [hereinafter FIRST STEPS]. Even though certain outdated provisions were removed during the 1960s, such as provisions dealing with ownership of land, yellowtail tenures and escheats, the purchase of Indian lands, and certain land grants made by the king of Great Britain, any reduction that was achieved was counteracted counterbalanced by subsequent additions to the document. See *id.* at 3; N.Y. CONST. art. I, § 10 (repealed 1962); N.Y. CONST. art. I, § 13 (repealed 1962); N.Y. CONST. art. I, § 15 (repealed 1962).

<sup>4</sup> Even with computer word counters, estimates of the word count for the New York Constitution vary wildly. This is because the document maintained by the New York Secretary of State's Office contains a title page, a table of contents, section titles which, but for certain titles in the home rule article, are not included in the document itself, bracketed material such as summaries of certain provisions which have been removed, a section title for each section, and an amendment history after each provision. When these items are included, the document has 58,036 words. When these items are removed, as we believe is appropriate for an accurate word count, the number of words drops to 49,914 words. This figure, however, is not definitive as it includes the two-word title "The Constitution," article headings, and section outlining characters (i.e., letters and numbers at the start of each provision) which some may argue should also not be counted.

ridicule and scholarly sarcasm, the detritus and disorder that characterize the document—products of the past century—do not usually affect the structure and operation of state government, and thus rarely receive systematic attention. The authors believe, however, that New York’s Constitution, like the building in which it is debated and amended, is in need of some good housekeeping.

New York has a proud constitutional tradition. Its first constitution, adopted in 1777, predated the approval of the Articles of Confederation by the Second Continental Congress.<sup>5</sup> Indeed, the first fruits of the American Revolution were the state constitutions adopted between 1776 and 1786.<sup>6</sup> The country cultivated a tradition of written charters that were the end product of the shared understanding of the states as engaged in a common enterprise, bound together by the values, interests, and aspirations contained in those founding documents.<sup>7</sup> Notwithstanding the intertwined history and common goals of the federal and state constitutional traditions, the treatment given to the United States Constitution and the New York State Constitution has differed in important respects.

We point to the national Constitution with pride and admiration. Read, studied, and celebrated, it has inspired generations, becoming in the process something of a sacred text. The Rotunda of the National Archives Building in Washington, D.C. that houses the document is its shrine.<sup>8</sup> The case preserving the document is a massive, bronze-framed, bulletproof, moisture-controlled, vacuum-sealed glass container.<sup>9</sup> Seated in the Rotunda by day, it is lowered into a multi-ton, bomb-proof vault by night.<sup>10</sup>

Do we point to the current New York Constitution with similar pride and affection? Is it read, studied, and celebrated? Has it inspired generations of New Yorkers? Where is its shrine? Those questions about the state constitution seem awkward, even out of

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<sup>5</sup> See 20 N.Y. JUR. 2D *Constitutional Law* § 1 (2013); 16 AM. JUR. 2D *Constitutional Law* § 7 (2009).

<sup>6</sup> For a convenient collection of the earliest of these documents, along with a thoughtful analysis of this tradition, see generally DONALD S. LUTZ, *COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* xv–xix (1998) (describing the “self-illumination” that followed the American Revolution). Lutz illuminates “the continuity in symbols running from the Mayflower Compact to the American state and national constitutions of the late eighteenth century . . . .” See *id.* at xvi.

<sup>7</sup> See *id.* at xv–xvi.

<sup>8</sup> PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* ix (1997).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

place. Why? For one, we are not in the habit of asking such questions about our state constitution. But the short answer to the four questions posed is that we have not treated our state constitution very well. We have not given it the care that founding documents deserve. One manifestation of that lack of care is what we have placed in the document and, more to the point, what we have allowed to remain in the document. By these measures, the current New York Constitution, adopted in 1894 and extensively revised in 1938,<sup>11</sup> falls far short. It is a document neither known nor read by the general public, or most public servants for that matter; a document subject to neglect and ridicule; a document filled with impenetrable prose, anachronisms, oddities, and redundancies; a document encrusted with amendments that have undermined the initial coherence of the constitution. By trivializing its content, these provisions have done more than discourage reading: they have derogated from the constitution's character as a fundamental document, engendering disrespect if not ridicule.

The burden of this two-part article will be to describe and analyze this condition, and suggest that a first-order task of New York State should be to rescue its constitution from the neglect and embarrassment occasioned by these features. This article will not address the larger issue of systematic and substantive reform of the state constitution. The need for such reform has been obvious to nearly all those who have addressed the question over the last two generations, including civic reformers, scholars, the media, and politicians.<sup>12</sup> We have not attempted to provide a revised

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<sup>11</sup> PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 204 (1996).

<sup>12</sup> Though not exhaustive, the following list is representative of the calls for reforming the constitution: N.Y.S. ASSEMBLY STANDING COMM. ON JUDICIARY, *SHALL THERE BE A CONVENTION TO REVISE THE CONSTITUTION AND AMEND THE SAME?* (May 1977); The Comm. on Mun. Affairs, *Committee Reports: Proposals to Strengthen Local Finance Laws in New York State*, in 34 *RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK* 2-3 (Jan./Feb. 1979); Mario M. Cuomo, *New York Needs Constitutional Convention*, *BUFFALO NEWS*, Jan. 26, 1992, at H6; Editorial, *Call a Constitutional Convention*, *N.Y. TIMES*, Oct. 28, 1997, at A22; Editorial, *Vote 'Yes' on Question One*, *N.Y. POST*, Oct. 21, 1997, at 28; Editorial, *Why Voters Should Say 'Yes' this Fall to a Constitutional Convention*, *BUFFALO NEWS*, Apr. 27, 1997, at H2; Editorial, *Vote for a Constitutional Convention and a Chance for a New New York*, *BUFFALO NEWS*, Nov. 2, 1997, at H2; *Report of the Task Force on the New York Constitutional Convention*, 52 *RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK* 522 (June 1997) (proposing constitutional reforms but not by constitutional convention); Peter G. Goldmark, Jr., *Introduction to DECISION 1997 CONSTITUTIONAL CHANGE IN NEW YORK*, at xv (Gerald Benjamin & Hendrik N. Dullea eds., Rockefeller Instit. Press, 1997) (advocating for significant constitutional reform through a constitutional convention); Press Release, Office of the N.Y.S. Comptroller, Hevesi Proposes Sweeping Debt Reform, Including Constitutional Amendment, New York's Use of Debt Still Out of Control (Feb. 1, 2005), *available at*

constitution that incorporates our recommendations; nor have we catalogued all possible candidates for re-arranging, though we have made some suggestions and have provided examples of proposals to reduce and simplify the document. The article focuses upon the provisions of each section of the constitution that can be removed, modified or relocated within the document without addressing the larger issue of the substantive changes the constitution might require. In Part I we address the first six articles of the constitution, which include the bill of rights, suffrage and the branches of state government; the second part will address the remaining articles.

### I. MANAGEMENT OF THE CONSTITUTION

The ancient Greek word *oikos*, from which we derive our word for economy,<sup>13</sup> was the management of the household,<sup>14</sup> the cornerstone of ancient Greek society. New York seems to have lost sight of that connection, at least insofar as its state constitution is concerned. Like a house filled with “stuff,” the document has expanded in size to nearly fifty thousand words. But the length of the state constitution itself is not the only problem with the document; it is

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<http://www.osc.state.ny.us/press/releases/feb05/020105.htm>; OFFICE OF THE N.Y.S. COMPTROLLER, ENDING NEW YORK'S CHRONIC BUDGET CRISIS: STRATEGY FOR FISCAL REFORM 1–2 (2010), *available at* [https://www.osc.state.ny.us/reports/budget/2010/fiscalreform\\_mar2010.pdf](https://www.osc.state.ny.us/reports/budget/2010/fiscalreform_mar2010.pdf); E.J. McMahon, *Time to End Misuse of Authorities*, POST-STANDARD (Syracuse), Jan. 18, 2005, at A4; JEREMY M. CREELAN & LAURA M. MOULTON, BRENNAN CTR. FOR JUST. AT N.Y.U. L. SCH., THE NEW YORK LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM (2004), *available at* [http://www.brennancenter.org/sites/default/files/legacy/d/albanyreform\\_finalreport.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/albanyreform_finalreport.pdf) (recognizing the need for change, yet recommending a change of chamber rules, rather than resorting to amending the constitution); Press Release, Pub. Pol'y Instit. of N.Y.S., Inc., New York Needs 'Real Budget Reform,' Not This Year's Proposed Constitutional Amendment (Sept. 6, 2005), *available at* <http://www.bcnys.org/whatsnew/2005/0906amendmentreport.htm>; Simon Yirka-Folsom, *Good Government Groups Urge Support for Constitutional Change*, LEGIS. GAZETTE (Albany), Sept. 19, 2005, at 3 (noting support by Common Cause, New York Public Interest Research Group, and New York Chapter of the League of Woman Voters); *see generally* CITIZENS' COMM. FOR AN EFFECTIVE CONSTITUTION, <http://nyconstitution.org/about> (last visited Aug. 6, 2014) (supporting constitutional reform and constitutional convention); Andrew Cuomo, *The New NY Agenda: A Plan for Action*, ANDREWCUOMO.COM, *available at* <http://webiva-downton.s3.amazonaws.com/487/34/9/378/6/acbookfinal.pdf> (last visited Aug. 8, 2014). The real divide comes not over the need for constitutional reform, but on the best means to achieve that reform: some reformers support change via legislative amendment, while others call for a constitutional convention. Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1286–87 (2001).

<sup>13</sup> Bradley A. Ault, *Oikos and Oikonomia: Greek Houses, Households and the Domestic Economy*, 15 BRITISH SCH. ATHENS STUD. 259, 259 (2007).

<sup>14</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 394 (11th ed. 2005).

the fact that the document is engorged with oddities, obsolete material, and redundancies, all displaying a half century of neglect. One does not have to read very far into the document before being confronted with deadwood, poor organization, and arcane or inscrutable language. Specific sections are no longer operative by virtue of clauses elsewhere in the document or by intervening court decisions and the meanings of certain provisions are not transparent without reference to provisions in other sections. This unkempt constitution did not just happen, nor has it gone entirely unnoticed.

The 1958 Inter-Law School Report on the New York State Constitution stated that it was “literally amazed by the extent to which the Constitution of New York contains hollow phrases, defective provisions, and creakingly antiquated policies.”<sup>15</sup> The Temporary Commission on the Revision and Simplification of the Constitution echoed these sentiments, calling the New York Constitution “almost unreadable and [one that] can be understood only after tedious study.”<sup>16</sup> It continued:

The Constitution of the State of New York is not a constitution in a proper constitutional sense. It is a mass of legal texts, some truly fundamental and appropriate to a constitution, others a maze of statutory detail, and many obsolete or meaningless in present times.<sup>17</sup>

These reports, written more than fifty years ago, are as timely today as when they were first scripted.<sup>18</sup>

#### *A. Length: Should It Stay or Should It Go?*

The decision to “clean house” requires some attention to a prior question: how do we decide what goes and what stays? Moreover, that question forces us to address, at least in a preliminary fashion,

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<sup>15</sup> SPECIAL LEGIS. COMM. ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION, INTER-LAW SCH. COMM. REPORT ON THE PROBLEM OF SIMPLIFICATION OF THE CONSTITUTION, N.Y. LEGIS. DOC. NO. 57, at 221 (1958) [hereinafter, INTER-LAW SCH. COMM. REPORT]. The *New York Times* editorial commenting on the report wrote that the state constitution was characterized by “haphazard arrangement, slipshod and confusing phraseology, relics of long-gone fears, verbosity, frustrated efforts to fit law to new circumstances, [and] a testimonial to the force of inertia.” Editorial, *A Simpler Constitution*, N.Y. TIMES, June 2, 1958, at 26.

<sup>16</sup> FIRST STEPS, *supra* note 3, at 2.

<sup>17</sup> *Id.* at 1.

<sup>18</sup> Some of the recommendations of the Inter-Law School Committee were adopted through a series of amendments approved by the voters in 1962 and 1963. See ERNEST HENRY BREUER, NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1967: CONSTITUTIONAL DEVELOPMENTS IN NEW YORK 1958–1967, at 12 (1967).

the question of what a constitution should contain.<sup>19</sup>

The answer from most scholars and constitutional reformers has been that a constitution should contain only the fundamentals. William Bennett Munro epitomized this philosophy when he wrote:

A state constitution should confine itself to fundamentals . . . .  
. The bill of rights should be reduced to a minimum . . . . The  
framework of state government should be simplified . . . . A  
large number of matters now incorporated in the state  
constitution should be transferred to an administrative  
code.<sup>20</sup>

Among the reform groups who subscribed to this approach, the National Municipal League (now the National Civic League) stands out. Throughout the twentieth century, it published a series of pamphlets, monographs, and specialized studies on state constitutions.<sup>21</sup> Included in the organization’s contributions to the study and reform of state constitutions was the publication of six editions of a *Model State Constitution* between 1921 and 1968.<sup>22</sup> The Model was intended to provide states with guidelines for writing efficient and effective constitutions. In the League’s view, the national Constitution met its criteria.<sup>23</sup>

Judged by the standards of the brief and basic approach, most current state constitutions fail to measure up. Currently, sixteen states have constitutions containing over forty thousand words,<sup>24</sup>

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<sup>19</sup> CHARLOTTE IRVINE & EDWARD M. KRESKY, HOW TO STUDY A STATE CONSTITUTION 2–3 (1962) (providing a brief overview of some of the answers to this question). John P. Wheeler, Jr. wrote of “principles of sound constitutional structure which apply to all 50 states . . . [and] which provide common guidelines to the development of modern constitutions.” John P. Wheeler, Jr., *Introduction* to SALIENT ISSUES OF CONSTITUTIONAL REVISION, at xi (John P. Wheeler, Jr. ed., 1961).

<sup>20</sup> William B. Munro, *An Ideal State Constitution*, 181 ANNALS AM. ACAD. POL. & SOC. SCI. 5, 7, 9 (1935).

<sup>21</sup> See, e.g., Wheeler, *supra* note 19 *passim*; ROBERT B. DISHMAN, STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT *passim* (Nat’l Mun. League rev. ed., 1968); NAT’L MUN. LEAGUE, MODEL STATE CONSTITUTION *passim* (6th ed. 1963). This approach as applied to New York’s Constitution was most aptly reflected in Alan K. Campbell’s comment: “To make the New York Constitution a genuinely basic document will require a minimum of restrictive provisions.” Alan K. Campbell, *A New Constitution for New York?*, in MODERNIZING STATE GOVERNMENT: THE NEW YORK CONSTITUTIONAL CONVENTION OF 1967, 209, 215 (Sigmund Diamond & Nancy Lane, eds., 1967).

<sup>22</sup> The first edition of the Model was published in 1921, followed by subsequent editions ending with the sixth edition published in 1968. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 152–54 (1998) (discussing the changes in the model between 1921 and 1968).

<sup>23</sup> *Id.* at 155.

<sup>24</sup> These counts are taken from the 2013 edition of THE BOOK OF THE STATES, published by the Council of State Governments. See John Dinan, *State Constitutional Developments in 2012*, in COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 12–13 (2013). States with constitutions having more than forty thousand words, according to that volume, include:

compared to the U.S. Constitution's 7,591 words. Alabama's Constitution contains an astonishing 376,006 words,<sup>25</sup> more than four times the closest second, Texas (86,936 words). Vermont is the lone state with a constitution having less than ten thousand words, 8,565 to be exact.<sup>26</sup>

The belief that a state constitution should be a compact instrument, limited to constitutional fundamentals along the lines of the national document, did not go unchallenged. The position of the states in the federal system both requires and enables them to address a range of issues beyond the purview of, or not addressed in, the national constitution.<sup>27</sup> The national government is, in theory, one of delegated powers—it may exercise only those powers enumerated in the document or fairly implied by the Necessary and Proper Clause.<sup>28</sup> Unlike the national government, state governments possess plenary or complete powers, and, except where limited by specific provisions of the national document, are free to take whatever actions they deem appropriate in governing the citizens of the state.<sup>29</sup> The states' position in the federal system and the extensive authority encompassed by the phrase “police power”—the power to regulate for the health, welfare, and safety of the community—enable states to regulate all areas of community life except where specifically prohibited from doing so by either the

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Alabama (376,006), Arizona (47,306), Arkansas (59,120), California (67,048), Colorado (66,140), Florida (56,705), Georgia (41,684), Louisiana (69,876), Maryland (43,198), Massachusetts (45,283), Missouri (69,394), New York (44,397), Ohio (53,239), Oklahoma (81,666), Oregon (49,016), and Texas (86,936). *Id.*

<sup>25</sup> *Id.* at 12. The length of Alabama's constitution is in large part a product of the fact that the state has little home rule for its sixty-seven counties, necessitating constitutional amendments for many local affairs. See John Peck, *Let Alabama Voters Decide Direction of State Constitutional Reform*, HUNTSVILLE TIMES, Apr. 19, 2011, at 9.

<sup>26</sup> THE BOOK OF THE STATES, *supra* note 24, at 12.

<sup>27</sup> See, e.g., N.Y. CONST. art. XIV, § 1 (protecting certain forest lands of New York State as forever wild).

<sup>28</sup> The expansion of Congress's authority under its taxing and interstate commerce powers have called into question the existence of any real limits on national power. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (holding that statute requiring individuals to purchase health insurance was a constitutional exercise of Congress's taxing power); *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (holding that Congress had the power to regulate activities associated with purely intrastate production and consumption of marijuana); *but cf.* *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (striking down as an unconstitutional exercise of the commerce clause power a statute prohibiting the knowing possession of a firearm in a school zone); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating portion of Violence Against Women Act that allowed victims of gender-based violence to file civil lawsuits against their attackers in federal court).

<sup>29</sup> See G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 329–30 (2003).



national or state constitution.<sup>30</sup> For example, it is primarily or exclusively the responsibility of the states to set up electoral systems, enact voting requirements, provide for local governments, establish education systems, and adopt laws and regulations having to do with health and safety, domestic relations (marriage, divorce, child custody), and social welfare.<sup>31</sup> Moreover, the ease with which state constitutions can be amended, in sharp contrast to the virtual unamendability of the U.S. Constitution,<sup>32</sup> has made it easier for reformers to ensconce public policy issues in their state charters. From 1821 through 1938, New York added articles on local governments,<sup>33</sup> canals,<sup>34</sup> housing,<sup>35</sup> welfare,<sup>36</sup> state and local finance,<sup>37</sup> the environment,<sup>38</sup> education,<sup>39</sup> and taxation.<sup>40</sup> Far from simply mandating legislative action, these articles laid out policies and procedures in great detail.<sup>41</sup>

Widespread distrust of state legislatures throughout the nineteenth century also contributed to the increased size of state constitutions. Constitutional reformers added numerous substantive and procedural limitations on state legislatures.<sup>42</sup>

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<sup>30</sup> See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241–42 (1978).

<sup>31</sup> See Markus Dirk Dubber, “*The Power to Govern Men and Things*”: *Patriarchal Origins of the Police Power in American Law*, 52 *BUFF. L. REV.* 1277, 1277–78 (2004); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *COLUM. L. REV.* 1, 9 (1988).

<sup>32</sup> See SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 11 (2012); see also Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 260 (Sanford Levinson ed., 1995) (using an index to show that the United States Constitution is the most difficult to amend of any constitution in the world); Henry Paul Monaghan, *Doing Originalism*, 104 *COLUM. L. REV.* 32, 35 (2004) (describing the United States Constitution as “practically unamendable”).

<sup>33</sup> N.Y. CONST. art. IX.

<sup>34</sup> N.Y. CONST. art. XV.

<sup>35</sup> N.Y. CONST. art. XVIII.

<sup>36</sup> N.Y. CONST. art. XVII.

<sup>37</sup> N.Y. CONST. art. VII (governing state finance); N.Y. CONST. art. VIII (governing local finance).

<sup>38</sup> See N.Y. CONST. art. XIV.

<sup>39</sup> N.Y. CONST. art. XI.

<sup>40</sup> N.Y. CONST. art. XVI.

<sup>41</sup> See, e.g., N.Y. CONST. art. XVIII, § 4 (providing that the legislature may authorize cities and towns to contract indebtedness, so long as it adheres to several restrictions on this power).

<sup>42</sup> See, e.g., N.Y. CONST. art. III, § 15 (providing that private and local bills may only embrace one subject, which must be expressed in the title); N.Y. CONST. art. III, § 17 (prohibiting the enactment of special or local laws for certain subjects); N.Y. CONST. art. VII, § 8 (prohibiting the gift or sale of state money or credit to private organizations); N.Y. CONST. art. VII, § 11 (providing certain procedural requirements for the incurring of state debt, including that any such debt be submitted to the voters at a referendum). See also TARR, *supra* note 22, at 117–21, for a description of this phenomenon on a national basis.

Added when less was demanded of government than is the case today, these restrictions now function in ways not intended by the reformers and, in some cases, have not eliminated the evils they were intended to remedy.<sup>43</sup>

Christopher W. Hammons undertook a defense of lengthy state constitutions, concluding that “neither great length nor greater amounts of policy content should concern state constitutional reformers. To the contrary, the findings here indicate that greater length and more policy content may actually be beneficial, resulting in increased constitutional durability.”<sup>44</sup> Hammons’ argument that the length of state constitutions, ipso facto, is not sufficient grounds for concern or condemnation and his defense of policy-laden state constitutions does not exorcize constitutional brevity as a goal worthy of pursuit.<sup>45</sup> Brevity remains one of several criteria to be applied when judging constitutions. As Frank Grad and Robert Williams point out, “the best state constitutions are usually brief—but they are not the best *because* they are brief, but because they best meet the needs of state government.”<sup>46</sup>

Freed from attachment to the federal model, a more relaxed and expansive understanding of state constitutions has emerged. Agreement remains that a constitution should serve the purposes of a fundamental organic document: establishing, defining, and limiting the basic structures of power, stating general principles, and declaring the rights of the people. But other values and goals, such as protecting policies deemed essential to the traditions, character, and values of the state have been added to the criteria by which we judge state constitutions.

We need not repeat the mistake earlier reformers made, viz., equating the nature and purposes of state and national constitutions, an equivalency that ignored these differences.

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<sup>43</sup> One reason for this failure is that legislatures have devised ways to evade the limitations, often with the approval of the courts. See Peter J. Galie & Christopher Bopst, *Anything Goes: A History of New York's Gift and Loan Clauses*, 75 ALB. L. REV. 2005, 2033–71 (2012) (describing how restrictions on the legislature’s ability to give or loan state money and credit have been circumvented in various ways and upheld by the courts); see also PETER J. GALIE & CHRISTOPHER BOPST, *THE NEW YORK STATE CONSTITUTION* 127–28 (2d ed. 2012) (stating that it is unusual for local laws to be invalidated based on limitations contained in the constitution); *id.* at 212 (describing how, notwithstanding referendum requirement in the constitution, over ninety four percent of state-funded debt in New York has not been approved by the voters).

<sup>44</sup> Christopher W. Hammons, *State Constitutional Reform: Is it Necessary?*, 64 ALB. L. REV. 1327, 1341 (2001).

<sup>45</sup> See *id.*

<sup>46</sup> FRANK P. GRAD & ROBERT F. WILLIAMS, 2 *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS* 15 (2006).

Nevertheless, questions can and should be raised as to the nature and length of the New York State Constitution. A fifty thousand-word document raises legitimate concerns about the length as well as the content of the state’s constitution. Eschewing the national Constitution as a model for the state does not mean that a lengthy, cluttered document is beyond criticism. A constitution with fifty thousand words discourages reading. A constitution with provisions concerning things such as debt for railroad crossings<sup>47</sup> and cooperation by municipalities on sewage removal<sup>48</sup> that are written in language so impenetrable as to be indecipherable to all but a handful of specialists makes the document confusing, intimidating, and unapproachable. A constitution whose bill of rights includes provisions prohibiting gambling,<sup>49</sup> regulating swamp lands<sup>50</sup> and divorces,<sup>51</sup> and setting maximum hours and days that public employees can work<sup>52</sup> invites confusion between public policies and constitutional rights and liberties. A constitution containing provisions that have long been invalidated by decisions of state and federal courts undermines its own authority and legitimacy.

### B. Policies

Closely linked to the issue of length is the question: to what extent should policy questions be addressed in a state constitution? Historically, reformers and civic groups of various stripes have opted for short state constitutions that contain few, if any policy matters, preferring to leave matters of policy to the political process. The framers of the *Model State Constitution*, taking as their ideal the national Constitution, took a jaundiced view of “departure[s] . . . from the simplicity and clarity of the national prototype.”<sup>53</sup> The “essentially statutory declarations of public policy in the guise of constitutional provisions” as well as the proliferation of “thou shalt not[]” clauses were seen as manifestations of “disillusionment with representative institutions and the desire either to prevent sin or to enforce the good.”<sup>54</sup> But lumping together all public policies found in state constitutions obscured, if it did not eliminate, the possibility

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<sup>47</sup> N.Y. CONST. art. VII, § 14.

<sup>48</sup> N.Y. CONST. art. VIII, § 5(E).

<sup>49</sup> N.Y. CONST. art. I, § 9(1).

<sup>50</sup> N.Y. CONST. art. I, § 7(d).

<sup>51</sup> N.Y. CONST. art. I, § 9(1).

<sup>52</sup> N.Y. CONST. art. I, § 17.

<sup>53</sup> NAT’L MUN. LEAGUE, *supra* note 21, at viii.

<sup>54</sup> *Id.*

that some policies, by virtue of the state's political culture, history, or geographic character, might be of such importance to the citizens of the state as to warrant inclusion in the state constitution. In New York, the conservation,<sup>55</sup> social welfare,<sup>56</sup> and housing<sup>57</sup> articles are examples of policies that were deemed fundamental and as such deserving of a place in the state's governing charter. Contrariwise, ensconcing detailed policy measures in the constitution runs the risk of limiting the ability of future governments to adapt to new circumstances and unforeseen changes.<sup>58</sup>

Policy issues are particularly susceptible to the passage of time. The militia article is a case-in-point. It has been revised on a number of occasions to reflect the changing role of the militia in New York State.<sup>59</sup> Currently, the entire article consists of two sentences.<sup>60</sup> This is in sharp contrast to other policy articles like the housing,<sup>61</sup> social welfare,<sup>62</sup> and state<sup>63</sup> and local<sup>64</sup> finance articles. In the case of housing and social welfare, added at a time when the State's ability to act in these areas was in doubt, a good portion of these articles contain language that is anachronistic given today's understanding of public purpose and state power. The state and local finance articles suffer from the same affliction: most of the prohibitions contained in those articles have been the subject of amendments that have added exemptions to the original prohibitions; and various devices or procedures designed to circumvent the restrictions have been crafted.<sup>65</sup> The result: lengthy finance articles that provide more symbolic than instrumental significance.

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<sup>55</sup> N.Y. CONST. art. XIV.

<sup>56</sup> N.Y. CONST. art. XVII.

<sup>57</sup> N.Y. CONST. art. XVIII.

<sup>58</sup> For example, the restrictions on gifts or loans of state and local money and credit found in articles VII and VIII of the New York Constitution were directed at particular evils that arose in the second half of the nineteenth century, but their application to twentieth- and twenty-first- century conditions have rendered them of limited value at best. See Galie & Bopst, *supra* note 43, at 2005–07.

<sup>59</sup> GALIE & BOPST, *supra* note 43, at 297.

<sup>60</sup> N.Y. CONST. art. XII, § 1. When the 1894 Constitution was adopted, the militia article contained 347 words, using the counting method described in note 4, *supra*. N.Y. CONST. of 1894, art. XI.

<sup>61</sup> N.Y. CONST. art. XVIII.

<sup>62</sup> N.Y. CONST. art. XVII.

<sup>63</sup> N.Y. CONST. art. VII.

<sup>64</sup> N.Y. CONST. art. VIII.

<sup>65</sup> See *supra* notes 42–43 and accompanying text (citing examples of provisions where the New York legislature has had to create exceptions in order to alter the limitations found within the state constitution).

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Against that backdrop, we turn to the specific sections of the New York Constitution that we believe are candidates for removal, modification, or rearrangement.

## II. CLEANING HOUSE ROOM BY ROOM

### A. *Article I—Bill of Rights*

Like its federal counterpart, the New York State Constitution contains a Bill of Rights. Originally inserted in the state constitution in 1821,<sup>66</sup> the 1846 Constitutional Convention moved the Bill of Rights to the first article,<sup>67</sup> signifying its importance. The symbolic placement of this article is undermined both by the inclusion of provisions that have been superseded by federal law and by the juxtaposition of fundamental freedoms with provisions having little or nothing to do with rights—provisions that could be located in other articles or eliminated from the document. Examples of these phenomena follow.

#### 1. Article I, section 1

The Bill of Rights begins with a ringing declaration:

No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers . . . .<sup>68</sup>

The “law of the land” phrase used in this section dates back to article 39 of the Magna Carta of 1215.<sup>69</sup> The phrase is now synonymous with “due process of law,” a phrase which appears in section 6 of the same article.<sup>70</sup> This fundamental principle of constitutional government is followed by a provision authorizing, but not requiring, the legislature to dispense with uncontested primaries:

[T]he legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which

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<sup>66</sup> N.Y. CONST. of 1821, art. VII.

<sup>67</sup> See N.Y. CONST. of 1846, art. I.

<sup>68</sup> N.Y. CONST. art. I, § 1.

<sup>69</sup> See *Magna Carta Translation*, NAT'L ARCHIVES & RECORDS ADMIN. (2007), [http://www.archives.gov/exhibits/featured\\_documents/magna\\_carta/translation.html](http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html).

<sup>70</sup> See N.Y. CONST. art. I, § 6.

such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law.<sup>71</sup>

Although the elimination of primary elections may have been deemed a deprivation of the suffrage in the absence of such a provision, the juxtaposition of the two provisions diminishes the significance of the first clause. To make the document more readable and to give the proper import to the broad command of this section, we recommend placing the primary election provision in article II, the suffrage article.

## 2. Article I, section 6

Section 6 of the Bill of Rights contains some of the most essential rights made available to criminal defendants, including the right to a grand jury indictment for felonies, the right to counsel, the right to confront witnesses, the right not to incriminate oneself, and the right not to be subjected to double jeopardy for the same offense.<sup>72</sup> This section further includes the right not to be deprived of life, liberty, or property without due process of law.<sup>73</sup> Also contained within the section is a provision requiring that a public official who refuses to waive his or her privilege against self-incrimination involving the performance of official duties to be terminated from employment. It reads:

No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his or her present office or of any public office held by him or her within five years prior to such grand jury call to testify, or the performance of his or her official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a

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<sup>71</sup> N.Y. CONST. art. I, § 1.

<sup>72</sup> N.Y. CONST. art. I, § 6.

<sup>73</sup> *Id.*

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period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his or her present office by the appropriate authority or shall forfeit his or her present office at the suit of the attorney-general.<sup>74</sup>

In 1968, the part of this section requiring an official’s termination for refusing to waive immunity from prosecution (thus eschewing the protections which the privilege against self-incrimination provides) was held by the U.S. Supreme Court in *Gardner v. Broderick*<sup>75</sup> to violate the national Constitution.<sup>76</sup> Yet almost half a century later, this unenforceable provision remains in the document.<sup>77</sup>

The section also allows an official to be dismissed from employment for the refusal “to answer any relevant question concerning such matters before such grand jury.”<sup>78</sup> In *Gardner*, the Supreme Court held that an officer could be dismissed for the refusal “to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself.”<sup>79</sup> The requirement laid down in *Gardner* is more restrictive than the inquiry permitted by the state constitution, which allows dismissal for the refusal “to answer any relevant question.”<sup>80</sup>

This section should be amended to bring it in line with the limitations required by *Gardner*. The language requiring removal for the failure to answer questions should be modified to reflect those limitations required by that case, and the language mandating job loss for the failure to sign a waiver of immunity should be excised from the section.

### 3. Article I, section 7

Section 7 of the same article contains a jarring juxtaposition of the profound with the trivial. The profound:

(a) Private property shall not be taken for public use without

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<sup>74</sup> *Id.*

<sup>75</sup> *Gardner v. Broderick*, 392 U.S. 273 (1968).

<sup>76</sup> *Id.* at 278–79.

<sup>77</sup> N.Y. CONST. art. I, § 6.

<sup>78</sup> *Id.*

<sup>79</sup> *Gardner*, 392 U.S. at 278.

<sup>80</sup> N.Y. CONST. art. I, § 6.

just compensation.<sup>81</sup>

The trivial:

(c) Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited.

(d) The use of property for the drainage of swamp or agricultural lands is declared to be a public use, and general laws may be passed permitting the owners or occupants of swamp or agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions, on making just compensation, and such compensation together with the cost of such drainage may be assessed, wholly or partly, against any property benefited thereby; but no special laws shall be enacted for such purposes.<sup>82</sup>

These latter two subsections are anachronistic remnants of an earlier age, inserted in response to nineteenth century court decisions which espoused a much narrower view of public use than the one subsequently adopted by courts in the twentieth century.<sup>83</sup> They are prime candidates for elimination. In fact, over fifty years ago, the Inter-Law School Report recommended that consideration be given to the removal of both these provisions,<sup>84</sup> and the constitution proposed by the 1967 Constitutional Convention

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<sup>81</sup> N.Y. CONST. art. I, § 7(a).

<sup>82</sup> N.Y. CONST. art. I, § 7(c), (d).

<sup>83</sup> Compare *Taylor v. Porter*, 4 Hill 140, 147–48 (N.Y. Sup. Ct. 1843) (holding that a statute providing for the laying of a private road across the land of another constituted an unconstitutional deprivation of property without due process of law and a taking of property for a private use), and *People ex rel. Pulman v. Henion*, 19 N.Y.S. 488, 491 (Gen. Term 5th Dep't 1892) (holding unconstitutional a statute which authorized the construction of drainage ditches across the land of others, finding that it took the private property of those whose lands the ditches passed through for purely private use for the benefit of those whose land was being improved; assessment for improvements could be made only by the landowner whose land was being drained), with *Goldstein v. New York State Urban Dev. Corp.*, 921 N.E.2d 164, 175 (N.Y. 2009) (upholding the condemnation of certain privately-owned properties for inclusion in a mixed-use development which was to be undertaken by a private developer), and *Kaur v. New York State Urban Dev. Corp.*, 933 N.E.2d 721, 734–35 (N.Y. 2010) (allowing acquisition by eminent domain of certain property for the development of a new Columbia University campus and holding that even though the university was private, the purpose of the project was civic).

<sup>84</sup> INTER-LAW SCH. COMM. REPORT, *supra* note 15, at 16 n.3.



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eliminated both provisions.<sup>85</sup>

#### 4. Article I, section 8

Like most state constitutions, the New York Constitution contains a provision which protects freedom of speech. It reads as follows:

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.<sup>86</sup>

This section guarantees the rights to speech and press—two rights that are, along with the right to vote, at the heart of self-government.<sup>87</sup> Nonetheless, this section bears little relationship to the current state of the law and has been largely superseded by federal and state jurisprudence.<sup>88</sup> The provision references truth only in a criminal context, saying nothing about the fact that it is also an absolute defense to civil suits.<sup>89</sup> Second, the section’s limitation of a truth defense to only those statements published with “good motives” and “justifiable ends” is no longer constitutionally permissible.<sup>90</sup> This provision should at a minimum be amended to reflect a current state of the law regarding this critical area.<sup>91</sup>

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<sup>85</sup> See Proposed N.Y. CONST. of 1967, art. I, § 6, *reprinted in* 11 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE NEW YORK STATE Doc. No. 60, 3 (1967). The constitution proposed by the 1967 Convention was overwhelmingly rejected by the voters.

<sup>86</sup> N.Y. CONST. art. I, § 8.

<sup>87</sup> See *id.*

<sup>88</sup> See *infra* notes 90–92 and accompanying text.

<sup>89</sup> See *Guccione v. Hustler Magazine*, 800 F.2d 298, 301 (2d Cir. 1986) (stating that truth is an absolute defense to a civil suit for defamation).

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

<sup>91</sup> The jurisprudence of the U.S. Supreme Court and the New York Court of Appeals no longer make truth the only defense to libel actions. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that in order for a public official to state an actionable claim for defamation, the official must establish that the statement was made with actual malice—

## 5. Article I, section 9

Another example of a jarring juxtaposition between fundamental rights and the trivial is found in section 9 of the article, which provides:

No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.<sup>92</sup>

This section opens with two rights, the right to assemble and the right to petition the government.<sup>93</sup> Along with free speech and the franchise, these rights are the indispensable conditions for self-government. Immediately following these rights are two spoilers: a provision declaring that no divorces shall be granted except by judicial proceedings and a prohibition on gambling, which is, in turn

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i.e., either the publisher of the statement must have known that the statement was false or acted in reckless disregard of its truth or falsity); *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41, 347–48 (1974) (holding that defamation action involving statement made about private plaintiff requires at least negligence; strict liability for defamation actions is unconstitutional); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 571 (N.Y. 1975) (holding that under New York law, a private figure plaintiff in a defamation case involving an issue of legitimate public concern must establish gross negligence). Beyond bringing the section into compliance with current jurisprudence, consideration must also be given to whether the language of the state constitution should replicate the free speech and press clause of the First Amendment or whether the state wishes to provide protections to the press and speech beyond those provided by the First Amendment.

<sup>92</sup> N.Y. CONST. art. I, § 9(1).

<sup>93</sup> *Id.*

followed by numerous exceptions.<sup>94</sup>

The divorce provision was first inserted into the Constitution of 1846,<sup>95</sup> in response to the legislative divorce of Eunice Chapman, whose husband sold their property, abandoned her, and joined the Society of Shakers.<sup>96</sup> Now that New York has adopted no-fault divorce,<sup>97</sup> the notion of a person seeking relief from a marriage through legislative means is anachronistic and unlikely.<sup>98</sup> The only lasting impact of the provision has been the invalidation of divorces granted by religious authorities in the state.<sup>99</sup> To the extent the state wishes to continue to prevent religious divorces, a statute affirming their non-recognition would achieve this objective while removing the anachronism.

The gambling prohibition was adopted in a nearly unanimous vote by the 1894 Constitutional Convention.<sup>100</sup> Since that time, the provision has been amended seven times, with six of these amendments either adding or altering exemptions to the prohibition.<sup>101</sup> Laying aside the question whether gambling provisions belong in the constitution or are more appropriately dealt with by the legislature,<sup>102</sup> placing them in the Bill of Rights, to say the least, jars sensibilities and leaves the reader wondering about the State’s concern for the quality and character of its constitution. Whether or not we have reached the point where the exceptions

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<sup>94</sup> *Id.*; In addition to the gambling exceptions contained in this section, which include lotteries run by the state, pari-mutuel betting authorized by the legislature and casino gaming at no more than seven casinos authorized by the legislature, another subsection allows games of chance to be conducted by religious and non-profit organizations. *Id.* at § 9(2).

<sup>95</sup> N.Y. CONST. of 1846, art. I, § 10.

<sup>96</sup> See GALIE & BOPST, *supra* note 43, at 82 n.128. Ms. Chapman’s story is more fully detailed in ILYON WOO, *THE GREAT DIVORCE: A NINETEENTH-CENTURY MOTHER’S EXTRAORDINARY FIGHT AGAINST HER HUSBAND, THE SHAKERS, AND HER TIMES passim* (2010).

<sup>97</sup> See N.Y. DOM. REL. LAW § 170(7) (McKinney 2014) (permitting divorce in cases where the relationship between the spouses has broken down irretrievably for a period of at least six months).

<sup>98</sup> One hundred years ago, a commentator questioned whether, in light of the Equal Protection Clause of the Fourteenth Amendment, a legislative divorce would still be valid. See Simeon E. Baldwin, *Legislative Divorces and the Fourteenth Amendment*, 27 HARV. L. REV. 699, 701–02 (1914).

<sup>99</sup> These divorces have not been recognized by New York courts, even if they were recognized in other jurisdictions. See, e.g., *Chertok v. Chertok*, 203 N.Y.S. 163, 164 (App. Div. 1st Dep’t 1924) (invalidating a rabbinical divorce obtained from a rabbi in Brooklyn, even though the divorce was recognized under Russian law).

<sup>100</sup> See GALIE & BOPST, *supra* note 43, at 82.

<sup>101</sup> See *id.* at 83–84. The other amendment, approved in 2001, was a constitution-wide revision to make the document gender neutral.

<sup>102</sup> New York is far from alone in placing in its state constitution a prohibition on gambling. However, New York is the only state that includes such a prohibition in its Bill of Rights.

have swallowed the general prohibition, at the very least some rearranging is in order by removing the provision from the Bill of Rights.<sup>103</sup>

#### 6. Article I, section 18

New York State's Bill of Rights has much to say about labor. Section 18 of the article allows the legislature to enact a workers' compensation system:

Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or herself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his or her employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer.<sup>104</sup>

This section is a remnant of a bygone era when state and federal courts limited the power of the legislature to regulate the conditions of labor.<sup>105</sup> It was adopted in 1911 as a direct response to a decision

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<sup>103</sup> For a thoughtful examination of this question, see Gerald Benjamin, *If the New York State Constitution Bans Gambling, Why is there So Much Opportunity to Gamble in New York?*, available at <http://nyconstitution.org/professors-corner/casino-gambling/if-new-york-state-constitution-bans-gambling-why-there-so-much-opp> (last visited Oct. 15, 2014).

<sup>104</sup> N.Y. CONST. art. I, § 18.

<sup>105</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 57 (1905) (invalidating a New York law which had established maximum daily and weekly hours for individuals working in bakeries).

of the New York Court of Appeals holding that New York’s workers’ compensation scheme violated the due process clauses of the state and federal constitutions.<sup>106</sup>

In the years since this provision was added to the state constitution, understandings of government’s role in labor and employment matters have changed dramatically. Such powers are now well established at both the national and state levels and state constitutional provisions guaranteeing such powers are redundant. The state legislature has enacted social legislation far more extensive than what is authorized by this provision without running afoul of due process.<sup>107</sup> Moreover, the section is largely legislative in nature, and detailing the exceptions to providing compensation for death or injury turns the constitution into a regulatory code.

The removal or shortening of this section has been suggested previously. The Inter-Law School Committee recommended removal of the provision in its entirety.<sup>108</sup> The constitution proposed by the 1967 Constitutional Convention did not go that far, but did reduce the section to a statement that the “legislature may provide a system of workmen’s compensation and protection against the hazards of unemployment and disability and against loss or inadequacy of income and employment opportunities.”<sup>109</sup> Since the power of the legislature to enact such a system is no longer in question, it makes little sense to keep this section unless the language is made mandatory. To the extent some preservation of the workers’ compensation section is deemed necessary, the adoption of language similar to that proposed by the 1967 constitution would result in a reduction of approximately 220 words.

### *B. Article II—Suffrage*

For decades the suffrage article was the poster child for the need to revise the state constitution. Before a 1995 amendment, the bulk of the article contained material that had been superseded by federal law. The voting age had been specified as twenty-one

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<sup>106</sup> See *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 441 (N.Y. 1911).

<sup>107</sup> See, e.g., *Montgomery v. Daniels*, 340 N.E.2d 444, 446 (N.Y. 1975) (upholding Comprehensive Automobile Insurance Reparations Act); *Metro. Life Ins. Co. v. New York State Labor Relations Bd.*, 20 N.E.2d 390, 393, 396 (N.Y. 1939) (upholding New York State Labor Relations Act); *W.H.H. Chamberlin, Inc. v. Andrews*, 2 N.E.2d 22, 23, 26 (N.Y. 1936), *aff’d*, 299 U.S. 515 (1936) (upholding New York Unemployment Insurance Law).

<sup>108</sup> INTER-LAW SCH. COMM. REPORT, *supra* note 15, at 57–58.

<sup>109</sup> Proposed N.Y. CONST. of 1967, art. I, § 10b, *reprinted in* 11 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE NEW YORK STATE Doc. No. 60, 5 (1967).

despite the fact that the Twenty-Sixth Amendment, adopted in 1971, made eighteen the eligible age.<sup>110</sup> The New York Court of Appeals, relying on federal precedent, had invalidated in 1972 the article's residency requirement of three months.<sup>111</sup> There had also existed a literacy test provision long since nullified by the Voting Rights Act.<sup>112</sup> Although the 1995 amendments brought the article in line with federal law, additional revision is desirable.

### 1. Article II, section 3

Section 3 of the suffrage article specifies who is constitutionally excluded from voting in New York State. It is a prolix section and reads like an election code:

No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election; and upon challenge for such cause, the person so challenged, before the officers authorized for that purpose shall receive his or her vote, shall swear or affirm before such officers that he or she has not received or offered, does not expect to receive, has not paid, offered or promised to pay, contributed, offered or promised to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at such election, and has not made any promise to influence the giving or withholding of any such vote, nor made or become directly or indirectly interested in any bet or wager depending upon the result of such election. The Legislature shall enact laws excluding

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<sup>110</sup> U.S. CONST. amend. XXVI, § 1; Proposed N.Y. CONST. of 1967, art. II, § 1, *reprinted in* 11 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE NEW YORK STATE Doc. No. 60, 6 (1967).

<sup>111</sup> *Atkin v. Onondaga Cnty Bd. of Elections*, 285 N.E.2d 687, 688–89 (N.Y. 1972) (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972)).

<sup>112</sup> Temporary suspensions of literacy tests were applied nationwide in 1970. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 314, 315, 316 (1970). The ban on these tests was made permanent in 1975. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400, 400 (1975).

from the right of suffrage all persons convicted of bribery or of any infamous crime.<sup>113</sup>

This section is a lengthy, detailed amalgam of amendments passed during the nineteenth century to deal with election chicanery, fraud, and wagering on the outcomes of elections. The provisions of this section reflect the distrust, if not outright disgust, with the legislature’s unwillingness to address these problems. Rather than being included as part of the State’s fundamental charter, the section is better suited to statutory regulation, where changes and additions to address new forms of abuse can be more readily made.<sup>114</sup>

### *C. Article III—Legislature*

Article III of the constitution has fallen prey to both constitutional and statutory attack. Certain provisions have been held to violate the Federal Constitution, while others have been only partially complied with in attempt to otherwise meet the dictates of the U.S. Constitution and the Federal Voting Rights Act.

#### 1. Article III, sections 3, 4, and 5

Sections 3 and 4 of Article III detail the apportionment process for state senators, while section 5 is the counterpart for the assembly.

§3. The senate districts described in section three of article three of this constitution as adopted by the people on November sixth, eighteen hundred ninety-four are hereby continued for all of the purposes of future reapportionments of senate districts pursuant to section four of this article.<sup>115</sup>

§4. Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly

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<sup>113</sup> N.Y. CONST. art. II, § 3.

<sup>114</sup> At the very least, archaic phrases like “any infamous crime” can be replaced by the word “felony.” As Judge Jack B. Weinstein points out, “[t]here is no need for separate treatment for persons who have bought or sold votes since conviction rather than disenfranchisement operates as a deterrent.” JACK B. WEINSTEIN, A NEW YORK CONSTITUTION MEETING TODAY’S NEEDS AND TOMORROW’S CHALLENGES 72 (1967).

<sup>115</sup> N.Y. CONST. art. II, § 3.

districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor. The legislature, by law, shall provide for the making and tabulation by state authorities of an enumeration of the inhabitants of the entire state to be used for such purposes, instead of a federal census, if the taking of a federal census in any tenth year from the year nineteen hundred thirty be omitted or if the federal census fails to show the number of aliens or Indians not taxed. If a federal census, though giving the requisite information as to the state at large, fails to give the information as to any civil or territorial divisions which is required to be known for such purposes, the legislature, by law, shall provide for such an enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census and be used in connection therewith for such purposes. The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session. At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if, in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at a subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-one, they shall remain unaltered until the first regular session after the year nineteen hundred forty. Such districts shall be so readjusted or altered that each senate district



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shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade as above defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

The senate districts, including the present ones, as existing immediately before the enactment of a law readjusting or altering the senate districts, shall continue to be the senate districts of the state until the expirations of the terms of the senators then in office, except for the purpose of an election of senators for full terms beginning at such expirations, and for the formation of assembly districts.<sup>116</sup>

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<sup>116</sup> N.Y. CONST. art. II, § 4.

§5. The members of the assembly shall be chosen by single districts and shall be apportioned by the legislature at each regular session at which the senate districts are readjusted or altered, and by the same law, among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows: One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one-half over. Two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders in the order thereof respectively. No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens.

The assembly districts, including the present ones, as existing immediately before the enactment of a law making an apportionment of members of assembly among the counties, shall continue to be the assembly districts of the state until the expiration of the terms of members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common

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council, shall assemble at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause to be filed in the office of the secretary of state and of the clerk of such county, a description of such districts, specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the census or enumeration used as the population basis for the formation of such districts; and such apportionment and districts shall remain unaltered until after the next reapportionment of members of assembly, except that the board of supervisors of any county containing a town having more than a ratio of apportionment and one-half over may alter the assembly districts in a senate district containing such town at any time on or before March first, nineteen hundred forty-six. In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. No town, except a town having more than a ratio of apportionment and one-half over, and no block in a city inclosed by streets or public ways, shall be divided in the formation of assembly districts, nor shall any districts contain a greater excess in population over an adjoining district in the same senate district, than the population of a town or block therein adjoining such assembly district. Towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens. Nothing in this section shall prevent the division, at any time, of counties and towns and the erection of new towns by the legislature.

An apportionment by the legislature, or other body, shall be

subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same.<sup>117</sup>

These apportionment schemes, adopted by the Republican-dominated Constitutional Convention of 1894, were designed to favor the interests of sparsely populated rural areas at the expense of more densely populated urban areas.<sup>118</sup> This was accomplished in different ways for the two houses. The senate apportionment provision was written so that population growth in urban areas would not result in an accompanying decrease of seats in less populated areas.<sup>119</sup> A growth in population of the larger counties results in an increase in the size of the senate, thus ensuring that the less populous rural areas would still retain their strength in the body. The assembly was constitutionally fixed at 150 seats,<sup>120</sup> so increasing the size of that body was not an option; however, the section governing apportionment of the assembly requires that all but one county receives an assembly seat,<sup>121</sup> thus allocating sixty-one seats on the basis of geographic boundaries unrelated to population. Although the remaining seats are allocated according to population, the apportionment formula results in significant imbalances, creating a situation in which certain counties having a majority of the state's population elect a minority of the state assembly members.

In 1964, both the senate and assembly apportionment schemes were determined by the U.S. Supreme Court to violate the requirement of the Equal Protection Clause that seats in a state legislature must be apportioned substantially on a population

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<sup>117</sup> N.Y. CONST. art. II, § 5.

<sup>118</sup> See PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 161, 166–67, 169 (1996).

<sup>119</sup> See N.Y. CONST. art. III, § 4.

<sup>120</sup> N.Y. CONST. art. III, § 2.

<sup>121</sup> N.Y. CONST. art. III, § 5. The only county which is not entitled to its own seat is Hamilton County, a county lying entirely within the Adirondack Park which has never had a population above 5,500. *Id.*; PATRICIA E. SALKIN, 1 NEW YORK ZONING LAW AND PRACTICE § 9:16 (4th ed. 2013); Richard L. Forstall, *New York: Population of Counties by Decennial Census: 1900 to 1990*, U.S. CENSUS BUREAU (Mar. 27, 1995), <http://www.census.gov/population/cencounts/ny190090.txt>. For apportionment purposes, Hamilton County is combined with Fulton County. N.Y. CONST. art. III, § 5.

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basis.<sup>122</sup> A subsequent decision of the New York Court of Appeals, *In re Orans*,<sup>123</sup> held that, in addition to the unconstitutionality of giving each county at least one full assembly district, the boundaries of districts could not always be coterminous with county borders.<sup>124</sup> The *Orans* court also invalidated the provision in “the fourth paragraph of section 5 of article III [which] giv[es] local legislatures the power to draw Assembly district lines in counties having more than one Assembly district,”<sup>125</sup> since in some instances part of an assembly district would have to be in one county and part in another. A 1972 decision, *Schneider v. Rockefeller*,<sup>126</sup> upheld a plan which segmented numerous counties and towns in the formation of legislative districts in each house on the basis that substantial equality of population among legislative districts superseded the state constitutional requirements.<sup>127</sup> In addition to population equality required by Equal Protection, any redistricting plan must also comply with the Voting Rights Act,<sup>128</sup> which provides that redistricting may not provide protected class members “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>129</sup>

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<sup>122</sup> *WMCA, Inc. v. Lomezo*, 377 U.S. 633, 653 (1964).

<sup>123</sup> *In re Orans*, 206 N.E.2d 854 (N.Y. 1965). In *Orans*, the court attempted to determine just what the Supreme Court in *Lomenzo* discarded and what remained:

What other parts, if any, of sections 3, 4 and 5 of article III remain binding? First taking up section 5, the unconstitutionality found by the United States Supreme Court relates almost entirely to the second paragraph of that section and to the provision in the first paragraph that each county no matter how small shall have an Assembly member. We see no reason why the balance of section 5 should not be obeyed, especially its requirement that Assembly districts be “compact . . . convenient and contiguous”, and including so far as possible all the other directions in the fourth paragraph of section 5. Section 3 of article III of the Constitution, insofar as it delimits the Senate districts, is completely void. Of course, also, the apportionment and locating of Senate districts by the 1964 statutes fall with the invalidated Assembly districting in the same 1964 statutes since the Constitution (art. III, § 5) says that the apportionment of Assembly districts and Senate districts must be “by the same law”. The third paragraph of section 4 which permits the increase of State Senate districts above 50 is still alive except, of course, that it too is subject to the requirement that districts must be substantially equal in population. The long full paragraph at the beginning seems still to be applicable except possibly the prohibitions in its last two sentences which should, however, be respected if it be mathematically possible so to do and still obey the “one man, one vote” basic rule.

*Id.* at 859 (citation omitted).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Schneider v. Rockefeller*, 293 N.E.2d 67 (N.Y. 1972).

<sup>127</sup> *Id.* at 69–70, 71 (upholding senate plan in which twenty-six out of sixty senate districts crossed county lines, splitting nine minor counties and ten major counties and upholding assembly plan in which eleven minor counties in the assembly were split).

<sup>128</sup> 42 U.S.C. §§ 1973 *et seq.* (2014).

<sup>129</sup> *Id.* § 1973(b).

Given the requirement of compliance with these federal constitutional and statutory requirements, the Court of Appeals has acknowledged that technical violations of the state constitution are “inevitable.”<sup>130</sup>

As a result of the one-person, one-vote decisions and the Voting Rights Act, significant portions of the sections addressing reapportionment and redistricting are dead letters. The continued existence of such provisions in the state’s operating document adds to confusion about what is and is not operative. Simply put, we are in an *Alice in Wonderland* world when the constitution means what it says but what it says is meaningless. These three sections need to be rewritten entirely to comport with the requirement of the national Constitution as well as requirements deemed appropriate to reflect and accommodate New York’s history and political culture.<sup>131</sup>

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<sup>130</sup> Wolpoff v. Cuomo, 600 N.E.2d 191, 193–94 (N.Y. 1992).

<sup>131</sup> A potential rewrite of the reapportionment section is well beyond the scope of this article. However, one need only look at the Colorado Constitution for one example of a concise set of reapportionment provisions that seem to balance population equality, preservation of communities of interest, and the indivisibility of counties to the extent possible:

Section 45. General Assembly.

The general assembly shall consist of not more than thirty-five members of the senate and of not more than sixty-five members of the house of representatives, one to be elected from each senatorial and each representative district, respectively.

Section 46. Senatorial and Representative Districts.

The state shall be divided into as many senatorial and representative districts as there are members of the senate and house of representatives respectively, each district in each house having a population as nearly equal as may be, as required by the constitution of the United States, but in no event shall there be more than five percent deviation between the most populous and the least populous district in each house.

Section 47. Composition of Districts.

(1) Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall consist of contiguous whole general election precincts. Districts of the same house shall not overlap.

(2) Except when necessary to meet the equal population requirements of section 46, no part of one county shall be added to all or part of another county in forming districts. Within counties whose territory is contained in more than one district of the same house, the number of cities and towns whose territory is contained in more than one district of the same house shall be as small as possible. When county, city, or town boundaries are changed, adjustments, if any, in legislative districts shall be as prescribed by law.

(3) Consistent with the provisions of this section and section 46 of this article, communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district wherever possible.

COLO. CONST. art. V, §§ 45–47. Colorado also has a constitutionally-created reapportionment commission which is responsible for redistricting state legislative seats. COLO. CONST. art. V, § 48.

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## 2. Article III, section 6

Section 6 of article III addresses the pay to be received by sitting legislators. It provides:

Each member of the legislature shall receive for his or her services a like annual salary, to be fixed by law. He or she shall also be reimbursed for his or her actual traveling expenses in going to and returning from the place in which the legislature meets, not more than once each week while the legislature is in session. Senators, when the senate alone is convened in extraordinary session, or when serving as members of the court for the trial of impeachments, and such members of the assembly, not exceeding nine in number, as shall be appointed managers of an impeachment, shall receive an additional per diem allowance, to be fixed by law. Any member, while serving as an officer of his or her house or in any other special capacity therein or directly connected therewith not hereinbefore in this section specified, may also be paid and receive, in addition, any allowance which may be fixed by law for the particular and additional services appertaining to or entailed by such office or special capacity. Neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he or she shall have been elected, nor shall he or she be paid or receive any other extra compensation. The provisions of this section and laws enacted in compliance therewith shall govern and be exclusively controlling, according to their terms. Members shall continue to receive such salary and additional allowance as heretofore fixed and provided in this section, until changed by law pursuant to this section.<sup>132</sup>

This section states that members of the legislature shall receive a salary to be fixed by law. The purpose of this statement is unclear, as it is certain the legislature would have the power to fix its members' salaries in the absence of the provision. Rather, it was inserted as an alternative to a previous provision, which specified the salaries of legislators (and thus required an amendment every time an increase was sought).<sup>133</sup> Although this may have been more

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<sup>132</sup> N.Y. CONST. art. III, § 6.

<sup>133</sup> GALIE & BOPST, *supra* note 43, at 122. The amendment giving the legislature the authority to fix its own members' salaries was adopted in 1947. *Id.*; Con. Res., 117th Sess., 1947 N.Y. Laws 2437–38.

palatable than eliminating the fixed salary amount without any alternative, the decision to leave that determination to legislative discretion renders the clause superfluous. The same can be said for the other “permissives” in the section. Providing that all members receive like salary allowances and reimbursements for expenses as fixed by statute and that they be neither reduced nor increased during the term for which they were elected would seem to be all that is necessary.<sup>134</sup>

### 3. Article III, section 8

Section 8 of the legislative article is a short provision that, on its face, may not seem unnecessary or redundant: “The elections of senators and members of assembly, pursuant to the provisions of this constitution, shall be held on the Tuesday succeeding the first Monday of November, unless otherwise directed by the legislature.”<sup>135</sup> This provision is typical of many provisions in the document that detail a particular action, and then give the legislature complete discretion to adopt a contrary requirement. As a result, the section is a default mechanism subject to change at the will of the legislature, and any attempt to understand it requires not only a review of the constitution but also a review of any applicable legislation.

### 4. Article III, section 17

This section has as its purpose “reduc[ing] the pressure on legislators from interested parties to pass bills that provide private benefits and to prevent legislators from passing local legislation in areas in which they are neither well informed nor competent.”<sup>136</sup> The legislature is prohibited from passing a private or local bill in fourteen specified areas:

Changing the names of persons.

Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands.

Locating or changing county seats.

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<sup>134</sup> N.Y. CONST. art. III, § 6; GALIE & BOPST, *supra* note 43, at 122. The section raises a larger question: should New York embrace a dedicated legislature—full-time, with a salary commensurate with that status, governed by rules limiting outside incomes and eliminating the lulus that make up an important, if problematic, part of a legislator’s compensation?

<sup>135</sup> N.Y. CONST. art. III, § 8.

<sup>136</sup> GALIE & BOPST, *supra* note 43, at 129.



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Providing for changes of venue in civil or criminal cases.

Incorporating villages.

Providing for election of members of boards of supervisors.

Selecting, drawing, summoning or empaneling grand or petit jurors.

Regulating the rate of interest on money.

The opening and conducting of elections or designating places of voting.

Creating, increasing or decreasing fees, percentages or allowances of public officers, during the term for which said officers are elected or appointed.

Granting to any corporation, association or individual the right to lay down railroad tracks.

Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever.

Granting to any person, association, firm or corporation, an exemption from taxation on real or personal property.

Providing for the building of bridges, except over the waters forming a part of the boundaries of the state, by other than a municipal or other public corporation or a public agency of the state.<sup>137</sup>

Although there are good reasons for prohibiting private bills concerning many of these subjects, the advance of home rule in New York during the twentieth century gives cause for re-examination of this section. The Home Rule Article adopted in 1963<sup>138</sup> provides that absent an emergency,<sup>139</sup> the legislature may act by special law "in relation to the property, affairs or government of any local government" only when requested to do so by either two-thirds of the membership of the local legislative body or by the municipality's chief executive officer and a majority of the local legislative body.<sup>140</sup> Because a number of the prohibited categories found in article III, section 17 affect the property, affairs, or government of a local government, they would not be permitted even in the absence of that section without the consent of the local government;

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<sup>137</sup> N.Y. CONST. art. III, § 17.

<sup>138</sup> N.Y. CONST. art. IX.

<sup>139</sup> The emergency must be certified by the governor with supporting facts and must be approved by two-thirds of the members of each house of the legislature. N.Y. CONST. art. IX, § 2(b)(2)(b).

<sup>140</sup> *Id.*

conversely, if the local government provides the necessary consent required by article IX, then the purpose behind article III, section 17 (to place those functions in the care of the authorities most knowledgeable of them) has been served. By eliminating certain categories that are governed by the home rule provisions, this section could be shortened and made more relevant.<sup>141</sup>

##### 5. Article III, section 24

The framers of the 1894 Constitution believed, inexplicably, that it was necessary to constitutionalize the state's policy for prison employment. The result, as amended, is the following section:

The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails and reformatories in the state; and no person in any such prison, penitentiary, jail or reformatory, shall be required or allowed to work, while under sentence thereto, at any trade, industry or occupation, wherein or whereby his or her work, or the product or profit of his or her work, shall be farmed out, contracted, given or sold to any person, firm, association or corporation, provided that the legislature may provide by law that such prisoners may voluntarily perform work for nonprofit organizations. As used in this section, the term "nonprofit organization" means an organization operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual. This section shall not be construed to prevent the legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political division thereof, or for or to any public institution owned or managed

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<sup>141</sup> The removal of this section would also preclude legislative manipulations that were the subject of *Stapleton v. Pinckney*, 57 N.E.2d 38 (N.Y. 1944). In that case, the legislature, in a not-so-veiled attempt to avoid the prohibitions of this section, adopted an act relating to jury service which applied only to counties that contained a city with a population of 125,000 and had a population of not less than 200,000 and not more than 250,000. *Id.* at 38-39. Only Albany County fit this description. *Id.* Despite the support in court by the Albany County attorney, the law was deemed to violate article III, section 17. *Id.* at 40. *Stapleton* indicates two troubling phenomena that could both be eliminated by a modification of this section: legislative attempts to craft laws in such a way as to only apply to one locality while still making it appear to be general in nature through the use of population statistics, and the invalidity of a law that had the support of both the legislature and the local government which is supposed to be the beneficiary of this section. *See id.*

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and controlled by the state, or any political division thereof.<sup>142</sup>

This section is a textbook example of the elevation of statutory law to the status of constitutional law. The evils that produced the section, the unfair advantage given to contractors who entered into agreements with prison authorities to provide labor, are no longer prevalent and are not likely to be revived. The issue can be readily addressed by statute, obviating the need for a constitutional amendment every time more enlightened or progressive penal reform is necessary. The section exemplifies the difficulty that accompanies the removal of constitutional material once it is adopted. A 2009 amendment edited the last sentence of the section to allow inmates to voluntarily perform work for nonprofit organizations, in contrast to the limitations that had existed since the section was first adopted.<sup>143</sup> It may be that there are continued justifications for the enscorning of prison regulations in our fundamental law but those justifications need to be adumbrated. In their absence, this provision could readily be removed. The 2009 amendment provided a perfect opportunity for such a revision and reduction; instead, the document was lengthened and made to read more like a statute book.

#### *D. Article IV—Executive*

Article IV, the Executive Article, is fairly compact compared to the articles concerning the other branches of government. Contained within this article are necessary sections addressing things such as the term, time of election, and powers of both the governor and lieutenant governor. There is one provision, however, which has existed since New York’s first constitution in 1777 that is anachronistic.

##### 1. Article IV, section 5

Section 5 provides for situations in which the lieutenant-governor shall act as governor. It provides:

In case of the removal of the governor from office or of his or her death or resignation, the lieutenant-governor shall become governor for the remainder of the term.

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<sup>142</sup> N.Y. CONST. art. III, § 24.

<sup>143</sup> *Id.*

In case the governor-elect shall decline to serve or shall die, the lieutenant-governor-elect shall become governor for the full term.

In case the governor is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.

In case of the failure of the governor-elect to take the oath of office at the commencement of his or her term, the lieutenant-governor-elect shall act as governor until the governor shall take the oath.<sup>144</sup>

Two of these circumstances in which the lieutenant governor shall be elevated to acting governor, impeachment or inability to serve, are relatively commonplace and necessary. There is, however, a clause which provides that the lieutenant-governor shall act as governor if the governor “is absent from the state.”<sup>145</sup> This provision has been in every New York constitution dating back to 1777.<sup>146</sup> Similar provisions are found in other state constitutions.<sup>147</sup> Their *raison d’être* arose from the fact that absence from the state might have prevented the governor from discharging the duties of office, particularly in emergencies.

The development of new forms of communications technology—email, faxes, telephones, and video conferencing—and travel methods that were not even contemplated when the provision was first inserted, have rendered the provision an anachronism. The Temporary Commission on the Revision and Simplification of the Constitution called for the removal of this provision over fifty years ago, reasoning that “[s]uch a provision, designed for the horse and buggy age, makes no sense in an era of rapid transportation and easy communication.”<sup>148</sup> The irrelevance of this provision to contemporary conditions was tellingly revealed when the 1967 Temporary State Commission on the Constitutional Convention,

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<sup>144</sup> N.Y. CONST. art. IV, § 5.

<sup>145</sup> *Id.*

<sup>146</sup> N.Y. CONST. of 1777, art. XXI; N.Y. CONST. of 1821, art. III, § 6; N.Y. CONST. of 1846, art. IV, § 6; N.Y. CONST. of 1894, art. IV, § 6.

<sup>147</sup> See Calvin Bellamy, *Presidential Disability: The Twenty-Fifth Amendment Still an Untried Tool*, 9 B.U. PUB. INT. L.J. 373, 382–83, 383 tbl.1 (2000) (“Twenty-nine states deem the governor’s physical absence from the state to be sufficient reason to transfer his authority to the lieutenant governor.”).

<sup>148</sup> THE TEMPORARY COMM’N ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION, SIMPLIFYING A COMPLEX CONSTITUTION, N.Y. Leg. Doc. No. 14, at 41 (Dec. 31, 1959).

when attempting to provide justification for the provision, could do no better than the following:

Beyond tradition, the principal *reason* for continuing the present arrangement of gubernatorial succession during absence is that it discourages long and frequent absences. If a governor were permitted to carry on state business from out-of-state locations, some *chief executives might be inclined to spend more time away from the center of state affairs*. On the other hand, automatic succession for absence might be justified antithetically on the ground that it enables the governor to free himself temporarily from his duties and thus to get much needed rest. It is also doubtful that governors today should be tightly constrained from travelling, since there is important state business to be done in Washington, D.C., in other states and even in foreign countries.<sup>149</sup>

In addition to being an anachronism, the clause provides an opportunity for mischief by a rogue lieutenant governor.<sup>150</sup> It was for this reason, among others, that the New York City Bar Association’s Task Force Report described the provision as “more than simply obsolete” and recommended removal.<sup>151</sup>

#### *E. Article V—Officers and Civil Departments*

This article concerns state officers other than the governor and lieutenant governor as well as civil departments of the state. Most of its provisions date back to the administrative reorganization of the state accomplished during the 1920s.

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<sup>149</sup> TEMPORARY STATE COMM’N ON THE CONSTITUTIONAL CONVENTION: STATE GOVERNMENT 88 (1967) (emphasis added).

<sup>150</sup> Lest we think such a possibility farfetched, recall California Lieutenant Governor Mike Curb, who signed several executive orders at odds with the administration of Governor Jerry Brown when Governor Brown left the state. Symposium, *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 365 (2002). While never reaching that level of conflict, New York has recently had its share of governors and lieutenant governors who had political and personal differences. Governor George Pataki had difficulty with his Lieutenant Governor Betsy McCaughey Ross over major policy questions. Marc Humbert, *New York State’s No. 2 Post Has Stormy History: McCaughey Ross is the Latest to Find Herself on Thin Political Ice*, BUFFALO NEWS, Feb. 4, 1996, at A3. In 1978, relations were so strained between Governor Hugh Carey and Lieutenant Governor Mary Anne Krupsak that she challenged him (unsuccessfully) in a Democratic primary for governor. *Id.* Similar tensions developed between Carey and his subsequent Lieutenant Governor, Mario Cuomo, that the latter was thinking about a primary challenge when Carey decided not to seek a third term. *Id.*

<sup>151</sup> *Report of the Task Force on the New York State Constitutional Convention*, 52 THE RECORD 523, 584 (1997), available at <http://www.nycbar.org/pdf/report/uploads/603—ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>.

## 1. Article V, sections 2–3

One of the more glaring examples of the time bound nature of the document is the clause in section 2 of the article which limits executive departments to no more than twenty.<sup>152</sup> The efficacy of this section, however, is undermined by the subsequent section, which provides:

[T]he legislature may from time to time assign by law new powers and functions to departments, officers, boards, commissions or executive offices of the governor, and increase, modify or diminish their powers and functions. Nothing contained in this article shall prevent the legislature from creating temporary commissions for special purposes or executive offices of the governor and from reducing the number of departments as provided for in this article, by consolidation or otherwise.<sup>153</sup>

The juxtaposition of these two sections, one restrictive and the other expansive, has resulted in the proliferation of government agencies, boards, and commissions, with most of them placed under the umbrella of the “executive department.”<sup>154</sup> There are currently over one hundred state administrative units reporting to the governor. The anachronistic and arbitrary limit of twenty departments has been subverted by the broader power given to the legislature by section 3, making the limit no more than symbolic reassurance that the state has its bureaucracy under control. The limitation contained in section 2 has little value and should be eliminated.

## 2. Article V, section 6

As stated above, the inclusion of statutory material in the constitution necessarily requires numerous amendments, which generally have the purpose of adding more statutory material. Section 6 of this article is a case in point. It provides:

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and

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<sup>152</sup> N.Y. CONST. art. V, § 2. This section provides: “There shall be not more than twenty civil departments in the 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.”

<sup>153</sup> N.Y. CONST. art. V, § 3.

<sup>154</sup> See, e.g., N.Y. EXEC. LAW § 31 (McKinney 2014) (locating ten divisions and offices within the legislatively created executive department).

villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, and who, at the time of such member's appointment or promotion, is a citizen or an alien lawfully admitted for permanent residence in the United States and a resident of this state and is honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war and his or her disability is certified by the United States department of veterans affairs to be in existence at the time of application for appointment or promotion, he or she shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he or she has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he or she has received one appointment, either original entrance or promotion, from an eligible list on which he or she was allowed the additional credit granted by this section.<sup>155</sup>

This almost 300-word section serves the laudable goal of providing a preference for military veterans in civil service matters; however, it is filled with significant amounts of statutory language. The inclusion of such detailed information necessitates the need for frequent amendments. This section has been amended six times since its adoption in 1949,<sup>156</sup> with more amendments likely on the horizon. The material in this section should be placed in statutes: a

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<sup>155</sup> N.Y. CONST. art. V, § 6.

<sup>156</sup> *See id.* Amendments to the section were adopted in 1964, 1987, 1997, 2001, 2008, and 2013. A predecessor to the current section was included in the Constitution adopted by the Constitutional Convention of 1894. *See* N.Y. CONST. of 1894, art. V, § 9. That section was renumbered Article V, section 6 and then amended twice, once in 1929 and once in 1945. In 1949, Article V, section 6 was repealed and this section was added. N.Y. CONST. art. V, § 6.

broad statement mandating that the legislature provide reasonable preferences for veterans would suffice.

#### *F. Article VI—Judiciary*

The judiciary article of the New York Constitution contains more than 16,000 words, representing approximately one-third of the document. Although the judiciary was the subject of significant reforms in 1961 and 1977, which created a “unified court system,” some proponents of reform argue that goal has not been fully realized.<sup>157</sup> One possible idea for revising the article would be to leave the jurisdiction of the courts largely to the legislature, as is the case with the U.S. Constitution.<sup>158</sup> The merits of these positions, though worthy of consideration, are beyond the scope of this article. However, there are numerous provisions of the article that can either be removed or truncated without significantly changing the substantive nature of the article. These include: (1) provisions which establish certain structures and procedures while at the same time granting the legislature power to modify the structures or procedures; (2) provisions which detail simple concepts, such as case transfers, either repetitively or in needlessly prolix detail; and (3) provisions which were germane to the transition to the amendments made in 1961 and 1977 but which are no longer relevant or applicable.

##### 1. Article VI, section 4(a)

Section 4(a) of the article defines the four judicial departments of the state, but also affords the legislature the power to change them:

The state shall be divided into four judicial departments.

The first department shall consist of the counties within the first judicial district of the state. The second department

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<sup>157</sup> Chief Judge Judith S. Kaye, the longest serving chief judge in the history of the Court of Appeals, testified over fifteen years ago: “[U]nless we overcome the institutional resistance to change, the ideal of a unified court system will remain, as it is today, a noble-sounding but utterly lifeless, meaningless sentence in our Constitution.” *Court Restructuring: Hearing Before the Joint Legislature*, 1997 Leg., 220th Sess. (N.Y. 1997) (statement of Judith S. Kaye, Chief Judge of State of New York), available at [http://www.nycourts.gov/press/old\\_keep/cjtestim.shtml](http://www.nycourts.gov/press/old_keep/cjtestim.shtml) (quoting Chief Justice Breitel’s statements to the New York Legislature on February 27, 1974). In bemoaning the fact that the constitution creates eleven separate trial courts, the Chief Judge further testified: “We have an organizational flow chart no business executive would be caught dead with—and no State judiciary should either.” *Id.*

<sup>158</sup> U.S. CONST. art. III, § 2, cl. 2.



shall consist of the counties within the second, ninth, tenth and eleventh judicial districts of the state. The third department shall consist of the counties within the third, fourth and sixth judicial districts of the state. The fourth department shall consist of the counties within the fifth, seventh and eighth judicial districts of the state. Each department shall be bounded by the lines of judicial districts. Once every ten years the legislature may alter the boundaries of the judicial departments, but without changing the number thereof.<sup>159</sup>

This section was part of a new judiciary article that was adopted in 1961. A brief history of the predecessor to the section demonstrates its redundancy. The 1894 Constitution required the legislature to divide the state into four departments, with one department consisting of New York County (Manhattan) and the other three bounded by county lines and being as compact and equal in population as nearly may be.<sup>160</sup> The constitution also afforded the legislature discretion to change the composition of the departments once every ten years,<sup>161</sup> in order to account for population shifts and other factors. The following year, the legislature created the mandated four departments.<sup>162</sup> A 1925 amendment continued the departments established by the legislature. The above section, with one change, represents the departments as they existed by statute at the time of the 1961 revision.

Although the drafters of the 1961 judiciary article may have found it important to specify the departments, this specificity has served little purpose. The predecessor provision, affording the legislature discretion to define the departments, was sufficient—if it had not produced effective results, the 1961 article would not have so closely mirrored the legislation. Since 1961, two new judicial districts have been created, with one being assigned to each of the first and second departments.<sup>163</sup> The power of the legislature to change the departments, a valuable tool in responding to the needs of the state,<sup>164</sup> renders the remainder of the section incomplete and

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<sup>159</sup> N.Y. CONST. art. VI, § 4(a).

<sup>160</sup> N.Y. CONST. of 1894, art. VI, § 2.

<sup>161</sup> *Id.*

<sup>162</sup> Act of Apr. 23, 1895, ch. 376, 1895 N.Y. Laws 210.

<sup>163</sup> See N.Y. JUD. LAW 70-a (McKinney 2014).

<sup>164</sup> The requirement of equality in the size of the departments, written into the 1894 Constitution, has long been discarded. Notwithstanding the demographic shifts and constitutional revisions that have occurred in the past 120 years, the geographic boundaries

misleading without the companion statutory law.

The section could be streamlined to provide: “The judicial departments as they currently exist shall continue. The legislature may revise the composition of the departments once every ten years, but may not change the number of departments.”

## 2. Article VI, sections 6(a) and (b)

Section 6(a) of the article is similar in its effect to section 4(a) in that it specifies the composition of the judicial districts of the state, while section 6(b) affords the legislature the discretion to change them on a decennial basis:

- a. The state shall be divided into eleven judicial districts. The first judicial district shall consist of the counties of Bronx and New York. The second judicial district shall consist of the counties of Kings and Richmond. The third judicial district shall consist of the counties of Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan, and Ulster. The fourth judicial district shall consist of the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren and Washington. The fifth judicial district shall consist of the counties of Herkimer, Jefferson, Lewis, Oneida, Onondaga, and Oswego. The sixth judicial district shall consist of the counties of Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins. The seventh judicial district shall consist of the counties of Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates. The eighth judicial district shall consist of the counties of Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming. The ninth judicial district shall consist of the counties of Dutchess, Orange, Putnam, Rockland and Westchester. The tenth judicial district shall consist of the counties of Nassau and Suffolk. The eleventh judicial district shall consist of the county of Queens.
- b. Once every ten years the legislature may increase or decrease the number of judicial districts or alter the

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of the departments remain very similar to those adopted by the 1895 legislation. This has resulted in the Second Department containing approximately 52 percent of the state's population.

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composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines.<sup>165</sup>

At the time the 1894 Constitution was adopted, the judicial districts had long been set by statute. The 1894 document continued the districts as they existed, but afforded the legislature the opportunity to change them once every ten years. The 1961 revision resulted in the above section, which suffers from the same infirmities as section 4. The provision does not reflect the current state of the judicial districts, as there are now thirteen districts: a twelfth district consisting of Bronx County and a thirteenth judicial district consisting of Richmond County began operation in 1983 and 2009, respectively.<sup>166</sup>

These prolix sections could be replaced with the following: "The judicial districts of the state as they currently exist shall continue, but the legislature may increase, decrease or alter the districts once every ten years. Each judicial district shall be bounded by county lines." With only twelve percent of the words the same results would be accomplished.

### 3. Article VI, section 19

Section 19 of the article, the section that deals with transfers of actions and proceedings, is over 750 words which, boiled to its essentials: 1) allows a court having greater jurisdiction (such as supreme court) to transfer a matter to any other court which may have jurisdiction over the matter; and 2) requires courts of inferior jurisdiction to transfer matters over which they do not have jurisdiction. The section reads more like a code than a constitution:

a. The supreme court may transfer any action or proceeding, except one over which it shall have exclusive jurisdiction which does not depend upon the monetary amount sought, to any other court having jurisdiction of the subject matter within the judicial department provided that such other court has jurisdiction over the classes of persons named as parties. As may be provided by law, the supreme court may transfer to itself any action or proceeding originated or

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<sup>165</sup> N.Y. CONST. art. VI, § 6(a)-(b). .

<sup>166</sup> Act of Aug. 7, 1981, ch. 1006, 1981 N.Y. Laws 2614; Act of Dec. 5, 2007, ch.690, 2007 N.Y. Laws 3542 (both codified at N.Y. JUD. LAW § 140-a (McKinney 2014)).

pending in another court within the judicial department other than the court of claims upon a finding that such a transfer will promote the administration of justice.

b. The county court shall transfer to the supreme court or surrogate's court or family court any action or proceeding which has not been transferred to it from the supreme court or surrogate's court or family court and over which the county court has no jurisdiction. The county court may transfer any action or proceeding, except a criminal action or proceeding involving a felony prosecuted by indictment or an action or proceeding required by this article to be dealt with in the surrogate's court or family court, to any court, other than the supreme court, having jurisdiction of the subject matter within the county provided that such other court has jurisdiction over the classes of persons named as parties.

c. As may be provided by law, the supreme court or the county court may transfer to the county court any action or proceeding originated or pending in the district court or a town, village or city court outside the city of New York upon a finding that such a transfer will promote the administration of justice.

d. The surrogate's court shall transfer to the supreme court or the county court or the family court or the courts for the city of New York established pursuant to section fifteen of this article any action or proceeding which has not been transferred to it from any of said courts and over which the surrogate's court has no jurisdiction.

e. The family court shall transfer to the supreme court or the surrogate's court or the county court or the courts for the city of New York established pursuant to section fifteen of this article any action or proceeding which has not been transferred to it from any of said courts and over which the family court has no jurisdiction.

f. The courts for the city of New York established pursuant to section fifteen of this article shall transfer to the supreme court or the surrogate's court or the family court any action or proceeding which has not been transferred to them from any of said courts and over which the said courts for the city of New York have no jurisdiction.

g. As may be provided by law, the supreme court shall transfer any action or proceeding to any other court having jurisdiction of the subject matter in any other judicial

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district or county provided that such other court has jurisdiction over the classes of persons named as parties.

h. As may be provided by law, the county court, the surrogate's court, the family court and the courts for the city of New York established pursuant to section fifteen of this article may transfer any action or proceeding, other than one which has previously been transferred to it, to any other court, except the supreme court, having jurisdiction of the subject matter in any other judicial district or county provided that such other court has jurisdiction over the classes of persons named as parties.

i. As may be provided by law, the district court or a town, village or city court outside the city of New York may transfer any action or proceeding, other than one which has previously been transferred to it, to any court, other than the county court or the surrogate's court or the family court or the supreme court, having jurisdiction of the subject matter in the same or an adjoining county provided that such other court has jurisdiction over the classes of persons named as parties.

j. Each court shall exercise jurisdiction over any action or proceeding transferred to it pursuant to this section.

k. The legislature may provide that the verdict or judgment in actions and proceedings so transferred shall not be subject to the limitation of monetary jurisdiction of the court to which the actions and proceedings are transferred if that limitation be lower than that of the court in which the actions and proceedings were originated.<sup>167</sup>

This section should be rewritten to eliminate the duplication involved while still retaining the purpose of the section, which is to allow the transfer of cases between courts having jurisdiction and to mandate transfer away from courts having no jurisdiction, to allow maximum efficiencies in the handling of cases in the appropriate courts. The rewrite would not only reduce the length but also make the provision more readable.

#### 4. Article VI, section 26

This section governing the temporary assignment of judges and justices provides almost unlimited permutations of assignments,

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<sup>167</sup> N.Y. CONST. art. VI, § 19.

and specifies each one in significant detail:

- a. A justice of the supreme court may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in any judicial district or to the court of claims. A justice of the supreme court in the city of New York may be temporarily assigned to the family court in the city of New York or to the surrogate's court in any county within the city of New York when required to dispose of the business of such court.
- b. A judge of the court of claims may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in any judicial district.
- c. A judge of the county court may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his or her residence or to the county court or the family court in any county or to the surrogate's court in any county outside the city of New York or to a court for the city of New York established pursuant to section fifteen of this article.
- d. A judge of the surrogate's court in any county within the city of New York may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his or her residence.
- e. A judge of the surrogate's court in any county outside the city of New York may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his or her residence or to the county court or the family court in any county or to a court for the city of New York established pursuant to section fifteen of this article.
- f. A judge of the family court may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his or her residence or to the county court or the family court in any county or to the surrogate's court in any county outside of the city of New York or to a court for the city of New York established pursuant to section fifteen of this article.
- g. A judge of a court for the city of New York established pursuant to section fifteen of this article may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in the judicial

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department of his or her residence or to the county court or the family court in any county or to the other court for the city of New York established pursuant to section fifteen of this article.

h. A judge of the district court in any county may perform the duties of office or hold court in any county and may be temporarily assigned to the county court in the judicial department of his or her residence or to a court for the city of New York established pursuant to section fifteen of this article or to the district court in any county.

i. Temporary assignments of all the foregoing judges or justices listed in this section, and of judges of the city courts pursuant to paragraph two of subdivision j of this section, shall be made by the chief administrator of the courts in accordance with standards and administrative policies established pursuant to section twenty-eight of this article.

j. (1) The legislature may provide for temporary assignments within the county of residence or any adjoining county, of judges of town, village or city courts outside the city of New York.

(2) In addition to any temporary assignments to which a judge of a city court may be subject pursuant to paragraph one of this subdivision, such judge also may be temporarily assigned by the chief administrator of the courts to the county court, the family court or the district court within his or her county of residence or any adjoining county provided he or she is not permitted to practice law.

k. While temporarily assigned pursuant to the provisions of this section, any judge or justice shall have the powers, duties and jurisdiction of a judge or justice of the court to which assigned. After the expiration of any temporary assignment, as provided in this section, the judge or justice assigned shall have all the powers, duties and jurisdiction of a judge or justice of the court to which he or she was assigned with respect to matters pending before him or her during the term of such temporary assignment.<sup>168</sup>

This provision contains approximately 800 words and reads like a statute. However, its basic tenets are simple: the chief administrator has considerable discretion to transfer and

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<sup>168</sup> N.Y. CONST. art. VI, § 26.

temporarily assign trial judges; judges of courts of record (as that term is defined in section 1 of the article) can generally perform the duties of their court statewide, can be assigned to the supreme court in the judicial department of their residence and, with certain exceptions, can be assigned to another court of record throughout the state. Each of these tenets is repeated for each court to which it applies. A careful rewrite of this section eliminating the duplicative language would result in a reduction in both the number of subsections and the overall size of the section.<sup>169</sup>

#### 5. Article VI, section 34

Section 34 details the status of cases pending at the time the new judiciary article went into effect in 1961, as well as the status of judges serving at that time:

- a. The court of appeals, the appellate division of the supreme court, the supreme court, the court of claims, the county court in counties outside the city of New York, the surrogate's court and the district court of Nassau county shall hear and determine all appeals, actions and proceedings pending therein on the effective date of this article except that the appellate division of the supreme court in the first and second judicial departments or the appellate term in such departments, if so directed by the appropriate appellate division of the supreme court, shall hear and determine all appeals pending in the appellate terms of the supreme court in the first and second judicial

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<sup>169</sup> Some states with fewer courts expend little constitutional ink on transfer issues, leaving them largely to the discretion of the chief judge. The Ohio Constitution, for example, provides:

The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

OHIO CONST. art. IV, § 5(A)(3). The Illinois Constitution similarly provides:

General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. The Supreme Court shall appoint an administrative director and staff, who shall serve at its pleasure, to assist the Chief Justice in his duties. The Supreme Court may assign a Judge temporarily to any court and an Associate Judge to serve temporarily as an Associate Judge on any Circuit Court.

ILL. CONST. art. VI, § 16.



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departments and in the court of special sessions of the city of New York and except that the county court or an appellate term shall, as may be provided by law, hear and determine all appeals pending in the county court or the supreme court other than an appellate term. Further appeal from a decision of the county court, the appellate term or the appellate division of the supreme court, rendered on or after the effective date of this article, shall be governed by the provisions of this article.

b. The justices of the supreme court in office on the effective date of this article shall hold their offices as justices of the supreme court until the expiration of their respective terms.

c. The judges of the court of claims in office on the effective date of this article shall hold their offices as judges of the court of claims until the expiration of their respective terms.

d. The surrogates, and county judges outside the city of New York, including the special county judges of the counties of Erie and Suffolk, in office on the effective date of this article shall hold office as judges of the surrogate’s court or county judge, respectively, of such counties until the expiration of their respective terms.

e. The judges of the district court of Nassau county in office on the effective date of this article shall hold their offices until the expiration of their respective terms.

f. Judges of courts for towns, villages and cities outside the city of New York in office on the effective date of this article shall hold their offices until the expiration of their respective terms.<sup>170</sup>

This section, necessary at the time it was adopted in 1961 to govern the transition to the new article, is now obsolete. Any cases that were pending at that time have either long been resolved, or their jurisdiction is no longer in question. Moreover, the unfinished terms of any then-sitting judges expired decades ago. There is no need for the continuation of this almost 400-word section and it should be repealed.

## 6. Article VI, section 35

Like section 34, section 35 is another transitional section. It constitutes approximately ten percent of the entire judiciary article,

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<sup>170</sup> N.Y. CONST. art. VI, § 34.

and it deals entirely with courts that were abolished by the adoption of the article:

a. The children's courts, the court of general sessions of the county of New York, the county courts of the counties of Bronx, Kings, Queens and Richmond, the city court of the city of New York, the domestic relations court of the city of New York, the municipal court of the city of New York, the court of special sessions of the city of New York and the city magistrates' courts of the city of New York are abolished from and after the effective date of this article and thereupon the seals, records, papers and documents of or belonging to such courts shall, unless otherwise provided by law, be deposited in the offices of the clerks of the several counties in which these courts now exist.

b. The judges of the county court of the counties of Bronx, Kings, Queens and Richmond and the judges of the court of general sessions of the county of New York in office on the effective date of this article shall, for the remainder of the terms for which they were elected or appointed, be justices of the supreme court in and for the judicial district which includes the county in which they resided on that date. The salaries of such justices shall be the same as the salaries of the other justices of the supreme court residing in the same judicial district and shall be paid in the same manner. All actions and proceedings pending in the county court of the counties of Bronx, Kings, Queens and Richmond and in the court of general sessions of the county of New York on the effective date of this article shall be transferred to the supreme court in the county in which the action or proceedings was pending, or otherwise as may be provided by law.

c. The legislature shall provide by law that the justices of the city court of the city of New York and the justices of the municipal court of the city of New York in office on the date such courts are abolished shall, for the remainder of the term for which each was elected or appointed, be judges of the city-wide court of civil jurisdiction of the city of New York established pursuant to section fifteen of this article and for such district as the legislature may determine.

d. The legislature shall provide by law that the justices of the court of special sessions and the magistrates of the city magistrates' courts of the city of New York in office on the

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date such courts are abolished shall, for the remainder of the term for which each was appointed, be judges of the city-wide court of criminal jurisdiction of the city of New York established pursuant to section fifteen provided, however, that each term shall expire on the last day of the year in which it would have expired except for the provisions of this article.

e. All actions and proceedings pending in the city court of the city of New York and the municipal court in the city of New York on the date such courts are abolished shall be transferred to the city-wide court of civil jurisdiction of the city of New York established pursuant to section fifteen of this article or as otherwise provided by law.

f. All actions and proceedings pending in the court of special sessions of the city of New York and the city magistrates' courts of the city of New York on the date such courts are abolished shall be transferred to the city-wide court of criminal jurisdiction of the city of New York established pursuant to section fifteen of this article or as otherwise provided by law.

g. The special county judges of the counties of Broome, Chautauqua, Jefferson, Oneida and Rockland and the judges of the children's courts in all counties outside the city of New York in office on the effective date of this article shall, for the remainder of the terms for which they were elected or appointed, be judges of the family court in and for the county in which they hold office. Except as otherwise provided in this section, the office of special county judge and the office of special surrogate is abolished from and after the effective date of this article and the terms of the persons holding such offices shall terminate on that date.

h. All actions and proceedings pending in the children's courts in counties outside the city of New York on the effective date of this article shall be transferred to the family court in the respective counties.

i. The justices of the domestic relations court of the city of New York in office on the effective date of this article shall, for the remainder of the terms for which they were appointed, be judges of the family court within the city of New York.

j. All actions and proceedings pending in the domestic relations court of the city of New York on the effective date of

this article shall be transferred to the family court in the city of New York.

k. The office of official referee is abolished, provided, however, that official referees in office on the effective date of this article shall, for the remainder of the terms for which they were appointed or certified, be official referees of the court in which appointed or certified or the successor court, as the case may be. At the expiration of the term of any official referee, his or her office shall be abolished and thereupon such former official referee shall be subject to the relevant provisions of section twenty-five of this article.

l. As may be provided by law, the non-judicial personnel of the courts affected by this article in office on the effective date of this article shall, to the extent practicable, be continued without diminution of salaries and with the same status and rights in the courts established or continued by this article; and especially skilled, experienced and trained personnel shall, to the extent practicable, be assigned to like functions in the courts which exercise the jurisdiction formerly exercised by the courts in which they were employed. In the event that the adoption of this article shall require or make possible a reduction in the number of non-judicial personnel, or in the number of certain categories of such personnel, such reduction shall be made, to the extent practicable, by provision that the death, resignation, removal or retirement of an employee shall not create a vacancy until the reduced number of personnel has been reached.

m. In the event that a judgment or order was entered before the effective date of this article and a right of appeal existed and notice of appeal therefrom is filed after the effective date of this article, such appeal shall be taken from the supreme court, the county courts, the surrogate's courts, the children's courts, the court of general sessions of the county of New York and the domestic relations court of the city of New York to the appellate division of the supreme court in the judicial department in which such court was located; from the court of claims to the appellate division of the supreme court in the third judicial department, except for those claims which arose in the fourth judicial department, in which case the appeal shall be to the appellate division of the supreme court in the fourth judicial department; from the city court of the city of New York, the municipal court of the city of New

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York, the court of special sessions of the city of New York and the city magistrates' courts of the city of New York to the appellate division of the supreme court in the judicial department in which such court was located, provided, however, that such appellate division of the supreme court may transfer any such appeal to an appellate term, if such appellate term be established; and from the district court, town, village and city courts outside the city of New York to the county court in the county in which such court was located, provided, however, that the legislature may require the transfer of any such appeal to an appellate term, if such appellate term be established. Further appeal from a decision of a county court or an appellate term or the appellate division of the supreme court shall be governed by the provisions of this article. However, if in any action or proceeding decided prior to the effective date of this article, a party had a right of direct appeal from a court of original jurisdiction to the court of appeals, such appeal may be taken directly to the court of appeals.

n. In the event that an appeal was decided before the effective date of this article and a further appeal could be taken as of right and notice of appeal therefrom is filed after the effective date of this article, such appeal may be taken from the appellate division of the supreme court to the court of appeals and from any other court to the appellate division of the supreme court. Further appeal from a decision of the appellate division of the supreme court shall be governed by the provisions of this article. If a further appeal could not be taken as of right, such appeal shall be governed by the provisions of this article.<sup>171</sup>

Over 1,500 words in the state constitution devoted to courts that are not even in existence anymore! This is a provision whose shelf-life ended when the courts in question expired. Now it simply adds bulk to an already heavy document. Its repeal would not affect in any way the operation of the judiciary or of the state.

#### 7. Article VI, sections 36, 36-a, 36-c and 37

Each of these sections concerns the pendency of any matters and the effective dates of certain sections of the article. These sections

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<sup>171</sup> N.Y. CONST. art. VI, § 35.

provide:

§36. No civil or criminal appeal, action or proceeding pending before any court or any judge or justice on the effective date of this article shall abate but such appeal, action or proceeding so pending shall be continued in the courts as provided in this article and, for the purposes of the disposition of such actions or proceedings only, the jurisdiction of any court to which any such action or proceeding is transferred by this article shall be coextensive with the jurisdiction of the former court from which the action or proceeding was transferred. Except to the extent inconsistent with the provisions of this article, subsequent proceedings in such appeal, action or proceeding shall be conducted in accordance with the laws in force on the effective date of this article until superseded in the manner authorized by law.<sup>172</sup>

§36-a. The amendments to the provisions of sections two, four, seven, eight, eleven, twenty, twenty-two, twenty-six, twenty-eight, twenty-nine and thirty of article six and to the provisions of section one of article seven, as first proposed by a concurrent resolution passed by the legislature in the year nineteen hundred seventy-six and entitled 'Concurrent Resolution of the Senate and Assembly proposing amendments to articles six and seven of the constitution, in relation to the manner of selecting judges of the court of appeals, creation of a commission on judicial conduct and administration of the unified court system, providing for the effectiveness of such amendments and the repeal of subdivision c of section two, subdivision b of section seven, subdivision b of section eleven, section twenty-two and section twenty-eight of article six thereof relating thereto', shall become a part of the constitution on the first day of January next after the approval and ratification of the amendments proposed by such concurrent resolution by the people but the provisions thereof shall not become operative and the repeal of subdivision c of section two, section twenty-two and section twenty-eight shall not become effective until the first day of April next thereafter which date shall be deemed the effective date of such amendments and the chief

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<sup>172</sup> N.Y. CONST. art. VI, § 36.

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judge and the associate judges of the court of appeals in office on such effective date shall hold their offices until the expiration of their respective terms. Upon a vacancy in the office of any such judge, such vacancy shall be filled in the manner provided in section two of article six.<sup>173</sup>

§36-c. The amendments to the provisions of section twenty-two of article six as first proposed by a concurrent resolution passed by the legislature in the year nineteen hundred seventy-four and entitled ‘Concurrent Resolution of the Senate and Assembly proposing an amendment to section twenty-two of article six and adding section thirty-six-c to such article of the constitution, in relation to the powers of and reconstituting the court on the judiciary and creating a commission on judicial conduct’, shall become a part of the constitution on the first day of January next after the approval and ratification of the amendments proposed by such concurrent resolution by the people but the provisions thereof shall not become operative until the first day of September next thereafter which date shall be deemed the effective date of such amendments.<sup>174</sup>

§37. This article shall become a part of the constitution on the first day of January next after the approval and ratification of this amendment by the people but its provisions shall not become operative until the first day of September next thereafter which date shall be deemed the effective date of this article.<sup>175</sup>

These sections, which total approximately 600 words, are “take effect” provisions. The last concurrent resolution mentioned in any of the sections which modified the article occurred in 1976 and was approved by the voters in November 1977, making the effective date of the latest provision of this article September 1, 1978, over thirty-five years ago. The provisions of this article have been fully implemented, enabling this unnecessary material to be eliminated.

The provisions of the judiciary article we have targeted for removal or shortening number approximately 4,500 words, slightly less than ten percent of the entire constitution. They can be removed or replaced with no substantive impact on the article or the

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<sup>173</sup> N.Y. CONST. art. VI, § 36-a.

<sup>174</sup> N.Y. CONST. art. VI, § 36-c.

<sup>175</sup> N.Y. CONST. art. VI, § 37.

operation of the judiciary. The elimination of certain of these provisions and the substitution of more abbreviated provisions having the same effect would reduce the size of the article by approximately twenty-five percent and result in a more streamlined, readable constitution containing material commensurate with its status as the state's governing charter.

The second part of this article will contain our suggestions to reduce, simplify and update the remaining articles of the constitution.