

## QUALITY IN NUMBERS? THE DYNAMICS OF DECISION- MAKING IN THE SECOND DEPARTMENT

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The utility of dissenting opinions has long been the subject of debate amongst the bench and bar. Proponents urge that the dissenting opinion “safeguards the integrity of the judicial decision-making process,” both “by keeping the majority accountable for the rationale and consequences of its decision,” and by forcing the prevailing party to deal with the most difficult questions offered by its opponent.<sup>1</sup> Unlike the judge authoring the majority opinion, a judge writing for a unanimous court has the choice of selecting which of the losing side’s arguments it wishes to refute, with the added luxury of framing the arguments in whatever manner he or she sees fit.<sup>2</sup>

In contrast, critics of dissenting opinions argue that they create uncertainty as to the finality of opinions and the infallibility of the judges who author them.<sup>3</sup> For them, dissenting opinions are merely self-aggrandizing nullities, “a sort of undesirable self-exploitation” that often leave open legal issues that should otherwise be resolved conclusively.<sup>4</sup>

Undoubtedly, dissenting opinions can serve a useful role in sharpening the issues for the majority by forcing them to omit arguments most vulnerable to objections, while acknowledging important limitations on the scope of the holding.<sup>5</sup> This role is diminished where such opinions originate in the courts of last resort, due primarily to the well-established legal doctrine of stare decisis.<sup>6</sup> Thus, critics argue, the benefit of dissenting opinions

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<sup>1</sup> William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

<sup>2</sup> Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 402 (1999).

<sup>3</sup> See Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMPLE L. REV. 307, 308–09 (1998).

<sup>4</sup> *Id.* at 309.

<sup>5</sup> Flanders, *supra* note 2, at 408.

<sup>6</sup> Stare decisis, otherwise known as the doctrine of precedent, refers to the legal principle “under which a court must follow earlier judicial decisions when the same points arise again

disappears well before they are within the public domain because by then the majority has already had ample time to address the dissenter's arguments and account for them in their opinions. However, this argument carries less weight when applied to dissenting opinions arising out of intermediate appellate courts.

To be sure, the usefulness of dissenting opinions as "benchmark[s] against which the majority's reasoning can continue to be evaluated,"<sup>7</sup> is an inescapable trait when such opinions arise out of an intermediate appellate court. Provided that the losing party chooses to appeal and the court of last resort decides to hear the appeal, the dissenting opinion is almost certain to become a valuable tool to the high-court judges in formulating their own opinions of the case. Therefore, many of the criticisms that are directed at dissenting opinions, insofar as they relate to their utility for deciding future cases, are not applicable in the intermediate appellate courts.

The following study examines the divided decisions of the New York State Appellate Division, Second Department ("Second Department"), over the ten-year period beginning January 1, 2000 and ending October 1, 2010.<sup>8</sup> In so doing, this paper seeks to impart a practical and useful perspective to practitioners and academicians alike through the empirical analysis of the dissenting opinions of the Second Department. By focusing specifically on opinions that are later reversed by the Court of Appeals and, more specifically, dissenting opinions that are later vindicated by the Court, this study seeks to provide a better perspective into the decision-making tendencies of the New York State appellate courts.

It should be noted however, that this study does not purport to provide 100% accuracy in either its data or the analysis thereof. Indeed, in the time it would take to thoroughly and adequately analyze and dissect the tens of thousands of opinions required to accomplish such a feat, it is entirely probable that the utility of such a study would have all but disappeared—the judges having long since retired. For that reason, and for the reasons stated below,

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in litigation." BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>7</sup> Brennan, *supra* note 1, at 435–36.

<sup>8</sup> It is important to note that this study does not include cases rendered in the Appellate Term, which hears appeals of decisions from the New York City Civil and Criminal Courts. See N.Y. STATE UNIFIED COURT SYS., THE NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE 4 [hereinafter INTRODUCTORY GUIDE], available at <http://www.courts.state.ny.us/admin/NYCourts-IntroGuide.pdf> (2010). In addition, the Second Department, Appellate Term, exercises jurisdiction over appeals from the District, City, Town, and Village courts, as well as non-felony appeals from County Courts. *Id.*

this study avoids characterizing the individual justices of the Second Department according to any preconceived judicial ideology (e.g., pro-plaintiff vs. pro-defendant).

Part I of this paper provides an introduction to the Second Department, briefly outlining the bounds of its jurisdiction and the composition of its bench. Parts II and III provide descriptions of the Second Department data with respect to the dissenting opinions and vindications at the Court of Appeals. Part IV examines the various factors that may affect the decision-making processes of the Second Department. Finally, Part V concludes by offering possible solutions for the problems outlined below.

## I. AN INTRODUCTION TO THE SECOND DEPARTMENT

The organization of New York's appellate courts is . . . antiquated and inefficient. The current structure . . . was set up in the 1890s, when the state's population was a small fraction of what it is today, and when the population was more evenly distributed. Today, more than a century later, one of these departments, the Second Department, has grown to include half the state's population. As a consequence, it now bears a highly disproportionate share of the state's appellate caseload, resulting in enormous backlogs, delays, and unnecessary costs to all concerned.<sup>9</sup>

By way of background, the State of New York is divided into four Judicial Departments, each served by an Appellate Division of the Supreme Court, and divided according to geographic region.<sup>10</sup> The Appellate Divisions of the Supreme Court serve as New York State's predominant intermediate appellate courts, responsible for hearing civil and criminal appeals from the trial courts, in addition to civil appeals from the Appellate Terms and County Courts.<sup>11</sup> This

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<sup>9</sup> SPECIAL COMM'N ON THE FUTURE OF N.Y. STATE COURTS, A COURT SYSTEM FOR THE FUTURE: THE PROMISE OF COURT RESTRUCTURING IN NEW YORK STATE 15 (2007) [hereinafter A COURT SYSTEM FOR THE FUTURE].

<sup>10</sup> The Appellate Division was established during the Constitutional Convention of 1894, upon which the State was divided into its current makeup of four judicial departments. HISTORICAL SOCIETY OF THE COURTS OF THE STATE OF N.Y., APPELLATE DIVISION, SECOND DEPARTMENT, 100TH ANNIVERSARY: CELEBRATING THE FIRST HUNDRED YEARS 1 (1996), available at <http://www.courts.state.y.us/history/elecbook/2ddept.htm> [hereinafter HISTORICAL SOCIETY REPORT].

<sup>11</sup> See INTRODUCTORY GUIDE, *supra* note 8, at 4. In addition, the Appellate Division has original jurisdiction in a limited number of circumstances not covered here. For more information, see N.Y. C.P.L.R. art. 78 (proceedings against a supreme court justice); N.Y. C.P.L.R. 5704(a) (McKinney 1994) (authorizing review of ex parte orders of a justice of the

jurisdiction encompasses orders, judgments, and decrees issued by the Court of Claims, the Supreme Court, the Family Court, and the Surrogate's Court.<sup>12</sup>

The Second Department covers five<sup>13</sup> of the thirteen judicial districts of the State of New York. In all, it spans ten New York counties,<sup>14</sup> which corresponds to just over 8% of New York's total land area. However, what the Second Department lacks in size, it makes up for in total population—its jurisdiction representing just over one-half of the state's total population.<sup>15</sup> As a result of its expansive constituency, the Second Department is forced to bear a caseload that is substantially greater than that of the other three departments.<sup>16</sup>

There are currently twenty-two justices that sit on the bench of the Second Department, led by Presiding Justice A. Gail Prudenti, who has served in that role since being appointed by Governor Pataki in 2002.<sup>17</sup> In addition to Presiding Justice Prudenti, there are six associate justices appointed by the governor pursuant to article VI of the New York State Constitution.<sup>18</sup> The justices of the constitutionally-prescribed, seven-member court include: Justice Daniel D. Angiolillo; Justice Leonard B. Austin; Justice Cheryl E. Chambers; Justice Mark C. Dillon; Justice Anita Florio; and Justice Reinaldo E. Rivera.<sup>19</sup>

In addition, the Second Department bench includes fifteen

supreme court, a judge of a family court or court of claims, or a surrogate).

<sup>12</sup> SUPREME COURT OF THE STATE OF N.Y., APPELLATE DIV.: SECOND JUDICIAL DEP'T, GUIDE TO CIVIL PRACTICE 1, available at <http://www.courts.state.ny.us/courts/ad2/pdf/guidetocivilpractice.pdf> (2004).

<sup>13</sup> Specifically, the Second Department includes Districts 2, 9, 10, 11, and 13. N.Y. CONST. art. VI, § 4(a).

<sup>14</sup> Those counties are: Dutchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester. See *About the Court, An Overview of the Appellate Division*, APPELLATE DIV., SECOND JUD. DEP'T, <http://www.nycourts.gov/courts/ad2/aboutthecourt.shtml> (last visited Dec. 10, 2010).

<sup>15</sup> See A COURT SYSTEM FOR THE FUTURE, *supra* note 9, at 15.

<sup>16</sup> See *id.*

<sup>17</sup> See *Justices of the Court, Presiding Justice A. Gail Prudenti*, APPELLATE DIV., SECOND JUD. DEP'T, [http://www.nycourts.gov/courts/ad2/justice\\_prudenti.shtml](http://www.nycourts.gov/courts/ad2/justice_prudenti.shtml) (last visited Dec. 10, 2010) [hereinafter *Presiding Justice Prudenti*]. Presiding Justice Prudenti was initially appointed to the Court as an associate justice in 2001. *Id.*

<sup>18</sup> N.Y. CONST. art. VI, § 4(b) states that, "[t]he appellate divisions of the supreme court . . . shall consist of seven justices of the supreme court in each of the first and second departments." Originally, the New York State Constitution set the number at five; however, in 1925 the Constitution was amended to increase the number of Justices from five to seven. See HISTORICAL SOCIETY REPORT, *supra* note 10.

<sup>19</sup> *Justices of the Court*, APPELLATE DIV., SECOND JUD. DEP'T, <http://www.nycourts.gov/courts/ad2/justices.shtml> (last visited Dec. 10, 2010).

additional associate justices<sup>20</sup> including: Justice Ruth C. Balkin; Justice Ariel E. Belen; Justice Joseph Covello; Justice Thomas A. Dickerson;<sup>21</sup> Justice Randall T. Eng; Justice Steven W. Fisher; Justice L. Priscilla Hall; Justice John M. Leventhal; Justice Plummer E. Lott; Justice William F. Mastro; Justice Howard Miller; Justice Sheri S. Roman; Justice Fred T. Santucci; Justice Sandra L. Sgroi; and Justice Peter B. Skelos.<sup>22</sup>

## II. DISSENTING OPINIONS IN THE SECOND DEPARTMENT

Collectively, the Second Department bench has rendered approximately 43,559 decisions—or 3960 per year—over the last ten years. An overwhelming majority of these decisions are issued in memorandum form, as opposed to an individual justice signing onto the opinion.<sup>23</sup> Because memoranda opinions are short, unsigned recitations of the salient facts and legal principles of a case, and consequently often fail to provide detailed guidance as to a case's nuances, they are necessarily limited in their usefulness to practitioners. At the very least, however, memoranda opinions must “briefly state the grounds of [the] decision” and identify those justices, if any, who dissent from the opinion.<sup>24</sup>

Over the period examined, the Second Department issued 343 dissenting opinions, or approximately thirty-one per year.<sup>25</sup> Of the 343 divided decisions, twenty-three were overturned on review by the Court of Appeals. And, in twenty of those cases, the Court of Appeals adopted the rationale of the Second Department dissenter.<sup>26</sup>

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<sup>20</sup> Although the New York State Constitution fixes the number of justices at seven, the Governor is permitted to appoint additional justices upon certification by the court that the addition of justices is necessary to “the speedy disposition of the business before the court.” N.Y. CONST. art. VI, § 4(e).

<sup>21</sup> Justice Dickerson has authored an article about class action certification in New York State for this year's issue of *New York Appeals*. See Thomas A. Dickerson, *New York State Class Actions: Make It Work—Fulfill the Promise*, 74 ALB. L. REV. 711 (2010/2011).

<sup>22</sup> In addition, it is important to note that this study also includes the decisions of former justices of the Second Department, including: Justice Edward D. Carni; Justice Stephen G. Crane; Justice Gloria Goldstein; Justice Gabriel M. Krausman; Justice Robert A. Lifson; Justice Daniel F. Luciano; Justice Robert J. Lunn; Justice Sondra M. Miller; Justice William E. McCarthy; Justice David S. Ritter; Justice Nancy E. Smith; and Justice Robert A. Spolzino.

<sup>23</sup> See ALAN D. SCHEINKMAN & DAVID D. SIEGEL, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE APPELLATE DIVISIONS OF THE STATE OF NEW YORK 101 (N.Y. St. Bar Assoc., 2d ed. 2005).

<sup>24</sup> N.Y. C.P.L.R. 5522, 5712(a) (McKinney 1995).

<sup>25</sup> See *infra* Table 1.

<sup>26</sup> See *id.*

TABLE 1: YEAR-OVER-YEAR SUMMARY OF SECOND DEPARTMENT DECISIONS

<i>Year</i>	<i>Total Cases</i>	<i>Total Divided Opinions</i>	<i>Divided Opinions Overturned on Appeal</i>	<i>Dissent Vindications</i>	<i>Vindications in Civil Cases</i>	<i>Vindications in Criminal Cases</i>
2000	4600	50	2	1	1	0
2001	4348	37	2	2	2	0
2002	3998	35	2	1	1	0
2003	3962	42	2	2	2	0
2004	3655	10	1	1	1	0
2005	3924	36	2	2	2	0
2006	4019	47	4	3	3	0
2007	4148	19	2	2	1	1
2008	4238	27	4	3	2	1
2009	3897	28	2	2	1	1
2010	2878	10	0	0	0	0
Total	43667	341	23	19	16	3

As Table 1 indicates, over the past ten years in which a divided decision was issued, the Court of Appeals has overturned the Second Department majority at a rate of approximately 7%. In other words, the Court of Appeals agrees with the Second Department majority in 93% of non-unanimous decisions. This figure, taken alone, appears to lend credibility to the Second Department bench, at least with respect to their ability to reach a consensus with the Court of Appeals majority. However, when compared to the overall rate at which the Court of Appeals has overturned the Second Department during the same period, the results are somewhat surprising. Indeed, over the ten-year period examined, the Second Department was overturned on review by the Court of Appeals 5203 times, at a rate of approximately 12%.<sup>27</sup> Thus, the data reveals that during the last ten years, the Court of Appeals was more likely to overturn a unanimous Second Department as opposed to a divided one.

<sup>27</sup> See *infra* Table 2.

TABLE 2: RATES OF REVERSAL IN UNANIMOUS AND DIVIDED DECISIONS OF THE SECOND DEPARTMENT

Year	Total Unanimous Opinions	Cases Overturned on Appeal	Reversal Rate (%)	Total Divided Opinions	Cases Overturned on Appeal	Reversal Rate (%)
2000	4550	565	12.42%	50	2	4.00%
2001	4816	553	11.48%	37	3	8.11%
2002	3963	523	13.20%	35	2	5.71%
2003	4426	486	10.98%	42	2	4.76%
2004	4110	462	11.24%	10	1	10.00%
2005	4486	552	12.30%	36	2	5.56%
2006	4455	608	13.65%	47	4	8.51%
2007	4613	626	13.57%	19	2	10.53%
2008	4673	524	11.21%	27	4	14.81%
2009	3869	159	4.11%	28	2	7.14%
2010	2868	145	5.06%	10	0	0.00%

A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reasoning can continue to be evaluated, and perhaps, in time, superseded . . . . And, each time the Court revisits an issue, the justices are forced by a dissent to reconsider the fundamental questions and to rethink the result.<sup>28</sup>

Table 2 presents a side-by-side comparison of the subsequent history of unanimous and divided decisions issued by the Second Department. The data shows that over the period examined, the Court of Appeals, on average, was more likely to overturn a unanimous Second Department. From a pragmatic standpoint, this trend does little to support the theory that, by directing attention to perceived difficulties within the majority's opinion, the dissenting opinion provides a basis for which the majority may be questioned, and perhaps overturned.<sup>29</sup> To the contrary, the evidence shows that in the Second Department, it is the unanimous opinion that is viewed by the Court of Appeals under the most critical lens.

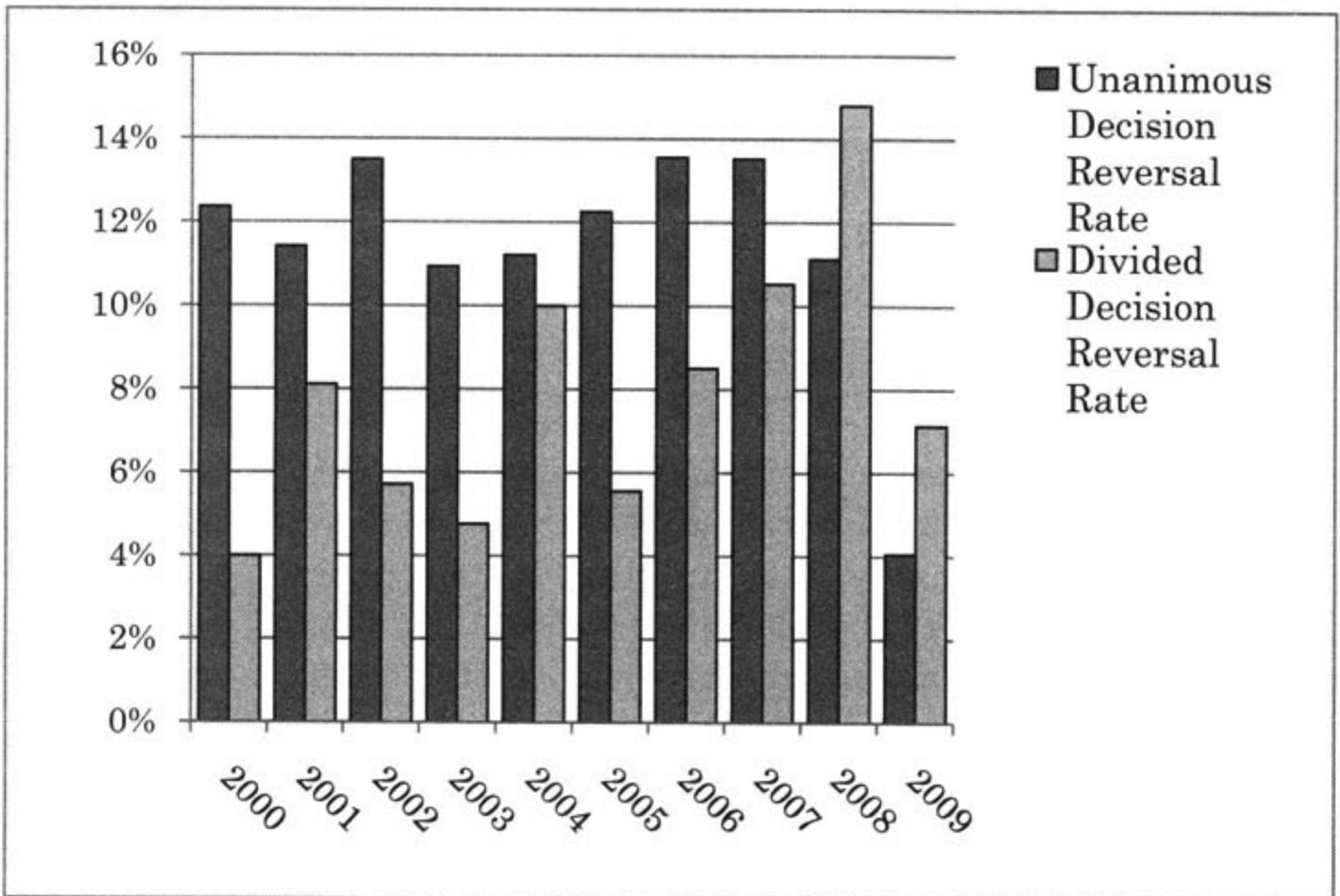
Moreover, the presumption established by proponents of

<sup>28</sup> Brennan, *supra* note 1, at 435–36.

<sup>29</sup> See, e.g., *id.* (stating that the dissent “establishes a benchmark against which the majority's reasoning can continue to be evaluated, and perhaps, in time, superseded”).

dissenting opinions—namely, that unanimous decisions become inherently more credible than non-unanimous decisions because the absence of a dissent provides “reassurance to counsel and the public that the court’s decision had been reached only after thoughtful and informed deliberation”—cannot be rationalized against the tendency of the Court of Appeals to overturn a unanimous Second Department.<sup>30</sup> Indeed, a lack of unanimity is traditionally seen as a negative reflection on the court.<sup>31</sup>

GRAPH 1: RATES OF REVERSAL IN SECOND DEPARTMENT DECISIONS<sup>32</sup>



While the findings above may be attributed to a host of different factors, it is important to note that, in recent years, this trend appears to be shifting. For example, as Graph 1 illustrates, in both 2008 and 2009, the rates of reversal in divided decisions surpassed those in unanimous decisions—a feat that had not been achieved in any of the eight previous years studied.

<sup>30</sup> Ray, *supra* note 3, at 312; *but see id.* at 430 (proposing that the dissenting opinion “safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision”).

<sup>31</sup> See Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 35.

<sup>32</sup> The data for the year 2010 was not included within this portion of the study because the Court of Appeals was not in session.

### III. SECOND DEPARTMENT VINDICATION RATES

As we have already seen, the Court of Appeals over the last ten years has reversed the Second Department twenty-three times in 343 divided decisions.<sup>33</sup> In twenty of those twenty-three decisions, the Court of Appeals has adopted the opinion of the Second Department dissenter.<sup>34</sup> These results indicate that, on average, a

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<sup>33</sup> *H.M. v. E.T.*, 65 A.D.3d 119, 881 N.Y.S.2d 113 (App. Div. 2d Dep't 2009), *rev'd*, 14 N.Y.3d 521, 930 N.E.2d 206, 904 N.Y.S.2d 285 (2010); *People v. Ramos*, 60 A.D.3d 1091, 876 N.Y.S.2d 127 (App. Div. 2d Dep't 2009), *rev'd*, 13 N.Y.3d 914, 922 N.E.2d 880, 895 N.Y.S.2d 294 (2010); *N.Y. City Transit Auth. v. Transport Workers Union of Am., Local 100*, 60 A.D.3d 1, 871 N.Y.S.2d 276 (App. Div. 2d Dep't 2008), *rev'd*, 14 N.Y.3d 119, 924 N.E.2d 797, 897 N.Y.S.2d 689 (2010); *Vomero v. City of N.Y.*, 54 A.D.3d 1045, 864 N.Y.S.2d 159 (App. Div. 2d Dep't 2008), *rev'd*, 13 N.Y.3d 840, 920 N.E.2d 340, 892 N.Y.S.2d 284 (2009); *Bazakos v. Lewis*, 56 A.D.3d 15, 864 N.Y.S.2d 505 (App. Div. 2d Dep't 2008), *rev'd*, 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785 (2009); *People v. Mingo*, 49 A.D.3d 148, 850 N.Y.S.2d 151 (App. Div. 2d Dep't 2008), *rev'd*, 12 N.Y.3d 563, 910 N.E.2d 983, 883 N.Y.S.2d 154 (2009); *In re Seasia D.*, 46 A.D.3d 878, 848 N.Y.S.2d 361 (App. Div. 2d Dep't 2007), *rev'd*, 10 N.Y.3d 879, 890 N.E.2d 875, 860 N.Y.S.2d 760 (2008); *Rivera v. Firetog*, 44 A.D.3d 957, 844 N.Y.S.2d 116 (App. Div. 2d Dep't 2007), *rev'd*, 11 N.Y.3d 501, 900 N.E.2d 952, 872 N.Y.S.2d 401 (2008); *Jericho Water Dist. v. One Call Users Council, Inc.*, 37 A.D.3d 136, 826 N.Y.S.2d 659 (App. Div. 2d Dep't 2006), *rev'd*, 10 N.Y.3d 385, 887 N.E.2d 1142, 858 N.Y.S.2d 84 (2008); *Watral & Sons, Inc. v. OC Riverhead 58, LLC*, 34 A.D.3d 560, 824 N.Y.S.2d 392 (App. Div. 2d Dep't 2006), *rev'd*, 10 N.Y.3d 180, 884 N.E.2d 1048, 855 N.Y.S.2d 49 (2008); *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 32 A.D.3d 431, 820 N.Y.S.2d 113 (App. Div. 2d Dep't 2006), *rev'd*, 9 N.Y.3d 219, 881 N.E.2d 172, 851 N.Y.S.2d 76 (2007); *Putter v. N. Shore Univ. Hosp.*, 25 A.D.3d 539, 807 N.Y.S.2d 624 (App. Div. 2d Dep't 2006), *rev'd*, 7 N.Y.3d 548, 858 N.E.2d 1140, 825 N.Y.S.2d 435 (2006); *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 23 A.D.3d 639, 804 N.Y.S.2d 805 (App. Div. 2d Dep't 2005), *rev'd*, 7 N.Y.3d 624, 859 N.E.2d 498, 825 N.Y.S.2d 692 (2006); *Munoz v. DJZ Realty, LLC*, 15 A.D.3d 363, 789 N.Y.S.2d 526 (App. Div. 2d Dep't 2005), *rev'd*, 5 N.Y.3d 747, 834 N.E.2d 776, 800 N.Y.S.2d 866 (2005); *N.Y. City Transit Auth. v. Transp. Workers' Union of Am., Local 100*, 13 A.D.3d 542, 787 N.Y.S.2d 80 (App. Div. 2d Dep't 2004), *rev'd*, 6 N.Y.3d 332, 845 N.E.2d 1243, 812 N.Y.S.2d 413 (2005); *Frankel v. Frankel*, 309 A.D.2d 65, 764 N.Y.S.2d 135 (App. Div. 2d Dep't 2003), *rev'd*, 2 N.Y.3d 601, 814 N.E.2d 37, 781 N.Y.S.2d 59 (2004); *Covington v. Walker*, 307 A.D.2d 908, 762 N.Y.S.2d 906 (App. Div. 2d Dep't 2003), *rev'd*, 3 N.Y.3d 287, 819 N.E.2d 1025, 786 N.Y.S.2d 409 (2004); *Hassan v. Montuori*, 291 A.D.2d 375, 737 N.Y.S.2d 625 (App. Div. 2d Dep't 2002), *rev'd*, 99 N.Y.2d 348, 786 N.E.2d 25, 756 N.Y.S.2d 126 (2003); *Delgado v. Sunderland*, 290 A.D.2d 440, 736 N.Y.S.2d 386 (App. Div. 2d Dep't 2002), *rev'd*, 97 N.Y.2d 420, 767 N.E.2d 662, 741 N.Y.S.2d 171 (2002); *Baisi v. Gonzalez*, 286 A.D.2d 313, 728 N.Y.S.2d 697 (App. Div. 2d Dep't 2001), *rev'd*, 97 N.Y.2d 694, 765 N.E.2d 295, 739 N.Y.S.2d 92 (2002); *Ifrah v. Utschig*, 282 A.D.2d 458, 723 N.Y.S.2d 61 (App. Div. 2d Dep't 2001), *rev'd*, 98 N.Y.2d 304, 774 N.E.2d 732, 746 N.Y.S.2d 667 (2002); *People v. Diaz*, 278 A.D.2d 505, 718 N.Y.S.2d 369 (App. Div. 2d Dep't 2000), *rev'd*, 97 N.Y.2d 109, 761 N.E.2d 577, 735 N.Y.S.2d 885 (2001); *Caristo v. Sanzone*, 274 A.D.2d 406, 711 N.Y.S.2d 23 (App. Div. 2d Dep't 2000), *rev'd*, 96 N.Y.2d 172, 750 N.E.2d 36, 726 N.Y.S.2d 334 (2001).

<sup>34</sup> *H.M.*, 65 A.D.3d 119, 881 N.Y.S.2d 113 (Balkin, J., dissenting), *rev'd*, 14 N.Y.3d 521, 930 N.E.2d 206, 904 N.Y.S.2d 285; *Ramos*, 60 A.D.3d 1091, 876 N.Y.S.2d 127 (Carni, J., dissenting), *rev'd*, 13 N.Y.3d 914, 922 N.E.2d 880, 895 N.Y.S.2d 294; *Local 100*, 60 A.D.3d 1, 871 N.Y.S.2d 276 (McCarthy, J., dissenting), *rev'd*, 14 N.Y.3d 119, 924 N.E.2d 797, 897 N.Y.S.2d 689; *Vomero*, 54 A.D.3d 1045, 864 N.Y.S.2d 159 (Lifson, J., dissenting), *rev'd*, 13 N.Y.3d 840, 920 N.E.2d 340, 892 N.Y.S.2d 284 (2009); *Bazakos*, 56 A.D.3d 15, 864 N.Y.S.2d 505 (Covello, J., dissenting), *rev'd*, 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785; *Mingo*,

dissenting justice of the Second Department is vindicated by the Court of Appeals at a rate of 5.6%. However, as can be expected, some justices are vindicated at a much higher rate than others.

TABLE 3: JUSTICES WHO HAVE BEEN VINDICATED<sup>35</sup>

<i>Justice</i>	<i>Total Dissenting Opinions</i>	<i>Vindicated Authored Dissent</i>	<i>Vindication Rate (%)</i>
<b>Balkin</b>	1	1	100%
<b>Covello</b>	4	1	25%
<b>Dillon</b>	11	2	18.18%
<b>Fisher</b>	14	1	7.14%
<b>H. Miller</b>	16	2	12.50%
<b>Rivera</b>	7	1	14.29%
Spolzino	23	2	8.70%
Carni	6	1	16.67%
Lifson	19	1	5.26%
McCarthy	1	1	100%
Goldstein	53	1	1.89%
Krausman	6	2	33.33%
Crane	21	1	4.76%
Feuerstein	11	1	9.09%
Altman	2	2	100%

49 A.D.3d 148, 850 N.Y.S.2d 151 (Spolzino, J., dissenting), *rev'd*, 12 N.Y.3d 563, 910 N.E.2d 983, 883 N.Y.S.2d 154; *In re Seasia D.*, 46 A.D.3d 878, 848 N.Y.S.2d 361 (Dillon, J., dissenting), *rev'd*, 10 N.Y.3d 879, 890 N.E.2d 875, 860 N.Y.S.2d 760; *Rivera*, 44 A.D.3d 957, 844 N.Y.S.2d 116 (Dillon, J., dissenting), *rev'd*, 11 N.Y.3d 501, 900 N.E.2d 952, 872 N.Y.S.2d 401; *Watral & Sons, Inc.*, 34 A.D.3d 560, 824 N.Y.S.2d 392 (Fisher, J., dissenting), *rev'd*, 10 N.Y.3d 180, 884 N.E.2d 1048, 855 N.Y.S.2d 49; *Riverkeeper, Inc.*, 32 A.D.3d 431, 820 N.Y.S.2d 113 (Spolzino, J., dissenting), *rev'd*, 9 N.Y.3d 219, 881 N.E.2d 172, 851 N.Y.S.2d 76; *Putter*, 25 A.D.3d 539, 807 N.Y.S.2d 624 (Miller, J., dissenting), *rev'd*, 7 N.Y.3d 548, 858 N.E.2d 1140, 825 N.Y.S.2d 435; *Welsbach Elec. Corp.*, 23 A.D.3d 639, 804 N.Y.S.2d 805 (Krausman, J., dissenting), *rev'd*, 7 N.Y.3d 624, 859 N.E.2d 498, 825 N.Y.S.2d 692; *Munoz*, 15 A.D.3d 363, 789 N.Y.S.2d 526 (Miller, J., dissenting), *rev'd*, 5 N.Y.3d 747, 834 N.E.2d 776, 800 N.Y.S.2d 866; *Local 100*, 13 A.D.3d 542, 787 N.Y.S.2d 80 (Crane, J., dissenting), *rev'd*, 6 N.Y.3d 332, 845 N.E.2d 1243, 812 N.Y.S.2d 413; *Frankel*, 309 A.D.2d 65, 764 N.Y.S.2d 135 (Altman, J., dissenting), *rev'd*, 2 N.Y.3d 601, 814 N.E.2d 37, 781 N.Y.S.2d 59; *Covington*, 307 A.D.2d 908, 762 N.Y.S.2d 906 (Feuerstein, J., dissenting), *rev'd*, 3 N.Y.3d 287, 819 N.E.2d 1025, 786 N.Y.S.2d 409; *Hassan*, 291 A.D.2d 375, 737 N.Y.S.2d 625 (Altman, J., dissenting), *rev'd*, 99 N.Y.2d 348, 786 N.E.2d 25, 756 N.Y.S.2d 126; *Baisi*, 286 A.D.2d 313, 728 N.Y.S.2d 697 (Crane, J., dissenting), *rev'd*, 97 N.Y.2d 694, 765 N.E.2d 295, 739 N.Y.S.2d 92; *Ifrah*, 282 A.D.2d 458, 723 N.Y.S.2d 61 (Krausman, J., dissenting), *rev'd*, 98 N.Y.2d 304, 774 N.E.2d 732, 746 N.Y.S.2d 667; *Caristo*, 274 A.D.2d 406, 711 N.Y.S.2d 23 (Goldstein, J., dissenting), *rev'd*, 96 N.Y.2d 172, 750 N.E.2d 36, 726 N.Y.S.2d 334.

<sup>35</sup> Current justices of the Second Department are highlighted in bold.

Table 3 presents the individual vindication rates of those Second Department justices—both current and former—who authored a dissenting opinion that was later vindicated by the Court of Appeals during the ten-year period examined.<sup>36</sup> The results show that the justices that have been vindicated by the Court of Appeals, generally, have exponentially higher vindication rates than the 5.6% rate of expectancy would otherwise indicate.

Notably, of the twenty vindications over the ten-year period examined, twelve were dissenting opinions issued by justices that are no longer with the court.<sup>37</sup> This means that less than half of the total vindications are attributable to a current Second Department judge. However, a further examination of the data shows that, between the former and current justices that have been vindicated by the Court of Appeals, the current justices are vindicated at a rate of 15.38%—almost double the rate of those no longer with the court. Thus, the data suggests that, although the current court receives fewer vindications overall, the “quality” of its dissenting opinions—to the extent that they are compatible with a majority of the Court of Appeals—is noticeably higher than those issued by their predecessors.

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<sup>36</sup> Justices who have authored dissenting opinions, but were not vindicated by the Court of Appeals, are not included within Table 4.

<sup>37</sup> Those justices are: Justice Spolzino; Justice Carni; Justice Lifson; Justice McCarthy; Justice Goldstein; Justice Krausman; Justice Crane; Justice Feuerstein; and Justice Altman.

TABLE 4: CURRENT JUSTICES OF THE SECOND DEPARTMENT

	<i>Total Dissents Authored</i>	<i>Criminal</i>	<i>Civil</i>	<i>Vindication Rate (%)</i>
<b>Angiolillo</b>				
<b>Austin</b>	1	0	1	0.00%
<b>Balkin</b>	1	0	1	100.00%
<b>Belen</b>	8	6	2	0.00%
<b>Chambers</b>	1	0	1	0.00%
<b>Covello</b>	4	0	4	25.00%
<b>Dickerson</b>				
<b>Dillon</b>	11	4	7	18.18%
<b>Eng</b>	4	4	0	0.00%
<b>Fisher</b>	14	4	10	7.14%
<b>Florio</b>	6	2	4	0.00%
<b>Hall</b>	1	1	0	0.00%
<b>Leventhal</b>	3	2	1	0.00%
<b>Lott</b>				
<b>Mastro</b>	7	2	5	0.00%
<b>H. Miller</b>	16	0	16	12.50%
<b>Prudenti</b>				
<b>Rivera</b>	7	1	6	14.29%
<b>Roman</b>				
<b>Santucci</b>	13	1	12	0.00%
<b>Sgroi</b>				
<b>Skelos</b>	7	0	7	0.00%

Table 4 outlines the dissenting and vindication patterns of the current justices of the Second Department. Notably, Justices Angiolillo, Dickerson, Lott, and Sgroi, in addition to Presiding Justice Prudenti, have not authored a dissenting opinion during their time on the court. Of these five, Presiding Justice Prudenti and Justice Angiolillo are the only two to have joined in dissent, each joining three times during their tenure on the Second Department bench.<sup>38</sup> Notably, Justices Dickerson, Lott, and Sgroi

<sup>38</sup> Justice Angiolillo joined the dissenting opinion in the following cases: *People v. Robinson*, 71 A.D.3d 1169, 898 N.Y.S.2d 175 (App. Div. 2d Dep't 2010) (Fisher, J., dissenting); *Vomero*, 54 A.D.3d 1045, 864 N.Y.S.2d 159 (Lifson, J., dissenting); and *D'Elia v. Menorah Home & Hosp. for the Aged and Infirm*, 51 A.D.3d 848, 859 N.Y.S.2d 224 (App. Div. 2d Dep't

all have neither authored, nor joined, a dissent during their tenure with the court.<sup>39</sup>

One record that should not go without mention is that of Presiding Justice A. Gail Prudenti. Appointed to the Appellate Division in 2001, in 2002 she became the first female presiding justice ever to serve on the Second Department bench.<sup>40</sup> Throughout that time, Presiding Justice Prudenti has participated in over 4000 cases, and yet, has never authored a dissenting opinion. She has, however, concurred in three dissenting opinions, all of which were vindicated on review by the Court of Appeals.<sup>41</sup> Thus, one could infer that it would be worthwhile to appeal to the Court of Appeals when Presiding Justice Prudenti joins in dissent.

#### IV. DYNAMICS OF DECISION-MAKING IN THE SECOND DEPARTMENT

##### A. *Strength in Numbers*

Over the period examined, a dissenting justice on the Second Department was joined in dissent only 10% of the time. In other words, approximately 90% of the 343 dissenting opinions rendered were solo dissents. However, of the twenty total vindications by the Court of Appeals, only ten were solo dissents. This means that where a dissenting opinion was issued jointly, the Court of Appeals was nine times as likely to vindicate the dissenting justices as it was when only one Second Department justice signed onto the opinion.<sup>42</sup>

For practitioners, these results have the potential of being enormously beneficial in determining whether to appeal an unfavorable decision in the Second Department. While not determinative, one would surely want to know that a single

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2008) (Covello, J., dissenting). Presiding Justice Prudenti joined the dissent in the following cases: *Watral & Sons, Inc.*, 34 A.D.3d 560, 824 N.Y.S.2d 392 (Fisher, J., dissenting); *Frankel*, 309 A.D.2d 65, 764 N.Y.S.2d 135 (Altman, J., dissenting); and *Hassan*, 291 A.D.2d 375, 737 N.Y.S.2d 625 (Altman, J., dissenting).

<sup>39</sup> It bears mentioning that Justices Lott and Sgroi have each only served approximately one year on the Second Department bench at the time of this writing. The former assumed his position on March 19, 2009, whereas the latter began her tenure on October 1, 2009.

<sup>40</sup> See *Presiding Justice Prudenti*, *supra* note 17.

<sup>41</sup> See *Watral & Sons, Inc.*, 34 A.D.3d 560, 824 N.Y.S.2d 392, *rev'd*, 10 N.Y.3d 180, 884 N.E.2d 1048, 855 N.Y.S.2d 49; *Frankel*, 309 A.D.2d 65, 764 N.Y.S.2d 135, *rev'd*, 2 N.Y.3d 601, 814 N.E.2d 37, 781 N.Y.S.2d 59; *Hassan*, 291 A.D.2d 375, 737 N.Y.S.2d 625, *rev'd*, 99 N.Y.2d 348, 786 N.E.2d 25, 756 N.Y.S.2d 126.

<sup>42</sup> Specifically, the vindication rate of the Second Department solo dissents was 3.26%, whereas the vindication rate of joint dissents was 27.78%.

dissenter in the Second Department equates to an approximately 3% likelihood of success on appeal to the state's highest court. By contrast, where there are two justices joining in the dissent, that rate increases markedly to approximately 28%, while providing the litigant with the additional benefit of an appeal "as of right" to the Court of Appeals.<sup>43</sup>

This knowledge, however, is presently immaterial to potential litigants in the Second Department. This is because the Second Department, as a necessary consequence of its increasingly burdensome caseload and its rising number of justices, has been forced to adopt alternative decision-making procedures to expedite the process of appellate review. Between 1970 and 1977, the number of justices in the Second Department grew from ten to fourteen.<sup>44</sup> In 1978, the court reduced the number of justices required to sit in each case from five to four per panel.<sup>45</sup> Incidentally, this procedural alteration had the consequence of eliminating the appeal "as of right" in cases where two justices join in dissent.

### *B. Overworked and Underpaid*

At first glance, the figures outlined in Table 1, *supra*, would appear to indicate that the Second Department's caseload has remained steady throughout the ten-year period examined. In fact, the year 2009 total of 3897 opinions rendered is almost 400 below the court's 4279 annual average. However, these facts should not be mistaken for a shortage of work at the Second Department. To the contrary, the court's current workload far exceeds any reasonable amount.

For example, in 1980, the Second Department decided exactly 8040 motions.<sup>46</sup> This number equated to approximately 233 motion dispositions per judge—in addition to their participation in approximately 932 appeals per year.<sup>47</sup> In all, the court rendered a total of 2645 dispositions in 1980, which even in 1980 appeared to "substantially exceed any level capable of full collegial consideration."<sup>48</sup> Despite this fact, by 2001 the court's numbers had

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<sup>43</sup> See N.Y. C.P.L.R. 5601(a) (McKinney 1995).

<sup>44</sup> HISTORICAL SOCIETY REPORT, *supra* note 10.

<sup>45</sup> See A COURT SYSTEM FOR THE FUTURE, *supra* note 9, at 25.

<sup>46</sup> See ROBERT MACCRATE ET AL., APPELLATE JUSTICE IN NEW YORK, app. E-5 (1982).

<sup>47</sup> See *id.*

<sup>48</sup> *Id.* at 61.

increased drastically to 12,195 motions, or approximately 610 motion dispositions per judge. And, in 2001 alone, the court rendered a total of 10,412 dispositions.<sup>49</sup> This increased workload necessarily bears on the time necessary for adequate legal research, as well as multi-judge, collegial consultation, both of which are “essential to proper appellate review.”<sup>50</sup>

Over the past twenty years, the Second Department has undertaken extraordinary measures to deal with its enormous caseload. One such measure has been the addition of justices from the constitutionally-mandated seven-member court.<sup>51</sup> Specifically, article VI of the New York State Constitution permits the “the Governor, upon certification by an Appellate Division that it needs additional justices to dispose of its business, to designate such additional justices.”<sup>52</sup> The Second Department in particular has made liberal use of this provision—its current membership consisting of two-thirds executive appointments.<sup>53</sup> As a result, a large faction of the current court is serving what amount to “indefinite [and] effectively permanent terms.”<sup>54</sup>

What is perhaps more troubling with respect to the addition of justices to compensate for an ever-increasing workload, is the rise of intra-departmental conflicts within the intermediate appellate courts. In the Second Department alone, there are twenty-two justices who often sit in four- and five-judge panels. This type of disarray can, and has, led to inconsistent holdings within the intermediate appellate divisions. Adding to the concern is the absence of any remedy for inconsistent judgments within the same department.

In addition to the quantitative elements that necessarily bear on the quality of the Second Department’s performance, certain qualitative factors may also play a significant role on its appellate jurisprudence. Indeed, Presiding Justice Prudenti has stated that geographical factors may also deprive potential litigants of justice

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<sup>49</sup> N.Y. STATE UNIFIED COURT SYS., REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS, ANNUAL REPORT 2009 (2009), available at <http://www.courts.state.ny.us/reports/annual/pdfs/UCSAnnualReport2009.pdf>.

<sup>50</sup> MACCRATE ET AL., *supra* note 46, at 55.

<sup>51</sup> See N.Y. CONST. art. VI, § 4(b).

<sup>52</sup> See A COURT SYSTEM FOR THE FUTURE, *supra* note 9, at 25 n.42 (citing N.Y. Const. art. VI, § 4(e)).

<sup>53</sup> See *id.* at 25

<sup>54</sup> See *id.* at 25–26. See also N.Y. CONST. art. VI, § 4(e) (providing that, where the Governor designates additional justices, such justices are permitted to serve until the Governor certifies that the need no longer exists).

within the Second Department:

Access to appellate justice is a particular problem for the Second Department because our geographic boundaries stretch from Montauk in the east beyond Poughkeepsie to the north . . . . The time and expenses of traveling to Brooklyn often force those who might seek appellate review to think twice.<sup>55</sup>

## V. CONCLUSION

We have an organizational flow chart no business executive would be caught dead with—and no state judiciary should either . . . . We say we want the public to trust and respect our system of justice, but then we hand them this jurisdictional maze that requires a roadmap and compass to navigate.<sup>56</sup>

Just over four years ago, the Special Commission on the Future of the New York State Courts was appointed by former Chief Judge Judith S. Kaye “to assess the effectiveness of the state’s current court structure and to propose appropriate reforms.”<sup>57</sup> Judge Kaye’s frustration was one shared by many of her colleagues and predecessors, including former Chief Judges Lawrence H. Cooke and Charles D. Breitel.<sup>58</sup> Specifically, Chief Judge Kaye implored the Commission to study what had been previously described as “the most archaic and bizarrely convoluted court structure in the country,” and incorporate their findings into recommendations for court restructuring.<sup>59</sup>

In its report, the Commission found the New York State court system to be “an inefficient and wasteful system that causes harm and heartache to all manner of litigants, and costs businesses, municipalities and taxpayers in excess of half a billion dollars per year.”<sup>60</sup> As a result, the Commission offered a number of reformation proposals to the New York State legislature—including the creation of a Fifth Department—while recommending further that such action “begin immediately.”<sup>61</sup>

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<sup>55</sup> A COURT SYSTEM FOR THE FUTURE, *supra* note 9, at 25.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See id.* at 7, 11.

<sup>59</sup> *Id.* at 9.

<sup>60</sup> *Id.* at 7. Specifically, the Commission estimated that the current court structure costs the State up to \$502 million annually in excess funding. *Id.* at 8.

<sup>61</sup> *Id.* at 10.

Four years later and counting, there has been little to no action from the New York legislature with respect to amending the State Constitution, while the New York State courts continue to be burdened with an unworkable caseload. The legislature's failure to act is especially troublesome given the State's current fiscal crisis, the necessity for court reform, and the substantial costs it stands to save New York's taxpayers. Until a solution is reached, New York citizens will continue to suffer by being deprived of justice in the New York courts, while their taxpayer dollars continue to be wasted.