

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

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[T]he Committee finds itself literally amazed by the extent to which the Constitution of New York contains hollow phrases, defective provisions, and creakingly antiquated policies. Moreover, the research that underlies our conclusions has in the main not exposed any true clash of principles. To a surprising degree the Constitution embodies sections that have been preserved not because they reflect the current convictions of some determined element of the public, but for no better reason than that nobody has bothered to remove them after they had served whatever purpose they originally had.¹

—Inter-Law School Committee

I. INTRODUCTION

The quotation above is particularly apt for the second portion of this two-part article about the unnecessary and outdated material that has been allowed to accumulate throughout the New York State Constitution.² Whereas the first part of the article addressed oddities, anachronisms, redundancies, archaic language, and incoherencies found in the bill of rights and in the sections of the constitution concerning the institutions of government, this part

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¹ 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].

² For the first part of the article, see Peter J. Galie & Christopher Bopst, *Constitutional “Stuff”: House Cleaning the New York Constitution—Part I*, 77 ALB. L. REV. 1385 (2013/2014) (discussing the first six articles of the New York Constitution and suggesting potential changes to the document).

will deal with the public policy sections of the document, which are located in articles VII through XVIII.³

Criticisms leveled against the state constitution, that it has not aged well (and was never designed to do so) and that it is a huge statute in constant need of reexamination, could never be said about the U.S. Constitution.⁴ The New York Constitution differs significantly from its federal counterpart in its inclusion of heavily-laden policy matters.⁵ Some of the document's size derives from its status as the governing charter of a state possessing plenary power.⁶ This is not the only reason, however. The U.S. Constitution generally does not direct the Congress or President to take specific actions concerning policies; rather, it provides a list of enumerated powers, which cannot be exceeded,⁷ and a list of prohibitions on the power of Congress.⁸ The New York Constitution, by way of contrast, often commands the legislature or governor to take certain actions.⁹ These detailed policy provisions engender further amendments necessary to respond to changing conditions. As often as not, the amendments that have been adopted have been work-arounds or poorly crafted attempts to circumvent or exempt previous provisions and restrictions, while retaining the original language.

Given the role and function of a state constitution, a certain amount of policy material may be desirable. However, as the analysis below will show, detailed and specific material quickly becomes insufficient, obsolete, or ineffective. Our analysis reveals a studied unwillingness on the part of the State to undertake necessary revision and updating, leaving us with a document less able to respond to the diverse and dynamic needs of the state.

The most recent illustration of this penchant for layering additional material onto existing language occurred shortly after

³ The state constitution contains twenty articles. The first six articles were addressed in the first portion of the article. See Galie & Bopst, *supra* note 2. Neither Article XIX, concerning amendments to the constitution, nor Article XX, concerning when the constitution is to take effect, contains material that is redundant, anachronistic, or otherwise susceptible to deletion.

⁴ *Id.* at 1386–87.

⁵ *Id.* at 1392–94.

⁶ *Id.*

⁷ See U.S. CONST. art. I, § 8 (stating the enumerated powers of Congress); see also U.S. CONST. art. II, § 2 (stating the enumerated powers of the President).

⁸ See U.S. CONST. art. I, § 9 (stating prohibitions on the powers of Congress).

⁹ See N.Y. CONST. art. III, § 18 (discussing the powers of the New York State Legislature to convene in special session); N.Y. CONST. art. IV, § 7 (discussing the powers given to the New York State Governor to take action on legislative bills).

the first part of this article was published. In November 2014, New Yorkers adopted an amendment to the state's reapportionment provisions.¹⁰ This amendment established a redistricting commission to draw the state legislative and congressional district lines every ten years beginning in 2021.¹¹ The commission consists of ten members: two appointed by the temporary president of the Senate, two appointed by the speaker of the Assembly, two appointed by the minority leader of the Senate, two appointed by the minority leader of the Assembly, and two appointed by the other eight members.¹² The commission is to submit a redistricting plan to the legislature, which the legislature must vote on without amendments.¹³ If the legislature does not adopt the first plan (by a majority determined by the commonality of the political affiliation of the legislative leadership in the two houses and the margin by which the plan received approval by the commission),¹⁴ the

¹⁰ N.Y. CONST. art. III, § 5-b. The reapportionment provisions are addressed in Part I of this Article. Galie & Bopst, *supra* note 2, at 1407–14.

¹¹ N.Y. CONST. art. III, § 5-b.

¹² *Id.*

¹³ *Id.* § 4(b).

¹⁴ *Id.* In order for the redistricting commission to approve a plan, the article provides that the following criteria must be met:

(1) In the event that the speaker of the assembly and the temporary president of the senate are members of the same political party, approval of a redistricting plan and implementing legislation by the commission for submission to the legislature shall require the vote in support of its approval by at least seven members including at least one member appointed by each of the legislative leaders.

(2) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, approval of a redistricting plan by the commission for submission to the legislature shall require the vote in support of its approval by at least seven members including at least one member appointed by the speaker of the assembly and one member appointed by the temporary president of the senate.

Id. § 5-b(f)(1)–(2). In the event a plan is not approved by the requirements specified in that section, a default mechanism goes into effect, which provides:

(g) In the event that the commission is unable to obtain seven votes to approve a redistricting plan on or before January first in the year ending in two or as soon as practicable thereafter, the commission shall submit to the legislature that redistricting plan and implementing legislation that garnered the highest number of votes in support of its approval by the commission with a record of the votes taken. In the event that more than one plan received the same number of votes for approval, and such number was higher than that for any other plan, then the commission shall submit all plans that obtained such number of votes. The legislature shall consider and vote upon such implementing legislation in accordance with the voting rules set forth in subdivision (b) of section four of this article.

Id. § 5-b(g).

Once a plan is submitted by the redistricting commission to the legislature, the legislature then has certain majority requirements, which are dependent on the leadership of the houses and whether the plan was submitted pursuant to section 5-b(f) (with the requisite majority) or section 5-b(g) (without the requisite majority). Section 4(b) provides:

commission must submit a second plan, which the legislature must vote on without amendments.¹⁵ If the legislature does not adopt the second plan (by the applicable majority), the legislature may make whatever amendments to the plan it wishes.¹⁶ The amendment also provides that “[d]istricts shall not be drawn to discourage competition or for the purpose of favoring . . . incumbents or other [political candidates].”¹⁷

While reasonable minds may differ over the merits of the reapportionment amendment,¹⁸ one of its major shortcomings is that it was added to already contradictory and confusing sections. The amendment was not designed to nor does it make sense of the existing language. It does not remove any of the sections found unconstitutional half a century ago.¹⁹ Instead, it adds additional

All votes by the senate or assembly on any redistricting plan legislation pursuant to this article shall be conducted in accordance with the following rules:

(1) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, approval of legislation submitted by the independent redistricting commission pursuant to subdivision (f) of section five-b of this article shall require the vote in support of its passage by at least a majority of the members elected to each house.

(2) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, approval of legislation submitted by the independent redistricting commission pursuant to subdivision (g) of section five-b of this article shall require the vote in support of its passage by at least sixty percent of the members elected to each house.

(3) In the event that the speaker of the assembly and the temporary president of the senate are members of the same political party, approval of legislation submitted by the independent redistricting commission pursuant to subdivision (f) or (g) of section five-b of this article shall require the vote in support of its passage by at least two-thirds of the members elected to each house.

Id. § 4(b). Predictably, if the legislature rejects both of the commission’s plans and proposes its own plan, that plan only needs to be approved through the normal legislative process—that is, by a majority of the elected members of each house.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* § 4(c)(5).

¹⁸ See, e.g., Editorial, *Ballot Measures for Nov. 4*, N.Y. TIMES, Oct. 29, 2014, at A28 (“This is a phony reform that purports to establish a new system of drawing legislative districts. . . . The net result would be to reinforce, not reform, a system that virtually guarantees job security for incumbents and discourages competition.”); Sally Robinson, Letter to the Editor, *Redistricting in New York*, N.Y. TIMES, July 15, 2014, at A24 (“A vote for this amendment will be a vote for a fairer redistricting process.”); Editorial, *State Propositions: Redistricting Effort Better than Nothing; School Borrowing Doesn’t Fill a Vital Need*, BUFF. NEWS, Oct. 23, 2014, at A10 (“[The amendment is] a deceptive and insufficient measure that would change redistricting without requiring lawmakers to give up their pernicious influence over the process.”).

¹⁹ See *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653–654 (1964) (holding that both senate and assembly apportionment schemes violated the requirement of the Equal Protection Clause that seats in a state legislature be apportioned substantially on a population basis); *In re Orans*, 206 N.E.2d 854, 859 (N.Y. 1965) (“[T]he fourth paragraph of section 5 of article III[,] giving local legislatures the power to draw Assembly district lines in counties having more

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requirements to a landscape already studded with provisions that have been superseded by federal constitutional and statutory mandates.

With those thoughts in mind, we now examine specific parts of the public policy sections of the New York Constitution that we believe are appropriate candidates for removal, modification, or rearrangement.

II. CLEANING HOUSE ROOM BY ROOM

A. Article VII—State Finances

It is no surprise that a state the size and complexity of New York has a fairly intricate financial structure and that the state constitution lays out provisions governing its operation. The first part of the state finances article details the state budget process,²⁰ provides conditions for the state to borrow money,²¹ and prohibits certain gifts and loans of state money and credit.²² In contrast to the necessary and substantive nature of these sections, however, are three sections totaling approximately 1200 words that concern authorizations for bonds that have long since been retired.²³ Not only could these sections be excised from the document without any impact on the state, future authorizations could include language allowing them either to be removed from the constitution by vote of the legislature or to be deleted automatically upon retirement of any bonds issued pursuant to the authorization.²⁴ These “hangers-on” are described in more detail below.

than one Assembly district[, is invalidated].”).

²⁰ See N.Y. CONST. art. VII, §§ 1–4.

²¹ See *id.* §§ 11–12.

²² See *id.* § 8.

²³ *Id.* §§ 14, 18–19; PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 231, 232 (2d ed. 2012).

²⁴ When it adopted its most recent judiciary article in 1972, Florida implemented a provision to allow its legislature to eliminate certain legacy material concerning its court system once the transition was complete. It provides:

Deletion of obsolete schedule items.— The legislature shall have power, by concurrent resolution, to delete from this article any subsection of this section 20 including this subsection, when all events to which the subsection to be deleted is or could become applicable have occurred. A legislative determination of fact made as a basis for application of this subsection shall be subject to judicial review.

FLA. CONST. art. V, § 20(i).

1. Article VII, Section 14

Section 14 of article VII, originally adopted in 1925,²⁵ had the laudable purpose of eliminating railroad crossings at grade. The provision as it currently exists reads:

The legislature may authorize by law the creation of a debt or debts of the state, not exceeding in the aggregate three hundred million dollars, to provide moneys for the elimination, under state supervision, of railroad crossings at grade within the state, and for incidental improvements connected therewith as authorized by this section. The provisions of this article, not inconsistent with this section, relating to the issuance of bonds for a debt or debts of the state and the maturity and payment thereof, shall apply to a state debt or debts created pursuant to this section; except that the law authorizing the contracting of such debt or debts shall take effect without submission to the people pursuant to section eleven of this article. The aggregate amount of a state debt or debts which may be created pursuant to this section shall not exceed the difference between the amount of the debt or debts heretofore created or authorized by law, under the provisions of section 14 of article VII of the constitution in force on July first, nineteen hundred thirty-eight, and the sum of three hundred million dollars.

The expense of any grade crossing elimination the construction work for which was not commenced before January first, nineteen hundred thirty-nine, including incidental improvements connected therewith as authorized by this section, whether or not an order for such elimination shall theretofore have been made, shall be paid by the state in the first instance, but the state shall be entitled to recover from the railroad company or companies, by way of reimbursement (1) the entire amount of the railroad improvements not an essential part of elimination, and (2) the amount of the net benefit to the company or companies from the elimination exclusive of such railroad improvements, the amount of such net benefit to be adjudicated after the completion of the work in the manner to be prescribed by law, and in no event to exceed fifteen per

²⁵ N.Y. CONST. art. VII, § 14.

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centum of the expense of the elimination, exclusive of all incidental improvements. The reimbursement by the railroad companies shall be payable at such times in such manner and with interest at such rate as the legislature may prescribe.

The expense of any grade crossing elimination the construction work for which was commenced before January first, nineteen hundred thirty-nine, shall be borne by the state, railroad companies, and the municipality or municipalities in the proportions formerly prescribed by section 14 of article VII of the constitution in force on July first, nineteen hundred thirty-eight, and the law or laws enacted pursuant to its provisions, applicable to such elimination, and subject to the provisions of such former section and law or laws, including advances in aid of any railroad company or municipality, although such elimination shall not be completed until after January first, nineteen hundred thirty-nine.

A grade crossing elimination the construction work for which shall be commenced after January first, nineteen hundred thirty-nine, shall include incidental improvements rendered necessary or desirable because of such elimination, and reasonably included in the engineering plans therefor. Out of the balance of all moneys authorized to be expended under section 14 of article VII of the constitution in force on July first, nineteen hundred thirty-eight, and remaining unexpended and unobligated on such date, fifty million dollars shall be deemed segregated for grade crossing eliminations and incidental improvements in the city of New York and shall be available only for such purposes until such eliminations and improvements are completed and paid for.

Notwithstanding any of the foregoing provisions of this section, the legislature is hereby authorized to appropriate, out of the proceeds of bonds now or hereafter sold to provide moneys for the elimination of railroad crossings at grade and incidental improvements pursuant to this section, sums not exceeding in the aggregate sixty million dollars for the construction and reconstruction of state highways and parkways.²⁶

²⁶ *Id.*

This section was the successor to several previous amendments designed to eliminate railroad grade crossings. These amendments had been largely unsuccessful because they had set the railroads' share of the elimination cost at fifty percent.²⁷ This section originally required the State to absorb the entire cost of all projects begun after January 1, 1939, and allowed the State to seek no more than fifteen percent of the expense involved for those improvements, which benefitted the railroad companies.²⁸ The section was amended in 1941 to allow a certain amount of the bond issued to be "used for improvements to highways and parkways."²⁹

Whatever the purpose of the section, it is now obsolete; the bonds authorized by this section were retired during the 1987–1988 fiscal year.³⁰ Nonetheless, this provision remains a 644-word history lesson that clutters an already stuffed document. It should be deleted in its entirety.

2. Article VII, Section 18

Section 18 of the state finances article allows the legislature to create debt in an amount of no more than four hundred million dollars to pay a bonus to veterans of World War II.³¹ It reads:

The legislature may authorize by law the creation of a debt or debts of the state to provide for the payment of a bonus to each male and female member of the armed forces of the United States, still in the armed forces, or separated or discharged under honorable conditions, for service while on active duty with the armed forces at any time during the period from December seventh, nineteen hundred forty-one to and including September second, nineteen hundred forty-five, who was a resident of this state for a period of at least six months immediately prior to his or her enlistment, induction or call to active duty. The law authorizing the creation of the debt shall provide for payment of such bonus to the next of kin of each male and female member of the armed forces who, having been a resident of this state for a period of six months immediately prior to his or her enlistment, induction or call to active duty, died while on

²⁷ GALIE & BOPST, *supra* note 23, at 231.

²⁸ *Id.*

²⁹ *Id.* at 231–32.

³⁰ *Id.* at 232.

³¹ N.Y. CONST. art. VII, § 18.

active duty at any time during the period from December seventh, nineteen hundred forty-one to and including September second, nineteen hundred forty-five; or who died while on active duty subsequent to September second, nineteen hundred forty-five, or after his or her separation or discharge under honorable conditions, prior to receiving payment of such bonus. An apportionment of the moneys on the basis of the periods and places of service of such members of the armed forces shall be provided by general laws. The aggregate of the debts authorized by this section shall not exceed four hundred million dollars. The provisions of this article, not inconsistent with this section, relating to the issuance of bonds for a debt or debts of the state and the maturity and payment thereof, shall apply to a debt or debts created pursuant to this section; except that the law authorizing the contracting of such debt or debts shall take effect without submission to the people pursuant to section eleven of this article.

Proceeds of bonds issued pursuant to law, as authorized by this section as in force prior to January first, nineteen hundred fifty shall be available and may be expended for the payment of such bonus to persons qualified therefor as now provided by this section.³²

The State has traditionally recognized the contributions of veterans in times of war by paying them a bonus. When the legislature attempted to pay a bonus to veterans of World War I, the Court of Appeals held it unconstitutional as a loan of the state's credit,³³ which is prohibited by another section of the state finances article.³⁴ To counter the effect of this decision, the constitution was quickly amended in 1923 to allow for the payment of a veterans bonus.³⁵ The provision allowing bonuses for World War I veterans was removed from the constitution by the 1938 constitutional convention, fifteen years after it was inserted.³⁶ The section

³² *Id.*

³³ *People v. Westchester Cnty. Nat'l Bank*, 132 N.E. 241, 246–247 (N.Y. 1921).

³⁴ At the time the *Westchester County National Bank* decision was handed down, the prohibition on gifts and loans of state credit was found in section 1 of article VII. *Id.* It has since been moved to article VII, section 8. GALIE & BOPST, *supra* note 23, at 235.

³⁵ See N.Y. CONST. art. VII, § 13; Peter J. Galie & Christopher Bopst, *Anything Goes: A History of New York's Gift and Loan Clauses*, 75 ALB. L. REV. 2005, 2022 (2011/2012) (“[This amendment] effectively revers[ed] the results of *People v. Westchester County National Bank* . . .”).

³⁶ See N.Y. CONST. art. VII, § 13; Galie & Bopst, *supra* note 35, at 2024 (noting that the

allowing World War II bonuses has much more staying power, and remains in the constitution almost seventy years after its adoption and almost three generations after the bonds authorized by this section were retired in 1958.³⁷ The section serves no current purpose and should be deleted.

3. Article VII, Section 19

Section 19 of the article contains the third of the triad of state bonds that have been retired but remain in the constitution. This provision, which authorizes the State to incur debt for expansion of the state university, provides:

The legislature may authorize by law the creation of a debt or debts of the state, not exceeding in the aggregate two hundred fifty million dollars, to provide moneys for the construction, reconstruction, rehabilitation, improvement and equipment of facilities for the expansion and development of the program of higher education provided and to be provided at institutions now or hereafter comprised within the state university, for acquisition of real property therefor, and for payment of the state's share of the capital costs of locally sponsored institutions of higher education approved and regulated by the state university trustees. The provisions of this article, not inconsistent with this section, relating to the issuance of bonds for a debt or debts of the state and the maturity and payment thereof, shall apply to a state debt or debts created pursuant to this section; except that the law authorizing the contracting of such debt or debts shall take effect without submission to the people pursuant to section eleven of this article.³⁸

The bonds authorized by this section, issued as part of a commitment to transform the State University of New York into "one of the truly great public universities of the nation,"³⁹ were retired in 2007.⁴⁰ Like the other two sections, the retention of this

Constitutional Convention of 1938 resulted in changes to the state gift and loan clause).

³⁷ Warren Weaver Jr., *98.5 Million Gain in Tax Revenue Expected with End of Abatement*, N.Y. TIMES, Jan. 28, 1958, at 21 (noting the retirement on January 1, 1958, of bonds issued in 1948 to fund a four hundred million dollar World War II bonus).

³⁸ N.Y. CONST. art. VII, § 19.

³⁹ Henry Steck, *Contested Futures*, in GOVERNING NEW YORK STATE 293 (Robert F. Pecorella & Jeffrey M. Stonecash eds., 5th ed. 2006).

⁴⁰ See STATE OF N.Y. OFFICE OF THE STATE COMPTROLLER, COMPTROLLER'S ANNUAL REPORT TO THE LEGISLATURE ON STATE FUNDS CASH BASIS OF ACCOUNTING 99 (Mar. 31,

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provision gives no indication of the current financial picture of the state and adds nothing to the state constitution other than confusion and additional verbiage.

B. Article VIII—Local Finances

The local finances article, article VIII, contains complex, detailed restrictions on the borrowing and taxing powers of local governments, followed by a significant number of exceptions to these restrictions.⁴¹ The article is longer than the U.S. Constitution, contains sentences of over 150 words, and, to add insult to injury, has been largely ineffective in providing a fiscally sound basis for municipal finance.⁴² Such was the judgment of the Staff Report on Constitutional Debt Limits for Local Governments produced by the Temporary Commission on the Revision and Simplification of the Constitution.⁴³ The report concluded that the introduction of so much transitory material by successive amendments “lengthened the text of the provisions . . . making [Article VIII] correspondingly more complicated. . . . Most of the changes . . . were based on conjectures, rather than on tested data . . . *with the wholly unexpected result of making the debt limits completely meaningless for most localities.*”⁴⁴

As no comprehensive overhaul of this article has been undertaken since the 1960 report was issued, it is no surprise that it contains some provisions that are ripe for removal. Prime targets for excision are described below.

1. Article VIII, Section 2-a

Section 2-a provides that local governments may pool their efforts to jointly provide certain municipal services (e.g., water supply and sewage and drainage facilities) without running afoul of the restrictions against gifts and loans of municipal money and credit

2007), available at <http://osc.state.ny.us/finance/cashrpt/annual2007.pdf> (“As of March 31, 2007, there are no loans outstanding.”).

⁴¹ N.Y. CONST. art. VIII.

⁴² GALIE & BOPST, *supra* note 23, at 238; *see, e.g.*, N.Y. CONST. art. VIII, § 1, para. 2 (containing a sentence of 205 words); *see also* Galie & Bopst, *supra* note 2, at 1391–92 (“Currently, sixteen states have constitutions containing over forty thousand words, compared to the U.S. Constitution’s 7,591 words.”).

⁴³ STATE OF N.Y. TEMPORARY COMM’N ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION, BACKGROUND STUDIES ON TAXATION AND FINANCE, N.Y. STAFF REPORT NO. 32, at 76 (1960).

⁴⁴ *Id.* (emphasis added).

found in section 1 of the article.⁴⁵ Section 2-a provides:

Notwithstanding the provisions of section one of this article, the legislature by general or special law and subject to such conditions as it shall impose:

A. May authorize any county, city, town or village or any county or town on behalf of an improvement district to contract indebtedness to provide a supply of water, in excess of its own needs, for sale to any other public corporation or improvement district;

B. May authorize two or more public corporations and improvement districts to provide for a common supply of water and may authorize any such corporation, or any county or town on behalf of an improvement district, to contract joint indebtedness for such purpose or to contract indebtedness for specific proportions of the cost;

C. May authorize any county, city, town or village or any county or town on behalf of an improvement district to contract indebtedness to provide facilities, in excess of its own needs, for the conveyance, treatment and disposal of sewage from any other public corporation or improvement district;

D. May authorize two or more public corporations and improvement districts to provide for the common conveyance, treatment and disposal of sewage and may authorize any such corporation, or any county or town on behalf of an improvement district, to contract joint indebtedness for such purpose or to contract indebtedness for specific proportions of the cost;

E. May authorize any county, city, town or village or any county or town on behalf of an improvement district to contract indebtedness to provide facilities, in excess of its own needs, for drainage purposes from any other public corporation or improvement district.

F. May authorize two or more public corporations and improvement districts to provide for a common drainage system and may authorize any such corporation, or any county or town on behalf of an improvement district, to contract joint indebtedness for such purpose or to contract indebtedness for specific proportions of the cost.

⁴⁵ See N.Y. CONST. art. VIII, § 1.

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Indebtedness contracted by a county, city, town or village pursuant to this section shall be for a county, city, town or village purpose, respectively. In ascertaining the power of a county, city, town or village to contract indebtedness, any indebtedness contracted pursuant to paragraphs A and B of this section shall be excluded.

The legislature shall provide the method by which a fair proportion of joint indebtedness contracted pursuant to paragraphs D and F of this section shall be allocated to any county, city, town or village.

The legislature by general law in terms and in effect applying alike to all counties, to all cities, to all towns and/or to all villages also may provide that all or any part of indebtedness contracted or proposed to be contracted by any county, city, town or village pursuant to paragraphs D and F of this section for a revenue producing public improvement or service may be excluded periodically in ascertaining the power of such county, city, town or village to contract indebtedness. The amount of any such exclusion shall have a reasonable relation to the extent to which such public improvement or service shall have yielded or is expected to yield revenues sufficient to provide for the payment of the interest on and amortization of or payment of indebtedness contracted or proposed to be contracted for such public improvement or service, after deducting all costs of operation, maintenance and repairs thereof. The legislature shall provide the method by which a fair proportion of joint indebtedness proposed to be contracted pursuant to paragraphs D and F of this section shall be allocated to any county, city, town or village for the purpose of determining the amount of any such exclusion. The provisions of paragraph C of section five and section ten-a of this article shall not apply to indebtedness contracted pursuant to paragraphs D and F of this section.

The legislature may provide that any allocation of indebtedness, or determination of the amount of any exclusion of indebtedness, made pursuant to this section shall be conclusive if made or approved by the state comptroller.⁴⁶

⁴⁶ *Id.*

Significant portions of this section have been made superfluous not by intervening court decisions or the passage of time, but by the adoption of additional constitutional provisions that provide the legislature with broader authority than that conveyed by this section. For example, section 1 of the same article, as amended in 1959, provides:

[T]wo or more such units may join together pursuant to law in providing any municipal facility, service, activity or undertaking which each of such units has the power to provide separately. Each such unit may be authorized by the legislature to contract joint or several indebtedness, pledge its or their faith and credit for the payment of such indebtedness for such joint undertaking and levy real estate or other authorized taxes or impose charges therefor subject to the provisions of this constitution otherwise restricting the power of such units to contract indebtedness or to levy taxes on real estate. The legislature shall have power to provide by law for the manner and the proportion in which indebtedness arising out of such joint undertakings shall be incurred by such units and shall have power to provide a method by which such indebtedness shall be determined, allocated and apportioned among such units and such indebtedness treated for purposes of exclusion from applicable constitutional limitations, provided that in no event shall more than the total amount of indebtedness incurred for such joint undertaking be included in ascertaining the power of all such participating units to incur indebtedness. Such law may provide that such determination, allocation and apportionment shall be conclusive if made or approved by the comptroller.⁴⁷

Section 1, allowing municipalities to join together to provide “any municipal facility, service, activity or undertaking which each of such units has the power to provide separately,” does not restrict the legislature to certain subject areas as does section 2-a.⁴⁸ Thus, those portions of section 2-a that allow joint collaboration for specific purposes, such as to provide a water supply or sewage disposal, have been supplanted by the more general grant of authority.⁴⁹

⁴⁷ *Id.* § 1.

⁴⁸ *Id.* §§ 1, 2-a.

⁴⁹ Compare *id.* § 2-a (B), (D) (allowing municipalities to contract for joint indebtedness for

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The duplication between section 1 and section 2-a does not end there. Both sections give the legislature wide authority to afford the comptroller the power to determine, allocate, and apportion the debt among the respective municipal entities.⁵⁰ Even when a portion of section 2-a is not directly superseded by section 1, it is sometimes superseded by a different section: one part of section 2-a not superseded by section 1 is the part that provides that “[i]n ascertaining the power of a county, city, town or village to contract indebtedness, any indebtedness contracted pursuant to paragraphs A and B of . . . section [2-a (related to the provision of a common water supply)] shall be excluded [from the debt limits of a municipality].”⁵¹ However, such exclusionary language is found in section 5 of the article.⁵²

Because paragraphs B, D, and F of section 2-a and all of the material after paragraph F have been superseded by other parts of the article, these portions could be removed.

2. Article VIII, Section 6

The local finance article contains limits on the amount of debt a municipality may incur; these limits are calculated as a “percentage[] of the average full valuation of taxable real estate of the county, city, town, village or school district.”⁵³ The percentages vary: New York City, for example, has a limit of ten percent of its average full valuation;⁵⁴ other cities having a population of 125,000 or more have a nine-percent limit;⁵⁵ cities with a population of less than 125,000 are limited to seven percent.⁵⁶ The reason behind these limits is obvious: to prevent a municipality from incurring debt beyond its means.

Complicating the pursuit of this objective is the number of exceptions to these limits and the interplay of these constitutional limits with statutory law and even executive interpretations.

a common water supply and for sewage services), *with id.* § 1 (allowing municipalities to contract for joint indebtedness for any municipal service).

⁵⁰ *Id.* §§ 1, 2-a.

⁵¹ *Id.* § 2-a.

⁵² *Id.* § 5(B) (“In ascertaining the power of a county, city, town or village to contract indebtedness, there shall be excluded . . . [i]ndebtedness heretofore or hereafter contracted to provide for the supply of water.”).

⁵³ *Id.* § 4. This section also treats separately debt incurred by a city for education purposes and the treatment varies depending on the population of the city involved. *Id.*

⁵⁴ *Id.* § 4(c).

⁵⁵ *Id.* § 4(d).

⁵⁶ *Id.* § 4(e).

Reading section 6 is an exercise that tries the patience of any constitutional scholar. It provides:

In ascertaining the power of the cities of Buffalo, Rochester and Syracuse to contract indebtedness, in addition to the indebtedness excluded by section 5 of this article, there shall be excluded:

Indebtedness not exceeding in the aggregate the sum of ten million dollars, heretofore or hereafter contracted by the city of Buffalo or the city of Rochester and indebtedness not exceeding in the aggregate the sum of five million dollars heretofore or hereafter contracted by the city of Syracuse for so much of the cost and expense of any public improvement as may be required by the ordinance or other local law therein assessing the same to be raised by assessment upon local property or territory.⁵⁷

This provision, adopted in 1927, was designed to give three of the state's largest cities some additional borrowing power for public improvements.⁵⁸ The amount of the exclusions show their dated nature: of the three municipalities to which this section pertains, the one with the smallest current budget, Rochester, has an annual budget of approximately five hundred million dollars,⁵⁹ dwarfing the size of the exemption.

Of greater significance, the exemption has been used up. Although the language of the provision, "heretofore or hereafter contracted,"⁶⁰ implies that this is a continuing aggregate exclusion, the legislature has decided otherwise. In the Local Finance Law, the legislature has provided that this exclusion applies "to the extent that such outstanding indebtedness together with other indebtedness initially contracted therefor from time to time after January [1, 1928,] and since retired aggregates," a sum not in excess of ten million dollars for Buffalo and Rochester and five

⁵⁷ *Id.* § 6.

⁵⁸ GALIE & BOPST, *supra* note 23, at 256.

⁵⁹ See CITY OF ROCHESTER, NY, 2014–2015 BUDGET ii (2014), available at <http://www.cityofrochester.gov/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8589962950&libID=8589962935> (showing the approved 2014–2015 annual budget to be \$499,950,200); see also CITY OF BUFFALO, COMBINED SUMMARY STATEMENT 2014–2015 ADOPTED BUDGET (2014), available at https://www.ci.buffalo.ny.us/files/1_2_1/Mayor/2014-2015AdoptedBudget/Section_1_GF_Summary_Statements_Graphs_revised.pdf (showing adopted annual budget to be \$1,418,208,012); CITY OF SYRACUSE, BUDGET FOR THE CITY OF SYRACUSE iv (2014), available at http://www.syracuse.ny.us/uploadedFiles/Departments/Budget/Content/Budget_Documents/2014-15%20Budget.pdf (showing the approved 2014–2015 annual budget to be \$664,168,598).

⁶⁰ N.Y. CONST. art. VIII, § 6.

million dollars for the Syracuse.⁶¹ The same section provides that “[a]ny indebtedness thereafter contracted for such purposes in excess of such sums shall not be so excluded.”⁶² The State Comptroller’s Office has determined this language to mean that the exclusions are one-time-only exemptions, and can only be relied upon to the extent that the total amount of indebtedness contracted since 1928 does not exceed the amounts specified in the constitution.⁶³ Each of the municipalities has used up the amount of its exclusion, and the legislature has chosen not to amend the Local Finance Law to make the exemption a recurring one.⁶⁴ Given the more permissive exclusions that exist in other sections of the constitution,⁶⁵ the possibility of the legislature authorizing ongoing exemptions for the relatively insignificant amounts found in this section is remote. This section could be removed from the constitution with no impact on the state or local governments.

3. Article VIII, Section 7(A)–(D)

Section 7 of article VIII contains numerous exclusions from the municipal debt limit for New York City.⁶⁶ The exceptions contained in subsections B through D of this section are “one time only” exceptions, meaning that once the city issues, exempts, and retires its indebtedness, it cannot exempt additional debt issued for the same purpose.⁶⁷ The section provides:

In ascertaining the power of the city of New York to contract indebtedness, in addition to the indebtedness excluded by section five of this article, there shall be excluded:

A. Indebtedness contracted prior to the first day of January, nineteen hundred ten, for dock purposes proportionately to the extent to which the current net

⁶¹ N.Y. LOCAL FIN. LAW § 105.00 (McKinney 2015).

⁶² *Id.*

⁶³ N.Y. State Comptroller, Op. State Comptroller, 1990 No. 90-23, at *1 (1990), *available at* 1990 WL 126162.

⁶⁴ *See* LOCAL FIN. §105.00 (noting that any funds spent beyond the exemption are not excluded).

⁶⁵ *See infra* note 69–71 and accompanying text.

⁶⁶ N.Y. CONST. art. VIII, § 7.

⁶⁷ *Id.*; *see also* GALIE & BOPST, *supra* note 23, at 257 (“The exclusions found in subsections (B), (C), and (D) are all one-time exemptions, not permanent increases in the borrowing limit.”). The specific language of these exceptions often allows refunding of the excluded debt; that is, the premature calling of debt securities from debt holders in order to reissue new debt at a lower coupon rate. N.Y. CONST. art. VIII, § 7(B)–(D).

revenues received by the city therefrom shall meet the interest on and the annual requirements for the amortization of such indebtedness. The legislature shall prescribe the method by which and the terms and conditions under which the amount of any such indebtedness to be so excluded shall be determined, and no such indebtedness shall be excluded except in accordance with such determination. The legislature may confer appropriate jurisdiction on the appellate division of the supreme court in the first judicial department for the purpose of determining the amount of any such indebtedness to be so excluded.

B. The aggregate of indebtedness initially contracted from time to time after January first, nineteen hundred twenty-eight, for the construction or equipment, or both, of new rapid transit railroads, not exceeding the sum of three hundred million dollars. Any indebtedness thereafter contracted in excess of such sum for such purposes shall not be so excluded, but this provision shall not be construed to prevent the refunding of any of the indebtedness excluded hereunder.

C. The aggregate of indebtedness initially contracted from time to time after January first, nineteen hundred fifty, for the construction, reconstruction and equipment of city hospitals, not exceeding the sum of one hundred fifty million dollars. Any indebtedness thereafter contracted in excess of such sum for such purposes, other than indebtedness contracted to refund indebtedness excluded pursuant to this paragraph, shall not be so excluded.

D. The aggregate of indebtedness initially contracted from time to time after January first, nineteen hundred fifty-two, for the construction and equipment of new rapid transit railroads, including extensions of and interconnections with and between existing rapid transit railroads or portions thereof, and reconstruction and equipment of existing rapid transit railroads, not exceeding the sum of five hundred million dollars. Any indebtedness thereafter contracted in excess of such sum for such purposes, other than indebtedness contracted to refund indebtedness excluded pursuant to this paragraph, shall not be so excluded.⁶⁸

⁶⁸ N.Y. CONST. art. VIII, § 7(A)–(D).

The debts excluded from the municipal debt limits by this section enabled the city to undertake public projects such as dock upgrades, rapid transit improvements, and hospital construction that would have consumed significant portions of the city’s debt limit had they not been exempted.⁶⁹ Debts incurred under these exclusions are all well over fifty years old and have long since been retired.⁷⁰ Unlike the limitations for Buffalo, Rochester, and Syracuse described above, these exclusions are facially limited to a single occurrence.⁷¹ These exceptions serve no purpose other than to confound the reader and to add approximately 340 words of girth to an already weighty constitution. These sections should be deleted.

4. Article VIII, Section 7-a(A)

Section 7-a was added to the local finance article by the 1938 Constitutional Convention.⁷² It allowed an exclusion of three hundred and fifteen million dollars for the acquisition by New York City of railroads and their attendant facilities.⁷³ This section provides:

In ascertaining the power of the city of New York to contract indebtedness, in addition to the indebtedness excluded under any other section of this constitution, there shall be excluded:

A. The aggregate of indebtedness initially contracted from time to time by the city for the acquisition of railroads and facilities or properties used in connection therewith or rights therein or securities of corporations owning such railroads, facilities or rights, not exceeding the sum of three hundred fifteen million dollars. Provision for the amortization of such indebtedness shall be made either by the establishment and

⁶⁹ See N.Y. CONST. art. VIII, § 7(A)–(D); see also STATE OF N.Y. TEMPORARY COMM’N ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION, SIMPLIFYING A COMPLEX CONSTITUTION, N.Y. LEG. DOC. NO. 14, at 76 (1961) (noting that the exemptions in section 7 allowed the city to borrow \$1,440,100,000 outside the debt limit for docks, transit, city hospitals, and schools).

⁷⁰ See N.Y. LOCAL FIN. LAW § 11.00(a)(7)–(8), (75) (McKinney 2015) (limiting period of indebtedness for dock, rapid transit, and hospital construction to fifty years, forty years, and thirty years, respectively); see also STATE OF N.Y. TEMPORARY STATE COMM’N ON THE CONSTITUTIONAL CONVENTION: LOCAL FINANCE 102 (1967) (“For example, Section 7(A) provides for the exemption of certain bonds for New York City docks issued before 1910, all of which have been paid.”).

⁷¹ N.Y. CONST. art. VIII, § 7(B)–(D); see *supra* text accompanying note 57.

⁷² Frank J. Macchiarola, *Local Finances Under the New York State Constitution with an Emphasis on New York City*, 35 FORDHAM L. REV. 263, 264 & n.2 (1966).

⁷³ N.Y. CONST. art. VIII, § 7-a(A).

maintenance of a sinking fund therefor or by annual payment of part thereof, or by both such methods. Any indebtedness thereafter contracted in excess of such sum for such purposes shall not be so excluded, but this provision shall not be construed to prevent the refunding of any such indebtedness.⁷⁴

Like the other debt limit exclusions that have long since expired, this provision should be jettisoned in order to make the constitution more accurate, timely, and to better depict what is represented within.

5. Article VIII, Section 8

This section is what is known as a “saving clause.”⁷⁵ It provides “[n]o indebtedness of a county, city, town, village or school district valid at the time of its inception shall thereafter become invalid by reason of the operation of any of the provisions of this article.”⁷⁶

This section is designed to ensure that debts that were valid at the time they were incurred will not be deemed invalid by operation of the article.⁷⁷ Perhaps this section was necessary at one time to ensure that pre-existing indebtedness would not be invalidated, requiring local governments to have to scramble to undertake emergency measures. However, as any debt incurred before the enactment of this article is long since retired, the provision is superfluous and should be deleted.⁷⁸

C. Article X—Corporations

The corporations article,⁷⁹ which was first inserted in the constitution by the 1846 Constitutional Convention, is a prime

⁷⁴ *Id.*

⁷⁵ BLACK’S LAW DICTIONARY 1544 (10th ed. 2014) (“A saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost.”)

⁷⁶ N.Y. CONST. art. VIII, § 8.

⁷⁷ GALIE & BOPST, *supra* note 23, at 259.

⁷⁸ Some may argue that the continued existence of this section is necessary in the event a future amendment further restricts the ability of a municipality to borrow money. This scenario is unlikely, however, as the amendments to this article during the last seventy-five years have served only to expand, not restrict, the ability of a municipality to borrow money and to make gifts and loans of public money and credit. Galie & Bopst, *supra* note 35, at 2026–27. Moreover, if such a restrictive amendment were to be passed, the legislature or constitutional convention could then add savings language to protect existing debts, where it would serve a purpose, rather than acting as it does now—as a solution in search of a problem.

⁷⁹ N.Y. CONST. art. X.

candidate for reduction. “The article regulates the chartering of corporations, generally barring special acts that grant exclusive privileges to particular organizations, and defines the liability of these entities.”⁸⁰ Adopted in response to particular problems and evils of the day, such as corruption in the granting of corporate charters, much of the language of this article has been made obsolete by the advent of general corporate laws.⁸¹

Over a half-century ago, the Inter-Law School Committee concluded: “Not one segment of Article X that deals in general with non-banking corporations fills an essential role today.”⁸² That statement is as accurate today as when the report was issued. In an abundance of caution, the committee said that if complete removal is thought too bold, the issues addressed in article X could be dealt with in a single declarative sentence: “The legislature may provide by law for the organization of corporations and for obtaining corporate powers, subject, however, to repeal or alteration at the will of the legislature.”⁸³

Other large states have done away with much of their constitutional ink dedicated to corporations. During the last fifty years, Texas has repealed five of the seven sections originally contained within its article governing private corporations; the entire article, not counting titles, is now less than forty words.⁸⁴ Florida’s most recent constitution, adopted in 1968, has no article or specific sections dedicated to corporations.⁸⁵ It is time New York did the same and eliminated this unnecessary material from its state constitution.

1. Article X, Section 1

Section 1 of the corporations article was meant to combat the evils of special incorporation laws granting privileges to individuals and

⁸⁰ GALIE & BOPST, *supra* note 23, at 281.

⁸¹ *See, e.g.*, N.Y. BUS. CORP. LAW §§ 101–2001 (McKinney 2015); N.Y. LTD. LIAB. CO. LAW §§ 101–1403 (McKinney 2015); N.Y. NOT-FOR-PROFIT CORP. LAW §§ 101–1617 (McKinney 2015).

⁸² INTER-LAW SCH. COMM. REPORT, *supra* note 1, at 108.

⁸³ *Id.* at 109.

⁸⁴ TEX. CONST. art. XII. The article provides in toto:

§ 1. Creation by General Laws. No private corporation shall be created except by general laws.

§ 2. General Laws to be Enacted; Protection of Public and Stockholders. General laws shall be enacted providing for the creation of private corporations, and shall therein provide fully for the adequate protection of the public and of the individual stockholders.

TEX. CONST. art. XII, §§ 1–2.

⁸⁵ *See generally* FLA. CONST.

refusing them to others.⁸⁶ It provides:

Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.⁸⁷

At the time this section was adopted, incorporation required a two-thirds vote of the legislature.⁸⁸ This section both made incorporation more accessible and removed a welter of special charter requests from the business of the legislature.⁸⁹ In the electronic age, there is no reason for it. The notion that an incorporator would bypass the state's general corporate laws, which provide for quick incorporation with very little effort, and attempt to lobby the legislature to enact a statute granting corporate status, is highly improbable. Moreover, the current section would allow precisely that, if the incorporator could establish to the satisfaction of the legislature that such special incorporation is necessary.⁹⁰

Concerning the creation of municipal corporations, the language allowing some is superfluous, as the power of the legislature to create these corporations is undisputed and was considered so even in 1846.⁹¹ So the goal of this clause, permitting the legislature to specifically charter municipal purposes, would have been achieved had the constitution remained mute on the point. Although the first sentence of the section should be repealed, a plausible argument exists that the second sentence still continues to serve a purpose and its language should be modified to reflect the deletion of the first. Inserted to guard against arguments similar to those prevailing in *Trustees of Dartmouth College v. Woodward*⁹² that a corporate charter is a contract between the corporation and the State,⁹³ this language has been mooted by general statutes that now provide for the voluntary and involuntary dissolution of both profit

⁸⁶ GALIE & BOPST, *supra* note 23, at 282.

⁸⁷ N.Y. CONST. art. X, § 1.

⁸⁸ N.Y. CONST. of 1821, art. VII, § 9.

⁸⁹ GALIE & BOPST, *supra* note 23, at 282.

⁹⁰ The language of the section requires that to obtain special incorporation, it must only be shown that the objects of the corporation cannot be obtained under general laws, "*in the judgment of the legislature.*" N.Y. CONST. art. X, § 1 (emphasis added). Given this language, a court would likely find that the granting of the special charter itself was evidence that the legislature judged that the objects could not be obtained under general laws.

⁹¹ GALIE & BOPST, *supra* note 23, at 282.

⁹² *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

⁹³ GALIE AND & BOPST, *supra* note 23, at 282.

and nonprofit corporations.⁹⁴ Because actions of the State cannot supersede either the Due Process Clause or Contracts Clause of the U.S. Constitution,⁹⁵ the language of this section cannot save any state action against challenges under either of those sections. Thus, the only possible purpose for this provision would be to serve as a defense to the argument that the repeal of a corporate charter by the legislature violated the *state’s* due process clause.⁹⁶ For this reason, this article takes no opinion on the deletion of this last sentence.

2. Article X, Section 2

Section 2 of the article, concerning individual liability for corporate obligations, provides: “Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law.”⁹⁷

This section is dressed up in anachronistic language: “dues,” as used by the section, means debts, and “corporators” in today’s language would mean incorporators or shareholders.⁹⁸ Originally conceived as a provision to make stockholders personally liable for the debts of the corporation in proportion to the holdings,⁹⁹ the section turns over the responsibility for determining these liabilities to the legislature.¹⁰⁰ The legislature would have this power even in the absence of the authority granted by this section, so the retention of the section is unnecessary.

3. Article X, Section 3

This section prohibits the chartering of banks through special legislation and requires the legislature to conform all charters of savings banks and savings and loan associations to general law:

The legislature shall, by general law, conform all charters of savings banks, savings and loan associations, or

⁹⁴ See N.Y. BUS. CORP. LAW §§ 1001, 1101–1103, 1104-a (McKinney 2015); N.Y. NOT-FOR-PROFIT CORP. LAW §§ 1001–1102 (McKinney 2015).

⁹⁵ U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . .”).

⁹⁶ N.Y. CONST. art. I, § 6.

⁹⁷ *Id.* at art. X, § 2.

⁹⁸ GALIE & BOPST, *supra* note 23, at 283.

⁹⁹ *Id.*

¹⁰⁰ Ultimately, the legislature has only imposed liability on individual shareholders for a very limited number of corporate debts, such as for wages and salaries owed corporate employees. See N.Y. BUS. CORP. LAW § 630(a) (McKinney 2015).

institutions for savings, to a uniformity of powers, rights and liabilities, and all charters hereafter granted for such corporations shall be made to conform to such general law, and to such amendments as may be made thereto. The legislature shall have no power to pass any act granting any special charter for banking purposes; but corporations or associations may be formed for such purposes under general laws.¹⁰¹

The second sentence of this section was added by the Constitutional Convention of 1846, and the first sentence was inserted in 1874.¹⁰² The justification offered by the 1846 Convention for banning special legislation for banks was the same as that of section 1: to prevent corruption in the granting of banking charters.¹⁰³ The special attention paid to banks was the result of numerous bank failures in the first half of the nineteenth century and the role wildcat banking played in precipitating the Panic of 1837.¹⁰⁴ The provision, however, did no more than ratify the legislative program then in place: the Free Banking Act of 1838 had previously “abolished the old system requiring special legislation for each bank charter and in effect introduced competition into banking.”¹⁰⁵

The first sentence of this section, “direct[ing] the legislature to conform all charters of savings banks and institutions for savings to the requirements of other corporate charters,” was necessary at the time it was adopted in 1874 to conform certain financial institutions to the requirements of this section.¹⁰⁶ The intent was to bring these institutions under stricter control.¹⁰⁷ Over a century later, financial institutions are subject to myriad state and federal regulations that are much more demanding than anything provided by this section.¹⁰⁸

Neither of the sentences in this section have any meaningful effect on financial institutions in the State of New York today. They should both be deleted.¹⁰⁹

¹⁰¹ N.Y. CONST. art. X, § 3.

¹⁰² GALIE & BOPST, *supra* note 23, at 283–84.

¹⁰³ *See id.* at 283.

¹⁰⁴ *Id.*

¹⁰⁵ Arthur A. Ekirch, Jr., *Democracy and Laissez Faire: The New York State Constitution of 1846*, 1 J. LIBERTARIAN STUD. 319, 321 (1977).

¹⁰⁶ GALIE & BOPST, *supra* note 23, at 284.

¹⁰⁷ *Id.*

¹⁰⁸ *See, e.g.*, 12 U.S.C. § 1464 (2013); N.Y. BANKING LAW § 375 (McKinney 2015).

¹⁰⁹ Should there be any lingering concerns about the removal of the limitation on

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4. Article X, Section 4

Section 4 of the corporations article defines the term “corporations” and then provides that these entities may sue and be sued like natural persons. It provides:

The term corporations as used in this section and in sections 1, 2 and 3 of this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.¹¹⁰

The language of this section more closely resembles that of a corporations code than a constitution. In light of the various corporate laws that the legislature subsequently adopted, this section should be deleted.

5. Article X, Section 6

Part of the difficulty in reading and understanding the New York State Constitution is the frequency with which provisions addressing similar subject matter are located in different articles of the document. Section 6 is an example of this scattering, as it contains provisions that should more properly be located in article VII, the state finances article. The section provides, in relevant part:

Notwithstanding any provision of this or any other article of this constitution, the legislature may by law, which shall take effect without submission to the people:

(a) make or authorize making the state liable for the payment of the principal of and interest on bonds of a public corporation created to construct state thruways, in a principal amount not to exceed five hundred million dollars, maturing in not to exceed forty years after their respective dates, and for the payment of the principal of and interest on notes of such corporation issued in anticipation of such bonds, which notes and any renewals thereof shall mature within five years after the respective dates of such notes

legislative power contained this section, that limitation would find a more coherent home as one of the many subject matters found in article III, section 17 for which the legislature is prohibited from passing special or private laws. N.Y. CONST. art. III, § 17.

¹¹⁰ *Id.* at art. X, § 4.

. . . .¹¹¹

This section closely resembles the provisions of the state finances article addressed previously in this essay,¹¹² involving debts that have long been retired. Added in 1951, it provided an exemption to the constitution's prohibition against gifts and loans of state credit by allowing the State to guarantee the debt of the New York State Thruway Authority.¹¹³ The language of the section itself suggests its obsolescence. The bonds authorized by this section matured no later than forty years after the respective dates of the bonds.¹¹⁴ The last bonds authorized by this section were issued in 1960 with maturity dates ranging from 1985 to 1995.¹¹⁵

6. Article X, Section 7

Section 7 is another example of a provision that permits the use of state credit to support a bond issue long since retired, this time for the purchase of railroads and other assets. It reads:

Notwithstanding any provision of this or any other article of this constitution, the legislature may by law, which shall take effect without submission to the people, make or authorize making the state liable for the payment of the principal of and interest on obligations of the port of New York authority issued pursuant to legislation heretofore or hereafter enacted, to purchase or refinance the purchase of, or to repay advances from this state made for the purpose of purchasing, railroad passenger cars, including self-propelled cars, and locomotives and other rolling stock used in passenger transportation, for the purpose of leasing such cars to any railroad transporting passengers between municipalities in the portion of the port of New York district within the state, the majority of the trackage of which within the port of New York district utilized for the transportation of passengers shall be in the state; provided, however, that the total amount of obligations with respect to which the state may be made liable shall not exceed one hundred million dollars at any time, and that all of such obligations

¹¹¹ *Id.* § 6.

¹¹² *See supra* Part II.A.

¹¹³ GALIE & BOPST, *supra* note 23, at 289.

¹¹⁴ N.Y. CONST. art. X, § 6.

¹¹⁵ *The New York State Thruway: 1951–1960*, UPSTATE N.Y. ROADS SITE, <http://www.upstatenyroads.com/thruway-history2.shtml> (last visited Oct 3, 2015) (noting that in September 1960, the Thruway Authority sold the last of the state-guaranteed bonds).

shall be due not later than thirty-five years after the effective date of this section.

To the extent payment is not otherwise made or provided for, the provisions of section sixteen of article seven shall apply to the liability of the state incurred pursuant to this section, but the powers conferred by this section shall not be subject to the limitations of this or any other article.¹¹⁶

This section, adopted in 1961, provides another exception to the requirement that a public authority’s debt cannot be guaranteed by the State.¹¹⁷ In this case, the obligations that are guaranteed by this section “shall be due not later than thirty-five years after the effective date of this section.”¹¹⁸ The provision makes clear the firm deadline is no later than 1996, almost twenty years ago. This obsolete section should be repealed.

D. Article XIII—Public Officers

The public officers article of the constitution, article XIII, contains terms and conditions for those individuals serving as officers of the state and its municipalities.¹¹⁹ Much of the material in the article, such as duration of term of office,¹²⁰ methods for filling vacancies in office,¹²¹ and the process for removal,¹²² remains relevant. There is, however, one section that has become obsolete by virtue of the changing notions of governmental power to regulate working conditions.

1. Article XIII, Section 14

As a response to a decision of the Court of Appeals striking down prevailing wage legislation,¹²³ the constitution was amended in 1905 to authorize such legislation.¹²⁴ In 1967, section 14 of article XIII was added, which reads:

The legislature may regulate and fix the wages or salaries and the hours of work or labor, and make provisions for the

¹¹⁶ N.Y. CONST. art. X, § 7.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.* at art. XIII.

¹²⁰ *Id.* § 2.

¹²¹ *Id.* § 3.

¹²² *Id.* § 5.

¹²³ *See People ex rel. Rodgers v. Coler*, 59 N.E. 716, 722–23 (N.Y. 1901).

¹²⁴ *Cayuga-Onondaga Cntys. Bd. of Co-op. Educ. Sers. v. Sweeney*, 676 N.E.2d 854, 856 (N.Y. 1996).

protection, welfare and safety, of persons employed by the state or by any county, city, town, village or other civil division of the state, or by any contractor or subcontractor performing work, labor or services for the state or for any county, city, town, village or other civil division thereof.¹²⁵

At the time this section was adopted, the power of government to regulate in areas such as wages and hours was not settled. The idea that states and municipalities cannot interfere with private contracts between employers and employees is a notion that fell out of favor in America three quarters of a century ago, and both federal and state courts have long since repudiated this philosophy.¹²⁶ Even if the courts were to reverse four generations of case law and require constitutional authority for the legislature to take the actions described above, article I, section 17 affords greater protections than this section.¹²⁷ The latter, now obsolete, should be repealed.¹²⁸

E. Article XIV—Conservation

In what may come as a surprise to those unfamiliar with the New York Constitution, one of the longest sections of the document, containing over 1900 words, is found in the conservation article.¹²⁹ The “forever wild” provision mandates that land in the state’s forest preserve, an area statutorily defined,¹³⁰ be kept as wild forest lands.¹³¹ *We do not advocate eliminating the state forest preserve.* What we do advocate, however, is an amendment that would reduce to approximately sixty words this behemoth of a section.

¹²⁵ N.Y. CONST. art. XIII, § 14.

¹²⁶ See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399–400 (1937) (upholding minimum wage legislation adopted by the State of Washington); *People v. Lochner*, 69 N.E. 373, 380–81 (N.Y. 1904) (upholding state law establishing maximum hours which could be worked by bakers), *rev’d*, 198 U.S. 45 (1905).

¹²⁷ Section 17 provides:

No laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall he or she be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used

N.Y. CONST. art. I, § 17.

¹²⁸ For a similar conclusion on this provision, see INTER-LAW SCH. COMM. REPORT, *supra* note 1, at 85–86.

¹²⁹ See N.Y. CONST. art. XIV.

¹³⁰ N.Y. ENVTL. CONSERV. LAW § 9-0101(6) (McKinney 2015).

¹³¹ N.Y. CONST. art. XIV, § 1.

1. Article XIV, Section 1

As adopted by the Constitutional Convention of 1894, this "forever wild" section originally contained fifty-four words.¹³² The current version of the section reads:

The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. Nothing herein contained shall prevent the state from constructing, completing and maintaining any highway heretofore specifically authorized by constitutional amendment, nor from constructing and maintaining to federal standards federal aid interstate highway route five hundred two from a point in the vicinity of the city of Glens Falls, thence northerly to the vicinity of the villages of Lake George and Warrensburg, the hamlets of South Horicon and Pottersville and thence northerly in a generally straight line on the west side of Schroon Lake to the vicinity of the hamlet of Schroon, then continuing northerly to the vicinity of Schroon Falls, Schroon River and North Hudson, and to the east of Makomis Mountain, east of the hamlet of New Russia, east of the village of Elizabethtown and continuing northerly in the vicinity of the hamlet of Towers Forge, and east of Poke-O-Moonshine Mountain and continuing northerly to the vicinity of the village of Keeseville and the city of Plattsburgh, all of the aforesaid taking not to exceed a total of three hundred acres of state forest preserve land, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than five miles of such trails shall be in excess of one hundred twenty feet wide, on the north, east and northwest slopes of Whiteface Mountain in Essex county, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than two miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Belleayre Mountain in Ulster and

¹³² N.Y. CONST. of 1894, art VII, § 7.

Delaware counties and not more than forty miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than eight miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Gore and Pete Gay mountains in Warren county, nor from relocating, reconstructing and maintaining a total of not more than fifty miles of existing state highways for the purpose of eliminating the hazards of dangerous curves and grades, provided a total of no more than four hundred acres of forest preserve land shall be used for such purpose and that no single relocated portion of any highway shall exceed one mile in length. Notwithstanding the foregoing provisions, the state may convey to the village of Saranac Lake ten acres of forest preserve land adjacent to the boundaries of such village for public use in providing for refuse disposal and in exchange therefore the village of Saranac Lake shall convey to the state thirty acres of certain true forest land owned by such village on Roaring Brook in the northern half of Lot 113, Township 11, Richards Survey. Notwithstanding the foregoing provisions, the state may convey to the town of Arietta twenty-eight acres of forest preserve land within such town for public use in providing for the extension of the runway and landing strip of the Piseco airport and in exchange therefor the town of Arietta shall convey to the state thirty acres of certain land owned by such town in the town of Arietta. Notwithstanding the foregoing provisions and subject to legislative approval of the tracts to be exchanged prior to the actual transfer of title, the state, in order to consolidate its land holdings for better management, may convey to International Paper Company approximately eight thousand five hundred acres of forest preserve land located in townships two and three of Totten and Crossfield Purchase and township nine of the Moose River Tract, Hamilton county, and in exchange therefore International Paper Company shall convey to the state for incorporation into the forest preserve approximately the same number of acres of land located within such townships and such County on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands to be conveyed by the state. Notwithstanding the foregoing provisions and subject to legislative approval of the tracts to be exchanged prior to the

actual transfer of title and the conditions herein set forth, the state, in order to facilitate the preservation of historic buildings listed on the national register of historic places by rejoining an historic grouping of buildings under unitary ownership and stewardship, may convey to Sagamore Institute Inc., a not-for-profit educational organization, approximately ten acres of land and buildings thereon adjoining the real property of the Sagamore Institute, Inc. and located on Sagamore Road, near Racquette Lake Village, in the Town of Long Lake, county of Hamilton, and in exchange therefor; Sagamore Institute, Inc. shall convey to the state for incorporation into the forest preserve approximately two hundred acres of wild forest land located within the Adirondack Park on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands and buildings to be conveyed by the state and that the natural and historic character of the lands and buildings conveyed by the state will be secured by appropriate covenants and restrictions and that the lands and buildings conveyed by the state will reasonably be available for public visits according to agreement between Sagamore Institute, Inc. and the state. Notwithstanding the foregoing provisions the state may convey to the town of Arietta fifty acres of forest preserve land within such town for public use in providing for the extension of the runway and landing strip of the Piseco airport and providing for the maintenance of a clear zone around such runway, and in exchange therefor, the town of Arietta shall convey to the state fifty-three acres of true forest land located in lot 2 township 2 Totten and Crossfield's Purchase in the town of Lake Pleasant.

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

that the legislature shall determine that the property to be received by the state is at least equal in value to the land to be conveyed by the state.

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

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, the state may convey to National Grid up to six acres adjoining State Route 56 in St. Lawrence County where it passes through Forest Preserve in Township 5, Lots 1, 2, 5 and 6 that is necessary and appropriate for National Grid to construct a new 46kV power line and in exchange therefore National Grid shall convey to the state for incorporation into the forest preserve at least 10 acres of forest land owned by National Grid in St. Lawrence county, on condition that the legislature shall determine that the property to be received by the state is at least equal in value to the land conveyed by the state.

Notwithstanding the foregoing provisions, the legislature may authorize the settlement, according to terms determined by the legislature, of title disputes in township forty, Totten and Crossfield purchase in the town of Long Lake, Hamilton county, to resolve longstanding and competing claims of title between the state and private parties in said township, provided that prior to, and as a condition of such settlement, land purchased without the use of state-appropriated funds, and suitable for incorporation in the forest preserve within

the Adirondack park, shall be conveyed to the state on the condition that the legislature shall determine that the property to be conveyed to the state shall provide a net benefit to the forest preserve as compared to the township forty lands subject to such settlement.

Notwithstanding the foregoing provisions, the state may authorize NYCO Minerals, Inc. to engage in mineral sampling operations, solely at its expense, to determine the quantity and quality of wollastonite on approximately 200 acres of forest preserve land contained in lot 8, Stowers survey, town of Lewis, Essex county provided that NYCO Minerals, Inc. shall provide the data and information derived from such drilling to the state for appraisal purposes. Subject to legislative approval of the tracts to be exchanged prior to the actual transfer of title, the state may subsequently convey said lot 8 to NYCO Minerals, Inc., and, in exchange therefor, NYCO Minerals, Inc. shall convey to the state for incorporation into the forest preserve not less than the same number of acres of land, on condition that the legislature shall determine that the lands to be received by the state are equal to or greater than the value of the land to be conveyed by the state and on condition that the assessed value of the land to be conveyed to the state shall total not less than one million dollars. When NYCO Minerals, Inc. terminates all mining operations on such lot 8 it shall remediate the site and convey title to such lot back to the state of New York for inclusion in the forest preserve. In the event that lot 8 is not conveyed to NYCO Minerals, Inc. pursuant to this paragraph, NYCO Minerals, Inc. nevertheless shall convey to the state for incorporation into the forest preserve not less than the same number of acres of land that is disturbed by any mineral sampling operations conducted on said lot 8 pursuant to this paragraph on condition that the legislature shall determine that the lands to be received by the state are equal to or greater than the value of the lands disturbed by the mineral sampling operations.¹³³

The first two sentences of this section constitute the entirety of the original article adopted by the 1894 convention.¹³⁴ Since its

¹³³ N.Y. CONST. art. XIV, § 1.

¹³⁴ *Id.*; N.Y. CONST. of 1894, art. VII, § 7.

adoption in 1894, it has been amended nineteen times, sometimes more than once in the same election, making it, by far, the most amended section of the constitution.¹³⁵ The net result of these amendments is a series of detailed exceptions permitting the building and modernizing of ski slopes, the building and maintaining of roads, the erection of power lines, and a number of exchanges in land between the state, towns, villages, and profit and nonprofit corporations.¹³⁶

This section could be a poster child for the difficulty of including outright prohibitions in a constitution, as there will always be some need for exceptions in just circumstances, such as the amendment in 2007 that allowed the drilling of wells so the citizens of the hamlet of Raquette Lake could obtain fresh water.¹³⁷ Although certain alternatives could be adopted that would eliminate the need for a constitutional amendment every time permission is granted for use of the forest preserve (e.g., allowing land to be transferred upon a supermajority of the legislature, allowing land up to certain sizes to be transferred without approval of the voters, or some combination of these measures), this would not be consistent with the intent of the delegates to the 1894 convention who placed this provision in the constitution in order to make sure that the people of the state were consulted before land in the preserve was leased, sold, exchanged, or developed.¹³⁸

What we recommend, however, is eliminating the bulk of the article by condensing the exceptions into a general exception. For example, the section could be amended to delete everything after the second sentence and simply add to the end of the first sentence the words “as heretofore guaranteed by constitutional provision.”¹³⁹

¹³⁵ See N.Y. CONST. art. XIV, § 1.

¹³⁶ GALIE & BOPST, *supra* note 23, at 312.

¹³⁷ *Id.* The history of the 2007 amendment is unusual in that the wells were drilled before the amendment was approved! GALIE & BOPST, *supra* note 23, at 312–13. This was a bona fide “necessity” situation. Since 1913, the residents of the hamlet had been getting water from a constitutionally permitted reservoir on the land. *Id.* at 312. Chlorine was needed to disinfect the water supply, but the chlorine was reacting with matter in the water to produce possibly carcinogenic products. *Id.* at 312–13. As the alternatives were impure water or possibly carcinogenic water, the State Department of Environmental Conservation gave permission to drill wells to obtain fresh water in 2004—three years before the amendment was adopted. *Id.* at 313. The passage of the amendment eliminated any controversy. *Id.*

¹³⁸ See *id.* at 312. This section directs that wild forests shall “not be leased, sold or exchanged . . . nor shall the timber thereon be sold, removed or destroyed.” *Id.* (internal quotation marks omitted).

¹³⁹ U.S. District Court Judge Jack Weinstein proposed dealing with conservation in the state constitution by substituting the following provision for the entire conservation article: “Conservation. The State shall preserve the forests, waters, wetlands, and wildlife of the

The effect of the phrase would be to freeze in the constitution all the exceptions and exchanges spelled out in the current document while permitting them to be omitted. Such an amendment would make no substantive change to the constitution while reducing the size of the document by approximately four percent.

F. Article XVII—Social Welfare

The Constitutional Convention of 1938 added two articles to the constitution, Article XVII (Social Welfare) and Article XVIII (Housing),¹⁴⁰ which reflected New York’s effort to deal with social problems such as poverty and a lack of affordable housing. These articles were added at the end of an era in which federal and state courts were more receptive to due process challenges to state actions to regulate the health, welfare, or morals of its citizens than they are today.¹⁴¹ Thus, even absent specific authorization, the constitutionality of the actions permitted by these two public policy articles would not be seriously contested. The almost universal acceptance—in law and public sentiment—of the government’s role in promoting the social and economic well-being of its citizens make many of the provisions of these articles at best unnecessary and at worst, a burden on the state’s ability to carry out that role.

1. Article XVII, Section 2

Immediately following the section of the constitution which makes “[t]he aid, care and support of the needy” public concerns

state. Except as approved by referendum submitted to the people by act of the Legislature, the lands of the State constituting the forest preserve shall be kept forever wild as heretofore guaranteed by constitutional provision.” JACK B. WEINSTEIN, *A NEW YORK CONSTITUTION MEETING TODAY’S NEEDS AND TOMORROW’S CHALLENGES* 9–10 (1967).

¹⁴⁰ See N.Y. CONST. art. XVII–XVIII; Galie & Bopst, *supra* note 35, at 2024. Although the 1938 convention added article XVII to the constitution, some of the provisions placed in the article date back to the original constitution of 1894. See N.Y. CONST. of 1894, art. VIII, § 11 (requiring legislature to provide for a state board of charities, a state commission in lunacy, and a state commission of prisons); *Id.* § 15 (continuing in office those individuals serving as commissioners of the state board of charities and the state commission in lunacy).

¹⁴¹ During the late nineteenth and early twentieth centuries, the New York Court of Appeals struck down several state statutes on state due process clause grounds. See, e.g., *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 436, 448 (N.Y. 1911) (striking down a state workers’ compensation scheme); *People ex rel. Rodgers v. Coler*, 59 N.E. 716, 721, 723 (N.Y. 1901) (invalidating a law requiring that any laborer, workman, or mechanic of any contractor on a public works project shall be paid a prevailing wage); *People v. Marx*, 2 N.E. 29, 29-30, 34 (N.Y. 1885) (invalidating a statute which prohibited the manufacture or sale of oleomargarine); *In re Application of Jacobs*, 98 N.Y. 98, 103, 115 (1885) (striking down a law which outlawed the creation or preparation of tobacco and related products by individuals living in tenements).

that are required to be provided by the State and its subdivisions¹⁴² is a section which reads much more like a statute book than a fundamental charter. Section 2 of this article provides:

The state board of social welfare shall be continued. It shall visit and inspect, or cause to be visited and inspected by members of its staff, all public and private institutions, whether state, county, municipal, incorporated or not incorporated, which are in receipt of public funds and which are of a charitable, eleemosynary, correctional or reformatory character, including all reformatories for juveniles and institutions or agencies exercising custody of dependent, neglected or delinquent children, but excepting state institutions for the education and support of the blind, the deaf and the dumb, and excepting also such institutions as are hereinafter made subject to the visitation and inspection of the department of mental hygiene or the state commission of correction. As to institutions, whether incorporated or not incorporated, having inmates, but not in receipt of public funds, which are of a charitable, eleemosynary, correctional or reformatory character, and agencies, whether incorporated or not incorporated, not in receipt of public funds, which exercise custody of dependent, neglected or delinquent children, the state board of social welfare shall make inspections, or cause inspections to be made by members of its staff, but solely as to matters directly affecting the health, safety, treatment and training of their inmates, or of the children under their custody. Subject to the control of the legislature and pursuant to the procedure prescribed by general law, the state board of social welfare may make rules and regulations, not inconsistent with this constitution, with respect to all of the functions, powers and duties with which the department and the state board of social welfare are herein or shall be charged.¹⁴³

This section requires, with certain exceptions, that the State Board of Welfare conduct visits and inspections of all public and private charitable, eleemosynary, correctional, or reformatory institutions that are in receipt of public funds.¹⁴⁴ It also requires the board inspect any institutions that are not in receipt of public

¹⁴² N.Y. CONST. art. XVII, § 1.

¹⁴³ *Id.* § 2.

¹⁴⁴ *Id.*

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funds but which exercise custody over dependent, neglected, or delinquent children.¹⁴⁵ The section also gives the board the power to make rules and regulations for conducting its business.¹⁴⁶ It was added to the constitution when the power of the State to conduct inspections of institutions was in doubt.¹⁴⁷ In fact, the power of the State to legislate in this area goes beyond what is authorized by this section. Indeed, a statute requiring private, proprietary adult homes to file financial statements has been upheld, even though this class of homes is not covered by this section.¹⁴⁸ This section is unnecessary and could be more readily handled legislatively.

2. Article XVII, Section 3

Section 3 of the social welfare article makes it clear that the health of the state’s inhabitants is a matter of state concern:

The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.¹⁴⁹

The notion that the State has a substantial and legitimate interest in the health of its citizens is no longer contested. This section, stating that the legislature has the power to take actions that are universally acknowledged to be within its constitutional authority, authority it has been exercising for the last four generations, is superfluous and could be eliminated.

3. Article XVII, Section 4

Section 4 of this article is similar to section 2 but applies to people suffering from mental disorders or defects. It provides:

The care and treatment of persons suffering from mental

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See, e.g.,* *People ex rel. State Bd. of Charities v. N.Y. Soc’y for Prevention of Cruelty to Children*, 55 N.E. 1063, 1064 (N.Y. 1900) (arguing that the State did not have the authority to subject to visitation a charitable corporation formed to prevent cruelty to children); *People v. Lewis*, 196 N.Y.S. 711, 712–13 (App. Div. 1922) (arguing the extent of power the state had to visit and inspect an institution for the blind), *aff’d*, 147 N.E. 181 (N.Y. 1924).

¹⁴⁸ *Katz v. Shapiro*, 405 N.Y.S.2d 315, 315, 318–19 (App. Div. 1978). In upholding the statute, the court stated that “[t]he police power is the least limitable of the powers of government.” *Id.* at 318 (alteration in the original) (quoting *N.Y. State Thruway Auth. v. Ashley Motor Ct., Inc.*, 176 N.E.2d 566, 569 (N.Y. 1961)) (internal quotation marks omitted).

¹⁴⁹ N.Y. CONST. art. XVII, § 3.

disorder or defect and the protection of the mental health of the inhabitants of the state may be provided by state and local authorities and in such manner as the legislature may from time to time determine. The head of the department of mental hygiene shall visit and inspect, or cause to be visited and inspected by members of his or her staff, all institutions either public or private used for the care and treatment of persons suffering from mental disorder or defect.¹⁵⁰

Even before this section was adopted, the State had enacted various statutes relating to mental hygiene;¹⁵¹ in fact, the Department of Mental Hygiene referred to in this section was originally created by statute in 1889 and named the “Commission in Lunacy.”¹⁵² For the reasons noted in the sections of this article addressed previously, this section is unnecessary.¹⁵³ No one challenges the power of state governments to provide for the care and treatment of persons suffering from mental disorder or defect and the protection of the mental health of the inhabitants of the state. This provision is a relic of the days when the power of the state to take these actions was in dispute.

4. Article XVII, Section 5

Originally adopted by the 1894 Constitutional Convention, section 5 of the social welfare article concerns correctional facilities. It provides:

The legislature may provide for the maintenance and support of institutions for the detention of persons charged with or convicted of crime and for systems of probation and parole of persons convicted of crime. There shall be a state commission of correction, which shall visit and inspect, or cause to be visited and inspected by members of its staff, all institutions used for the detention of sane adults charged with or convicted of crime.¹⁵⁴

Like many of the sections contained in this article, this section was enacted in response to a specific problem: in this case,

¹⁵⁰ *Id.* § 4.

¹⁵¹ GALIE & BOPST, *supra* note 23, at 335.

¹⁵² Act of May 14, 1889, ch. 283, 1889 N.Y. Laws 345. The name of the agency was changed to its current title by constitutional amendment in 1925. GALIE & BOPST, *supra* note 23, at 335.

¹⁵³ *See supra* Part II.F.1–2.

¹⁵⁴ N.Y. CONST. art. XVII, § 5.

deplorable conditions in state prisons.¹⁵⁵ The worthiness of the goals of this section—to have safe and sanitary prisons—is beyond dispute, but the material contained in this section could be described as statutory in nature. The State has the uncontested authority to inspect its prisons even absent the authority provided in this section.¹⁵⁶ Moreover, inserting specific offices in the constitution complicates reorganization. The provision mandates a state commission of correction and there is also a legislatively-created department of corrections and community supervision.¹⁵⁷ The continued existence of these constitutionally created offices is in tension with the powers conferred upon the legislature in other parts of the constitution to create departments and assign tasks within those departments.¹⁵⁸ This tension could be mitigated by the removal of this section.

5. Article XVII, Section 6

Section 6 is a provision designed to protect against the argument that the failure to include a specific constitutional power to inspect invalidates any nonconstitutionally mandated inspections: “Visitation and inspection as herein authorized, shall not be exclusive of other visitation and inspection now or hereafter authorized by law.”¹⁵⁹

This provision, originally adopted in 1894,¹⁶⁰ may have been necessary to prevent challenges at that time. Given the expanded notions of the state police power in today’s jurisprudence, it is an unnecessary provision the elimination of which would have no impact on the governance of the state.

G. Article XVIII—Housing

Added at the same time as the social welfare article, the housing article of the state constitution suffers from many of the same infirmities. In contrast to the first section of the former, which holds that “[t]he aid, care and support of the needy . . . shall be

¹⁵⁵ GALIE & BOPST, *supra* note 23, at 335.

¹⁵⁶ *See id.* at 331 (noting that the state’s police powers were sufficient to permit the duties authorized by this section).

¹⁵⁷ N.Y. CONST. art. XVII, § 5; N.Y. CORRECT. LAW § 5 (McKinney 2015).

¹⁵⁸ *Id.* at art. V, §§ 2–3.

¹⁵⁹ *Id.* at art. XVII, § 6.

¹⁶⁰ PETER J. GALIE, THE NEW YORK STATE CONSTITUTION 292 (2011).

provided by the state,¹⁶¹ the latter does not command the State to do anything. The article merely gives the legislature and local governments the power to take actions concerning low-income housing and slum clearance that may otherwise be prohibited by other provisions of the constitution.¹⁶² Although in 1938, as now, providing housing for low-income persons was considered a public purpose,¹⁶³ making much of the article unnecessary, removal of the entire article is not desirable as the article exempts or relaxes low-income housing from numerous other constitutional constraints, such as local debt limits.¹⁶⁴ Moreover, the article allows the State and its municipalities to give or lend money and credit notwithstanding prohibitions against those practices found in other articles.¹⁶⁵ This does not mean that the article is immune from trimming. On the contrary, this article contains four sections that could be excised without any substantive impact on the current functioning of low-income housing legislation and administration.

1. Article XVIII, Section 6

Section 6 of the housing article, existing in the form in which it was adopted by the 1938 Constitutional Convention, provides:

No loan, or subsidy shall be made by the state to aid any project unless such project is in conformity with a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a sub-standard and unsanitary area or areas and for recreational and other facilities incidental or appurtenant thereto. The legislature may provide additional conditions to the making of such loans or subsidies consistent with the purposes of this article. The occupancy of any such project shall be restricted to persons of low income as defined by law and preference shall be given to persons who live or shall have lived in such area or areas.¹⁶⁶

This provision was intended to ensure that any loans made for

¹⁶¹ N.Y. CONST. art. XVII, § 1.

¹⁶² *Id.* at art. XVIII, § 1.

¹⁶³ See N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 155–56 (N.Y. 1936).

¹⁶⁴ N.Y. CONST. art. XVIII, § 5. For limitations on local debt, see *id.* at art. VIII, § 4.

¹⁶⁵ Compare *id.* at art. XVIII, § 2 (discussing the liability of a municipality with respect to loans), *id.* § 3 (providing exceptions to state debt requirements of Article VII), and *id.* § 4 (providing that municipalities can contract indebtedness up to a certain amount), with *id.* at art. VII, § 8 (providing restrictions on gifts and loans of state money and credit), and *id.* at art. VIII, § 1 (providing restrictions on gifts and loans of municipal money and credit).

¹⁶⁶ *Id.* at art. XVIII, § 6.

the purposes of low-income housing and slum clearance were not done haphazardly and that subsidies were not used for purposes other than low-income housing. The vague and ambiguous language of the section, a source of much confusion since the provision was added, makes it almost impossible to enforce. Its lack of clarity was pointed out by the 1967 Temporary State Commission on the Constitutional Convention.¹⁶⁷ The effectiveness of the section, if it ever had any, was further reduced by a 2009 Court of Appeals decision holding that projects alleviating relatively mild conditions of urban blight may replace low-income housing units with units at market rate.¹⁶⁸ The section should be repealed.

2. Article XVIII, Section 8

Section 8 of the article affords the State and its municipalities the power of excess condemnation, (i.e., the power to take more land than necessary), when condemning land for the purposes of the article:

Any agency of the state or any city, town, village, or public corporation, which is empowered by law to take private property by eminent domain for any of the public purposes specified in section one of this article, may be empowered by the legislature to take property necessary for any such purpose but in excess of that required for public use after such purpose shall have been accomplished; and to improve and utilize such excess, wholly or partly for any other public purpose, or to lease or sell such excess with restrictions to preserve and protect such improvement or improvements.¹⁶⁹

In 1938, when this section was added, the issue of excess condemnation was not a settled one and the courts' view of public purpose in land cases was not as expansive and deferential as it is today.¹⁷⁰ The state constitution at that time only mentioned excess condemnation in a (since-repealed) provision allowing the use of

¹⁶⁷ See STATE OF N.Y. TEMPORARY STATE COMM'N ON THE CONSTITUTIONAL CONVENTION: HOUSING, LABOR & NATURAL RESOURCES 42 (1967).

¹⁶⁸ Goldstein v. N.Y. State Urb. Dev. Corp., 921 N.E.2d 164, 175 (N.Y. 2009).

¹⁶⁹ N.Y. CONST. art. XVIII, § 8.

¹⁷⁰ For a thorough exposition on the status of excess condemnation at that time, see J.B. Steiner, *Excess Condemnation*, 3 MO. L. REV. 1 (1938). As one example, the Pennsylvania Supreme Court had invalidated a statute allowing cities to appropriate private property within two hundred feet of land appropriated for parkways in order to protect the same by resale of neighboring property with restrictions. *Pa. Mut. Life Ins. Co. v. Philadelphia*, 88 A. 904, 905, 907 (Pa. 1913).

this power for parks, streets, and public places.¹⁷¹ This provision removed any doubt about its use for low-income housing purposes as well. The adoption of the Local Government Article in 1963, granting to local governments a general power of excess condemnation,¹⁷² coupled with judicial deference to legislative determinations of public use,¹⁷³ make the continued existence of this section unnecessary.

3. Article XVIII, Section 9

This section allows both state and local governments to acquire land, by any means, beyond what it immediately needs. It provides:

Subject to any limitation imposed by the legislature, the state, or any city, town, village or public corporation, may acquire by purchase, gift, eminent domain or otherwise, such property as it may deem ultimately necessary or proper to effectuate the purposes of this article, or any of them, although temporarily not required for such purposes.¹⁷⁴

Section 9 of article XVIII is similar to section 8 in that it affords state and local governments the authority to “acquire by purchase, gift, eminent domain or otherwise, . . . property [that] it may deem ultimately necessary or proper to effectuate the purposes of th[e] article, [even if] temporarily not required . . .”¹⁷⁵ The power of governments to condemn or acquire additional land is now firmly established: any restriction on the government’s authority in this area was resolved in favor of the legislature years ago.¹⁷⁶

4. Article XVIII, Section 10

The last section of the article, section 10, is a “catch-all” provision, which gives the legislature ample discretion to implement the goals of this article:

The legislature is empowered to make all laws which it shall deem necessary and proper for carrying into execution the foregoing powers. This article shall be construed as extending powers which otherwise might be limited by other articles of this constitution and shall not be construed as

¹⁷¹ GALIE & BOPST, *supra* note 23, at 347.

¹⁷² N.Y. CONST. art. IX, § 1(e).

¹⁷³ *See Kaur v. N.Y. State Urb. Dev. Corp.*, 933 N.E.2d 721, 730–31 (N.Y. 2010).

¹⁷⁴ N.Y. CONST. art. XVIII, § 9.

¹⁷⁵ *See id.* §§ 8–9.

¹⁷⁶ *See Kaur*, 933 N.E.2d at 730–31.

imposing additional limitations; but nothing in this article contained shall be deemed to authorize or empower the state, or any city, town, village or public corporation to engage in any private business or enterprise other than the building and operation of low rent dwelling houses for persons of low income as defined by law, or the loaning of money to owners of existing multiple dwellings as herein provided.¹⁷⁷

As a government of plenary powers, a “necessary and proper clause” comparable to the one found in the U.S. Constitution is unnecessary. That, however, is not the section’s most serious defect. It goes on to state that “[t]his article shall be construed as extending powers which otherwise might be limited by other articles of this constitution and shall not be construed as imposing additional limitations.”¹⁷⁸ This language makes no sense. For example, could the legislature suspend due process and public-use requirements for the sake of carrying out the purposes of the article? Does the legislature have the power to suspend those state and local finance sections that are not affected by the specific sections of article XVIII? Probably not; but if this section is to be read to exempt certain constitutional requirements, it raises more questions than it answers. Which sections are exempt? If specific exemptions are already included in the article, why is this generic “catch-all” exemption even necessary? The elimination of this section would remove these questions without affecting the ability of the legislature and local governments to accomplish the otherwise laudable purposes of article XVIII.

III. RECAPITULATION AND RECOMMENDATIONS

The provisions we have targeted in this two-part article¹⁷⁹ for removal or editing are not an exhaustive list of those provisions that could be shortened, eliminated, or otherwise modified. Over the course of this two-part article, we have examined fifty-three sections of the New York State Constitution, totaling over 14,600 words we believe could be repositioned, modified, or removed without substantively changing the operation of the state.

To a large extent, the problem of housekeeping arises when a document has been subjected to piecemeal amendment over an extended period of time and no attempt has been made to revise and

¹⁷⁷ N.Y. CONST. art. XVIII, § 10.

¹⁷⁸ *Id.*

¹⁷⁹ Galie & Bopst, *supra* note 2.

rearrange other parts of the document to reflect this change. The current New York Constitution was written in 1894 and revised substantially in 1938. However, many of its provisions were carried over from previous constitutions, and since 1938, there have been scores of amendments. The result: an outdated document written by many different authors and lacking coherence, conciseness, and failing to provide meaningful guidance (and in some cases, even containing illegal provisions) on issues that are most important to New Yorkers.

The amount of material in the New York State Constitution that is obsolete, incoherent, redundant, or misplaced is startling, not to say embarrassing. Simplification of the constitution would mean the removal of obsolete or redundant clauses and the occasional oddities that are found in the document. It means shortening its length, rearranging related sections, and reshaping its language. These steps would improve the clarity of the document and make it more likely citizens will come away with an understanding of our charter. Taking these steps would give citizens assurance that what they find in the constitution matters. They would enable our constitution once again to take pride of place—a status commensurate with the stature of the Empire State.