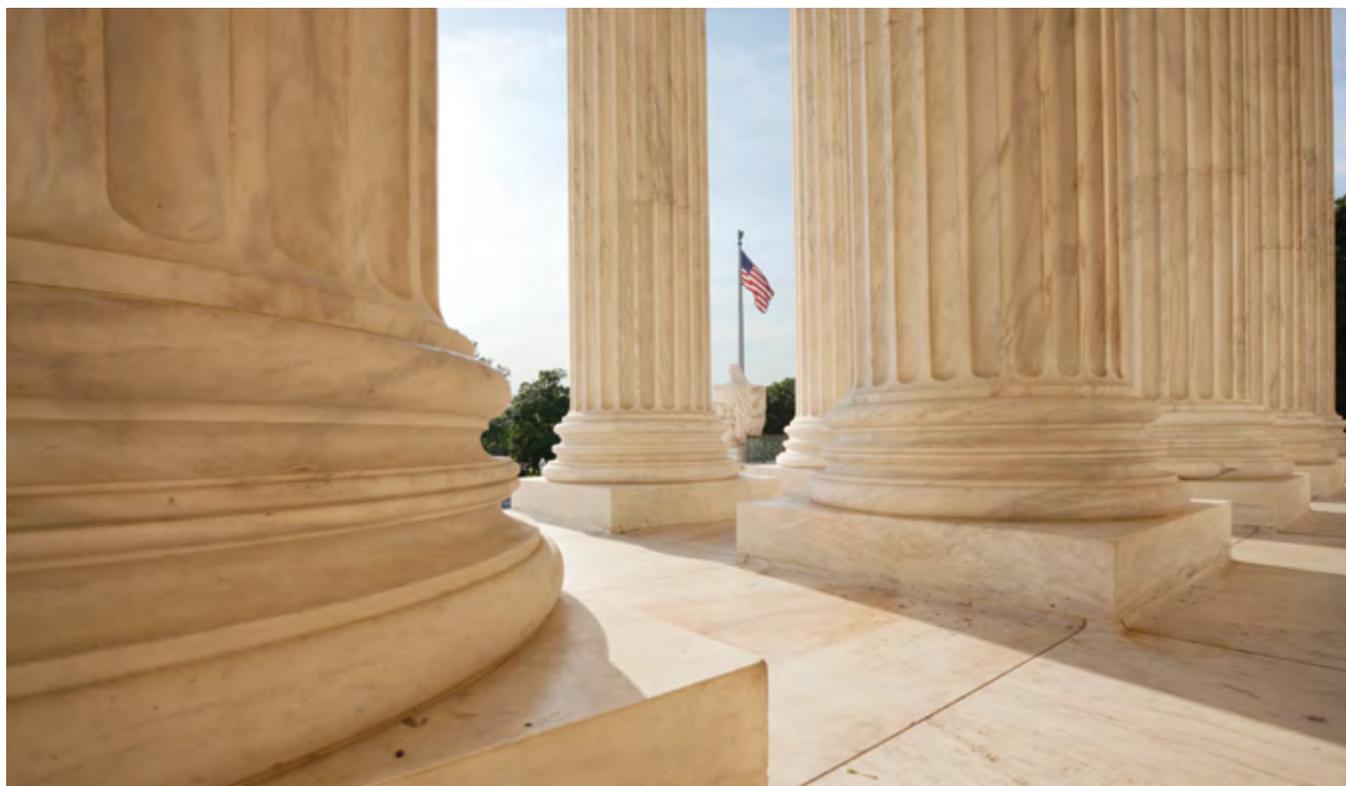


# A Constitutional Convention – Opportunities to Restructure and Modernize the New York Courts

By Stephen P. Younger and William F. Schmedlin



**A**t its June 2017 meeting, the New York State Bar Association’s House of Delegates voted to support a constitutional convention for New York. One of the principal reasons why a convention could benefit New York’s legal profession is the opportunity it would provide to modernize and streamline the operations of New York’s Unified Court System. New York has one of the most byzantine and costly court structures, which is mandated by our state constitution. With 11 trial-level courts, New York has an unnecessarily complex and inefficient court system.

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The sprawling structure of New York’s courts is a byproduct of Article VI, the Judiciary Article of the New York Constitution. Article VI creates the operating system for our courts. Notably, it has been decades since there last was comprehensive reform of Article VI. The result is a court system that has major structural barriers which impede ready access to the courts for all New Yorkers – whether for an indigent litigant who cannot afford a lawyer or for a sophisticated multi-national corporation.

In November 2017, New Yorkers will vote on whether to call for a constitutional convention. If a convention is called, it will provide a meaningful opportunity to study, update and restructure New York’s court system. This sort of reform is long overdue. Modernizing the court system would have meaningful benefits for every member of the Bar in New York, and for our clients.

Nowhere is the potential for improvement of the State Constitution more evident than in the Judiciary Article.

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Despite its lofty statement that “there shall be a unified court system,”<sup>1</sup> it is hard to deny that our courts today are hardly “unified.” This is largely because Article VI is complex, wordy, at times redundant, and out-of-sync with the modern legal world.

The unduly complex nature of New York’s court structure can pose difficulties for even the most experienced advocates who may need to access multiple courts in order to resolve a legal issue. But for unrepresented parties, navigating the state’s court system can involve surmounting structural impediments that stand between them and achieving justice. Given the limitations of Article VI, court administrators have turned to workarounds to improve court operations.

### History of New York’s Judiciary Article

The founders of the then-new State of New York did not call for anything close to the court structure that we have today. Indeed, the original State Constitution did not contain any article dedicated to the judiciary.<sup>2</sup> While there continue to be some vestiges of our 1700s-era court system in the current legal system – such as divisions between law and equity – our original State Constitution specifies little about the structure and operations of New York’s courts. Rather, it took 240 years of constitutional changes – many of which were proposed at past conventions – to produce what is today’s “Unified Court System.”

Article VI had its genesis in New York’s Constitution of 1846, which provided for a Supreme Court with general jurisdiction<sup>3</sup> and a Court of Appeals.<sup>4</sup> The 1894 Constitution introduced many aspects of the framework of today’s judiciary, such as the jurisdiction of the Court of Appeals<sup>5</sup> and the four departments of the Appellate Division.<sup>6</sup>

One of the last structural reforms of the New York courts came more than 50 years ago in 1962 revisions to the Judiciary Article, which followed the 1950s recommendations of the Tweed Commission formed by Gov. Thomas E. Dewey.<sup>7</sup> These reforms included the creation of the “Unified Court System” and the formation of an Administrative Board to promulgate statewide policies and procedures.<sup>8</sup>

The last structural reforms of the judiciary took place 40 years ago in 1977, following passage of the Unified Court Budget Act. At that time, the voters passed three constitutional amendments. These changes emanated from the work of the Vance Commission<sup>9</sup> created by Gov. Hugh Carey. Those amendments to the Judiciary Article consisted of merit selection of Court of Appeals judges through a new Commission on Judicial Nomination; statewide court leadership under the Chief Judge of the State of New York and a new position of Chief Administrator of the Courts; and a newly formed Commission on Judicial Conduct with power to sanction or remove members of the judiciary.

Since that time, while there has been some modest tinkering to the Judiciary Article, the overall court structure has remained essentially the same. During this period, multiple commissions have recommended much needed reforms of the court system. In 2006, for example, the Dunne Commission<sup>10</sup> made extensive recommendations about updating the structure of the state’s judiciary. Although legislation was introduced to advance these proposals, it was not enacted. As a result, most court innovations have been accomplished through policies and procedures initiated by court leadership or patches designed to work around constitutional restrictions – such as the formation of New York’s Integrated Domestic Violence courts.

In order to bring New York’s court system into the modern era, structural reform is needed. The upcoming vote on a constitutional convention creates an opportunity to explore more permanent solutions which would result in a stronger and more accessible judicial branch of our state government.

### Current Structure of New York’s Court System

New York’s “unified court system”<sup>11</sup> is in reality anything but. With 11 trial-level courts, each governed by its own rules, and with its own retirement ages for judges and jurisdictional limits and constraints, the New York courts are more complex than any court system in the nation. As a result, when faced with a potential claim, a prospective litigant needs to choose one of the following courts in which to bring their case:

- Supreme Court;
- Court of Claims;
- County Court;
- Family Court;
- Surrogate’s Court;
- New York City Civil Court;
- New York City Criminal Court;
- District Court;
- City Court;
- Town Court; and
- Village Court.

Even appellants with existing cases in the New York courts may need to decide whether appeals go to one of the four Appellate Division Departments, one of the two Appellate Terms in the First and Second Departments, directly to the Court of Appeals, or even to a trial-level court.<sup>12</sup> This archaic structure is largely a consequence of an outmoded constitutional framework.

### Potential Areas for Court Reform

There are several distinct areas in which Article VI can be improved.

#### A. Updating the Structure of the New York Courts

Fundamentally, today’s court system is ripe for restructuring.

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A key question that a constitutional convention would need to address is whether a judicial system with 11 trial-level courts is a sound way to administer justice in our state. The State Bar and other interest groups have long advocated for restructuring the trial courts.<sup>13</sup> The most common suggestion is to combine New York's trial courts into a single, statewide trial-level court or into a group of two or three such courts. For example, the Dunne Commission, appointed by then-Chief Judge Judith S. Kaye, proposed combining these courts into a two-tiered trial court system with a single Supreme Court and regional District Courts.<sup>14</sup> Some have suggested modifying this structure to keep the Family Court and/or the Surrogate's Court as separate courts, given their specialized expertise.

Independent analyses of court restructuring proposals have concluded that there are substantial budgetary savings to be achieved from such changes.<sup>15</sup> While initial expenditures would be needed to accomplish a comprehensive court restructuring, there would be recurring savings from such a reform, which would be budget-relieving going forward. Notably, one of the most significant areas of savings would be the benefits to lawyers and their clients from easier access to the courts.

Unifying the trial-level courts would also have other benefits. For example, a consolidated judicial system could have uniform retirement ages and consistent terms of office for judges.

Similarly, the overburdened caseloads of the Appellate Division, Second Department have long been a subject of discussion within the Bar. Creating a new Fifth Department would ease the burdens that have resulted from major population shifts since the four Departments were formed by the 1894 Constitution. An alternative would be to re-allocate the state's Judicial Districts within the existing four Departments. But this is currently not an option absent a constitutional amendment.<sup>16</sup>

The State Constitution also divides the state's courts into 11 Judicial Districts, which can only be increased once every 10 years.<sup>17</sup> This has resulted in New York having 13 Judicial Districts, even though the Constitution specifies 11.

Another critical issue is how judges should be selected. The State Bar has long supported what has been called "merit selection," or a system where judges are appointed.<sup>18</sup> The Dunne Commission, through its "merger in place" proposal for combining the trial courts, would have maintained the election of elected judges and appointment of appointed judges.<sup>19</sup> Concerns about the particular method of judicial selection – whether appointive or elective – range from ensuring diversity in the judiciary to recruiting the best judges to serve on the bench.

Although certain to be a hot button topic, there is also much to consider regarding the structure of the town and village justice courts. A constitutional convention could consider issues such as the eligibility criteria to become a

town and village justice, including whether justices need to be lawyers and what education and training they need in order to serve on those courts.

A convention can provide an opportunity to design comprehensive methods to improve how New York's courts are organized. The goal would be to simplify the court structure while ensuring that New York has a judicial system that is the best our state can offer.

## **B. Providing Flexibility to Adjust Court Structure in the Future**

Another key reason why a constitutional convention could be beneficial for the judiciary is the number of outdated requirements contained in Article VI.

Article VI contains approximately 16,000 words.<sup>20</sup> It takes up almost a third of the entire State Constitution. This is true even though New York's Constitution has 20 articles, which establish powers for the Executive, Legislative, and Judicial branches of State government; provide a Bill of Rights to protect the citizenry; and address such disparate topics as conservation, taxation, housing, and state and local finances.

In contrast, Article III of the U. S. Constitution leaves it to Congress to fill in much of the details as to the powers and processes of the judiciary. Article III requires a Supreme Court and provides that "Judges . . . shall hold their Offices during good Behaviour, and . . . receive for their Services, a Compensation, which shall not be diminished during their continuance in Office."<sup>21</sup> It also specifies the contours of federal jurisdiction<sup>22</sup> and the protection for the right to jury trial.<sup>23</sup> It accomplishes its goals in under 400 words. The details are left to be selected by Congress as needs arise. This permits much more flexibility to adapt the judicial process as times require – as opposed to the cumbersome process of amending the Constitution each time that change is needed.

Some of the issues addressed in Article VI of the State Constitution may be better left to the legislature. Doing so would allow the judiciary to better adapt to changing circumstances without going through the added complications inherent in amending the State Constitution.

For example, Article VI caps the number of Supreme Court justices in any Judicial District at no more than "one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration."<sup>24</sup> This constitutional limitation means that overburdened judges are unable to have their caseloads lightened by increasing the number of Supreme Court justices if a Judicial District has already reached its constitutional cap on such judges. It has also resulted in workarounds by court leadership with frequent use of Acting Supreme Court Justices to fill the gap. There are structural issues with this constitutional formula. For example, the number of cases filed in a particular locality is not directly tied to a Judicial District's population. More

over, this formula assumes that a small case uses the same judicial resources as a large one. It is thus not surprising that the State Bar has opposed this cap for at least 20 years.<sup>25</sup>

Rewriting or removing these constitutional limitations would give our state's judiciary better flexibility to react to future developments affecting the courts.

### C. Deleting Obsolete Provisions in the Judiciary Article

At a minimum, the 16,000 words that make up the Judiciary Article could be adjusted to remove remnants of bygone eras.

For example, one provision directs courts in handling issues such as adoptions or guardianships to place children in "an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child."<sup>26</sup> In the context of separation of church and state, this seems an outdated mandate for our courts.

A comprehensive redrafting of the Constitution could remove these sorts of anachronisms, correct references to include recently created judicial districts, and could make the Judiciary Article more easily understood by lawyers and laypersons alike.

### Conclusion

The Judiciary Article of the State Constitution offers numerous opportunities to improve and modernize the court system on which we depend to resolve legal disputes. Whether it is restructuring the judicial branch, granting the legislature greater flexibility to modify and improve the court system in the future, or removing sections of Article VI that are obsolete, New York's judiciary would benefit from a thorough review of Article VI. The multiple perspectives that delegates to a convention would bring could lead to a modernized court system that would help maintain New York's place as a leader in delivering justice for all. ■

1. N.Y. Const. art. VI, § 1 (2015).
2. See [www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_1777-NY-Constitution.pdf](http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1777-NY-Constitution.pdf).
3. Compare N.Y. Const. art. VI, § 3 (1846) with N.Y. Const. art. VI, § 7 (2015).
4. Compare N.Y. Const. art. VI, § 2 (1846), [www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_1846-NY-Constitution.pdf](http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1846-NY-Constitution.pdf); with N.Y. Const. art. VI, § 2 (2015).
5. Compare N.Y. Const. art. VI, § 9 (1894), [www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_1894-NY-Constitution.pdf](http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1894-NY-Constitution.pdf), with N.Y. Const. art. VI, § 3 (2015).
6. Compare N.Y. Const. art. VI, § 2 (1894) with N.Y. Const. art. VI, § 4 (2015).
7. The "Tweed Commission" was formally known as the New York State Temporary Commission on the Courts.
8. See <https://www.nycourts.gov/COURTS/nyc/housing/civilhistory.shtml>.
9. The Vance Commission was formally known as the Task Force on Court Reform, created by then-Governor Hugh Carey and headed by Cyrus Vance.
10. In 2006, for example, the Dunne Commission made extensive recommendations about reforming the structure of the Judiciary in New York. Although legislation was introduced, it was never passed.
11. See N.Y. Const. art. VI, § 1 (2015).

12. Criminal appeals from the City Court outside of the Appellate Term jurisdictions are taken to the County Courts instead of being taken directly to the Appellate Divisions themselves. See N.Y. Const. art. VI, § 11 (describing the county court's jurisdiction to include original jurisdiction and appellate jurisdiction).

13. See New York State Bar Association – Report of Action Unit No. 4 (Court Reorganization) to the House of Delegates on Trial Court Merger and Judicial Selection (dated 1979).

14. A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (Feb. 2007), available at [http://nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://nycourts.gov/reports/courtsys-4future_2007.pdf); NYSBA Committee on Court Structure & Operations: Report by Subcommittee on Court Reorganization (Sept. 6, 2011).

15. The Committee for Modern Courts, "Court Simplification in New York State: Budgetary Savings and Economic Efficiencies" (2012) at Appendix C, <http://moderncourts.org/wp-content/uploads/2013/10/CourtSimplificationinNewYorkState73112.pdf>.

16. N.Y. Const. art. VI, § 4 (2015).

17. *Id.* at § 6. The legislature created a 12th Judicial District pursuant to this power effective January 1, 1983, and a 13th Judicial District effective January 1, 2009. See 1981 N.Y. Laws ch. 1006; 2007 N.Y. Laws ch. 690.

18. See April 3, 1993 House of Delegates Resolution.

19. A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (Feb. 2007), [http://nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://nycourts.gov/reports/courtsys-4future_2007.pdf); NYSBA Committee on Court Structure & Operations: Report by Subcommittee on Court Reorganization (Sept. 6, 2011).

20. N.Y. Const. art. VI (2015).

21. U.S. Const. art. III, § 1.

22. *Id.* at § 2.

23. *Id.*

24. N.Y. Const. art. VI, § 6(d) (2015).

25. See, e.g., April 1998 New York State Bar Association House of Delegates Minutes ("The population cap limiting the number of Supreme Court Justices per district should be abolished."); May 31, 2007 New York State Bar Association Executive Committee Minutes (finding the Dunne Commission report consistent with State Bar policies); November 4, 2011 New York State Bar Association Executive Committee Minutes (resolving that "[t]he population cap limiting the number of Supreme Court Justices per judicial district should be abolished[.]").

26. N.Y. Const. art. VI, § 32.

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