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## The Road to a Constitutional Convention: Reforming the New York State Unified Court System and Expanding Access to Civil Justice

Jonathan Lippman  
*Latham & Watkins LLP*

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# **The Road to a Constitutional Convention: Reforming the New York State Unified Court System and Expanding Access to Civil Justice**

**By Judge Jonathan Lippman\***

## I. Introduction

On November 7, 2017, citizens of New York State will have a unique, once-in-a-lifetime opportunity to shape the future and direction of New York for generations to come. Every twenty years, voters in New York head to the ballot box to determine whether to hold a constitutional convention, where amendments to the New York State Constitution are discussed, debated, and ultimately proposed back to the voters for a final vote.<sup>1</sup> The decision by voters whether to hold a convention is one of utmost importance that should not be taken lightly. In an age where legislatures at both the federal and state level are often deadlocked and polarized to the point of stagnation, holding a constitutional convention may be the most efficient and practical way to make meaningful reforms to the New York State Constitution that are long overdue.

Many issues have been mentioned that can dramatically alter the contours of life in our state for decades to come. The possible subjects are plentiful, including reforming our state's election laws to allow for open primaries and early voting, setting education standards to guarantee the future of our children in New York schools, and creating a constitutional right to clean air and water, to name just a few. Two additional areas of particular interest to me given my forty years of service in the court system are reforming the judiciary article of the state

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\* Of Counsel, Latham & Watkins LLP; Former Chief Judge, New York State Court of Appeals, 2009–2015. The author wishes to express his appreciation and gratitude to Matthew Geyer for his assistance in researching and drafting this article.

1. *See generally* COMM. ON THE N.Y. STATE CONST., N.Y. ST. BAR ASS'N, THE JUDICIARY ARTICLE OF THE NEW YORK STATE CONSTITUTION – OPPORTUNITIES TO RESTRUCTURE AND MODERNIZE THE NEW YORK COURTS (2017) [hereinafter N.Y. STATE BAR ASS'N REPORT & RECOMMENDATION].

constitution and expanding access to justice in civil cases and matters across the state. These areas are of particular importance because of the potential cost savings and the easing of everyday burdens on the state and its citizens that could result from meaningful, common sense, and pragmatic reforms.<sup>2</sup>

This article will focus on the judiciary reforms and access to justice—starting with reforms to the structure of the Unified Court System and discussing other ways that a constitutional convention might serve to improve the operation of the courts. The article will then explore the state’s deficiency in providing its low-income citizens access to justice in civil matters relating to housing, family safety and security, and subsistence income, and how a convention can highlight these issues.

## II. Restructuring and Reforming the New York State Unified Court System

New York State has one of the most complicated, confusing, and archaic court systems in the United States. Named the “Unified Court System,” the New York courts are anything but. With eleven different trial-level courts and an outmoded appellate division configuration, inefficiencies in the current system are causing both economic and societal hardships that can be eliminated by making our court system more streamlined and cost-effective. As the Unified Court System is codified in article VI, section 1 of the New York State Constitution<sup>3</sup> (the “judiciary article”) and can be reformed only by amending the constitution, the judiciary article is a prime area for the constitutional convention. Trial court consolidation, the creation of an additional appellate department, and revising the qualifications for judges themselves are all areas of judicial reform that should be explored. Each of these potential reforms to the structure and functionality of the Unified Court System are outlined and analyzed below.

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2. See *infra* Part I.A.

3. N.Y. CONST. art. VI, § 1.

### A. Trial Court Consolidation

Perhaps the most unique yet perplexing feature of New York's Unified Court System is its eleven different trial courts. These courts include the supreme court, the surrogate's court, the court of claims, the county court, the family court, the New York City Civil Court, the New York City Criminal Court, the Long Island district courts, the city courts outside of Manhattan, and the town and village justice courts.<sup>4</sup> Some of these courts—like the supreme court—sit in all sixty-two counties statewide, while others—like the Long Island district courts—are specific to a certain geographical location.<sup>5</sup> This structure creates much confusion over which court is proper to file a claim. For example, a non-felony criminal proceeding can be brought in either New York City Criminal Court, the Long Island district courts, or one of the other city courts.<sup>6</sup> Not only are the courts difficult to navigate geographically, but the subject matter each court handles is a maze for even the most experienced attorneys and practitioners. An example would be a claim involving New York State, which may be brought in both the court of claims and the supreme court—not to mention that this can bring about the possibility of inconsistent liability judgments.<sup>7</sup> Figuring out where to file cases involving family, matrimonial, and divorce matters is even more challenging—as detailed below—with different courts hearing different aspects of the same case.

This hodgepodge of fragmented and disjointed trial courts not only makes for a financial headache for the state but also makes it difficult for New Yorkers to navigate the state courts without a roadmap. From an administrative perspective, having so many different trial courts makes it very difficult to manage caseloads statewide and is a logistical nightmare, as taxpayer dollars are wasted on the system's inefficiencies and shortcomings.<sup>8</sup> In this regard, countless hours and dollars are

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4. SPECIAL COMM'N ON THE FUTURE OF THE N.Y. STATE COURTS, A COURT SYSTEM FOR THE FUTURE: THE PROMISE OF COURT RESTRUCTURING IN NEW YORK STATE 16 (2007) [hereinafter PROMISE OF COURT RESTRUCTURING].

5. *See id.*

6. *See id.* at 22.

7. *Id.* at 19.

8. *See id.* at 45.

lost to unnecessary court dates, duplicative filings in multiple trial courts, and travel expenses to multiple courts. The wastefulness and inefficiency of the current system are best exemplified in the family and matrimonial area. An individual seeking a divorce, child custody, and child support may appear before three different judicial officers in two separate courts—a supreme court justice for the divorce, a family court judge for child custody, and a family court hearing examiner for child support.<sup>9</sup> Not only is this scenario illogical, but it also has life-altering consequences for the vulnerable members among us: low-income New Yorkers.

While the problems with the day to day operations of the Unified Court System are nothing new, neither is the desire to make meaningful reforms to the system's structure. In fact, many efforts have been made throughout the past few decades to reform the court system, but none have been successful.<sup>10</sup> One such effort included the 1997 Concurrent Resolution (the "1997 Proposal") that then-Chief Judge Judith Kaye and I (then-Chief Administrative Judge) proposed, which, among other things, would have consolidated the eleven separate trial courts into two: the supreme court and the district court.<sup>11</sup> Under the 1997 Proposal, district courts dispersed throughout the state would have limited jurisdiction over housing cases and low-level criminal and civil cases, while the supreme court would have jurisdiction over all other matters.<sup>12</sup> Additionally, the supreme court would contain at least five different divisions: criminal, commercial, state, probate, and family, with the chief

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9. See *id.* at 37; see also N.Y. STATE BAR ASS'N REPORT & RECOMMENDATION, *supra* note 1, at 58. Further, if there is a domestic violence aspect to the case, it will probably wind up being heard by still another judge in a separate criminal proceeding. N.Y. STATE BAR ASS'N REPORT & RECOMMENDATION, *supra* note 1, at 57-58. It is worth noting that New York has set up forty Integrated Domestic Violence Courts, which seek to address this issue. *Integrated Domestic Violence Court*, CENTER FOR COURT INNOVATION, <http://www.courtinnovation.org/project/integrated-domestic-violence-court> (last visited Sept. 16, 2017).

10. For a comprehensive list and description of such proposals, see PROMISE OF COURT RESTRUCTURING, *supra* note 4, at 49-58.

11. See Jan Hoffman, *Chief Judge Offers a Plan to Consolidate the Court System*, N.Y. TIMES (Mar. 20, 1997), <http://www.nytimes.com/1997/03/20/nyregion/chief-judge-offers-a-plan-to-consolidate-the-court-system.html>.

12. *Id.*

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administrative judge having the authority to create additional divisions at his or her discretion.<sup>13</sup> While this proposal was introduced in the New York State Senate shortly after its inception, the legislature failed to take any action on it, despite a strong coalition supporting this reform and editorial backing by news outlets.<sup>14</sup>

The need for some type of consolidation at the trial court level is long overdue. As such, the judiciary article of the New York State Constitution should be one of the primary areas discussed and debated at a constitutional convention. There is no practical reason why a litigant should have to bring cases in different courts for the same (or related) matters and or why the court system cannot freely use its resources without being stymied by an outdated court structure. Beyond these obvious issues, the monetary savings of court consolidation must also be taken into consideration. A 2007 report found that trial court consolidation alone could result in approximately \$502 million in total annual savings, with individual litigants, business litigants, municipalities, and employers saving \$443 million.<sup>15</sup> On many levels, the status quo can no longer be maintained. Addressing the issue of court reform at a constitutional convention would take it out of the political arena, where it could be addressed in a more policy-focused discussion among convention members charged with recommending needed reforms.

### B. Creation of a Fifth Appellate Department

Another area of the judiciary article that is ripe for reform is the structure of the appellate division.<sup>16</sup> As it stands, there are four appellate departments that handle appeals from the various trial-level courts: the First Department, which covers

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13. PROMISE OF COURT RESTRUCTURING, *supra* note 4, at 56.

14. *See id.* at 56–57. Subsequent proposals over the next decade by court administrators suffered the same fate on the basis of widely acknowledged parochial and political concerns. *Id.* at 57–58. Despite the obvious need for a more streamlined court system, the well-being of the courts and our citizens were not served though the normal legislative process. *Id.*

15. *Id.* at 45.

16. *See* N.Y. CONST. art. VI, § 8.

Manhattan and the Bronx; the Second Department, which covers Brooklyn, Queens, Staten Island, Long Island, and the five counties north of the city; the Third Department, which covers the greater Albany region and north to the Canadian border; and the Fourth Department, which covers the central and western part of the state including Syracuse, Rochester, and Buffalo.<sup>17</sup> The geographical lines of these departments were drawn in 1894 so that each appellate department encompassed roughly the same population.<sup>18</sup> While the four departments may have been equal in population in 1894, population trends have drastically changed over the past hundred plus years while the departments' boundaries have not. This change has led to an unequal allocation of work among the departments, with the Second Department representing half of the population and half of the caseload in the departments. In 2015, the Second Department handled eighty percent more filings than the First, Third, and Fourth Departments combined<sup>19</sup>—turning to the actual numbers, in 2015 the Second Department handled 11,600 appeals, while the other three departments *combined* handled a total of 6,340.<sup>20</sup> The New York State Constitution specifically prohibits adding additional appellate departments to help ease the burden and resolve this pressing problem.<sup>21</sup>

The simplest answer to this uneven workload problem would be to create a fifth appellate department in the appellate division—a solution that has been proposed many times throughout the past decades.<sup>22</sup> While the exact lines of the new

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17. See N.Y. UNIFIED COURT SYST., *Appellate Divisions*, NYCOURTS.GOV (Mar. 15, 2013), <https://www.nycourts.gov/courts/appellatedivisions.shtml>. In addition to the four Appellate Departments, there are also two intermediate Appellate Terms that are branches of the State Supreme Court. N.Y. UNIFIED COURT SYST., *Lower Appellate Courts*, NYCOURTS.GOV (June 9, 2014), <https://www.nycourts.gov/courts/appellatedivisions.shtml>.

18. N.Y. STATE BAR ASS'N REPORT & RECOMMENDATION, *supra* note 1, at 16.

19. *Id.* at 38.

20. See N.Y. STATE UNIFIED COURT SYS., 2015 ANNUAL REPORT OF THE CHIEF ADMINISTRATOR 23 (2015). For the year 2015, the First Department was the second-busiest department, handling a mere 3,072 total appeals compared to the Second Department's 11,600. N.Y. STATE BAR ASS'N REPORT & RECOMMENDATION, *supra* note 1, at 38.

21. See N.Y. CONST. art. VI, § 4; N.Y. STATE BAR ASS'N REPORT & RECOMMENDATION, *supra* note 1, at 16.

22. See N.Y. STATE BAR ASS'N REPORT & RECOMMENDATION, *supra* note 1,

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department would have to be hashed out, one possible configuration would be to create a Fifth Department comprised of Nassau and Suffolk and the five counties north of the city. This would help to both reduce the caseloads in the Second Department and spread the burden more evenly throughout each department. Even if convention delegates choose not to create a Fifth Department, they might at least consider redrawing the current department lines to ensure that each encompasses roughly the same population. No matter what the ultimate solution, a constitutional convention would be the best vehicle to examine past proposals or welcome new ones to address and alleviate this ongoing issue.

*C. Judicial Retirement Age*

In New York State, all judges in the Unified Court System— with the exception of town and village justices and housing court judges—are forced to retire at age seventy.<sup>23</sup> That said, there is another layer of complexity to this seemingly simple mandate in that justices of the supreme court have the option to extend their service on the court up until age seventy-six, so long as they undergo a mental and medical examination every two years.<sup>24</sup> The mandatory age of seventy was set in 1869 when the average life expectancy was about forty years of age.<sup>25</sup> While living to age seventy back then was quite an impressive feat, the same cannot be said for the modern era; in fact, judges at that age are today often at the top of their game, more experienced and

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at 38-39. The creation of a Fifth Department was also part of the 1997 Proposal put forth by Chief Judge Kaye and myself. See PERMANENT COMM'N ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, app. 13 at 4-5 (2016) [hereinafter 2016 ACCESS TO JUSTICE REPORT].

23. See N.Y. CONST. art. VI, § 25; N.Y. STATE BAR ASS'N REPORT & RECOMMENDATION, *supra* note 1, at 51.

24. See N.Y. CONST. art. VI, § 25; see also James C. McKinley Jr., *Plan to Raise Judges' Retirement Age to 80 Is Rejected*, N.Y. TIMES (Nov. 6, 2013), <http://www.nytimes.com/2013/11/06/nyregion/plan-to-raise-judges-retirement-age-to-80-is-rejected.html?mcubz=1/> [hereinafter McKinley Jr., *Plan to Raise Judges' Retirement*].

25. See N.Y. CONST. art. VI, § 25 (amended 1869); Clayne L. Pope, *Adult Mortality in America before 1900: A View from Family Histories in Strategic Factors*, in NINETEENTH CENTURY AMERICAN ECONOMIC HISTORY 267, 277 (Claudia Goldin & Hugh Rockoff eds. 1992).

imbued with invaluable wisdom and legal acumen at the time they are forced to retire.<sup>26</sup> Arbitrarily requiring judges retire at seventy deprives society of the meaningful contributions these judges can still make and perpetuates harmful stereotypes about age that are outdated, to say the least. Additionally, allowing judges to serve for a longer period of time would help ease the workflow in the lower courts, as more judges would be available to be deployed to backlogged courts.<sup>27</sup>

For these very reasons, in 2013 as Chief Judge of the Court of Appeals, I spearheaded the effort to raise the mandatory judicial retirement age to eighty for judges sitting on certain courts.<sup>28</sup> While we were able to place this amendment on the ballot for a referendum vote in November of 2013, the voters ultimately rejected the amendment with sixty-one percent opposed and thirty-nine percent in favor.<sup>29</sup> This defeat, however, should not discourage a constitutional convention from taking up the issue. As age expectancy continues to increase, this issue should be debated in the context of present-day norms and health advances.

#### *D. Other Reforms to the Judiciary Article*

While trial court consolidation, creating a fifth appellate department, and raising the retirement age should be prioritized, there are other areas of the judiciary article that might be considered by a constitutional convention. These include the selection of judges and reform of the town and village justice courts. Regarding the former, there has been much debate and controversy over whether judges should be appointed, elected, or a mixture of both.<sup>30</sup> The current system calls for seventy-five percent of our judges to be elected in partisan elections—New York is only one of eight states in the

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26. See McKinley Jr., *Plan to Raise Judges' Retirement*, *supra* note 24.

27. James C. McKinley Jr., *Ballot Measure on Judicial Retirement Age Is Said to Divide Cuomo and Top Judge*, N.Y. TIMES (Oct. 29, 2013), <http://www.nytimes.com/2013/10/30/nyregion/judicial-retirement-ballot-measure-said-to-divide-cuomo-and-top-judge.html?mcubz=1>.

28. See *id.*

29. See *id.*

30. See PROMISE OF COURT RESTRUCTURING, *supra* note 4, at 74-75.

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country to follow this practice.<sup>31</sup> Many organizations, including the New York State Bar Association, have advocated for the “merit selection” of all judges across the state: “the chief elected official of the state, city or county appoints judges from candidates selected and designated by non-partisan nominating commissions, subject to confirmation by either the Senate or local legislative body.”<sup>32</sup> Others have focused their efforts on reforming the way judges are elected by turning to a primary system, rather than the use of judicial nominating conventions.<sup>33</sup> The debate over an appointive versus an elected judicial selective system is critically important for the future of our justice system and needs to be addressed.

Regarding the town and village justice courts, many have questioned and challenged the qualifications for local judgeships. These courts deal primarily with traffic violations, misdemeanors, and small claims.<sup>34</sup> One of the unique features of these courts is that their justices do not need to be lawyers and need only minimal legal training throughout their terms.<sup>35</sup> This has sparked widespread debate, as many of these town and village justices are “unfamiliar with basic principles of criminal law and civil rights.”<sup>36</sup> As such, some have proposed setting minimum standards across the state for these justices, including having a law degree.<sup>37</sup> These courts are where the average citizen, outside of New York City, comes into contact with our justice system—they cannot be ignored.

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31. See N.Y. STATE BAR ASS’N REPORT & RECOMMENDATION, *supra* note 1, at 40-41; JOHN F. KOWAL, BRENNAN CENTER FOR JUSTICE AT N.Y.U., JUDICIAL SELECTION FOR THE 21ST CENTURY 9 (2016).

32. *Id.* at 41 (citing Mark H. Alcott, *Promoting Needed Reform, Defending Core Values*, 78 N.Y. ST. B. ASS’N J., 5, 6 (2006)).

33. N.Y. STATE BAR ASS’N REPORT & RECOMMENDATION, *supra* note 1, at 47-48.

34. See *id.* at 59 (citing N.Y. STATE UNIFIED COURT SYST., *City Town and Village Courts*, NYCOURT.GOV (July 22, 2016), <http://www.nycourts.gov/courts/townandvillage/>).

35. PROMISE OF COURT RESTRUCTURING, *supra* note 4, at 81.

36. *Id.* (citing William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), <http://www.nytimes.com/2006/09/25/nyregion/25courts.html>).

37. See N.Y. STATE BAR ASS’N REPORT & RECOMMENDATION, *supra* note 1, at 60-61.

## III. Expanding Access to Justice in Civil Cases

New York State is facing a crisis in the delivery of civil legal services to those who cannot afford the simple necessities of life. In the current economic climate, resources continue to dwindle, and New York State's most disadvantaged citizens are suffering as they are forced to navigate the civil legal landscape without affordable representation or often any representation at all. In 2014, 1.8 million New Yorkers appeared without representation in New York courts, unable to pursue their legal rights and remedies to life essentials like housing, family safety and security, and subsistence income.<sup>38</sup> As the justice gap continues to grow throughout the country, New York State is in a unique position to change its own trajectory by establishing a constitutional right to counsel and affordable legal services in civil cases—similar to the federal right to counsel in criminal cases established by the seminal U.S. Supreme Court case of *Gideon v. Wainwright*.<sup>39</sup>

In 2010, over ninety percent of low-income New Yorkers appeared in civil court without any form of representation.<sup>40</sup> Relatedly, according to the 2010 and 2011 census, poverty levels in New York State were over fifteen percent,<sup>41</sup> and the United States Department of Agriculture estimated that roughly 2.5 million New Yorkers could not afford enough food to support their homes.<sup>42</sup> While the economy is slowly recovering from the economic downturn of 2008, many New Yorkers are still experiencing the effects of lost wages, foreclosures, and other economic hardships. And it should come as no surprise that people of modest means and those living in poverty turn to the courts more often than those in the middle class.<sup>43</sup>

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38. See Jonathan Lippman, *New York's Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL'Y REV. 13, 13 (2012); 2016 ACCESS TO JUSTICE REPORT, *supra* note 22, at 6.

39. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

40. 2016 ACCESS TO JUSTICE REPORT, *supra* note 22, at 1.

41. See Lippman, *supra* note 38, at 14 (2012) (citing ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, POVERTY: 2010 AND 2011 3 (2012)).

42. TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 16 (2011).

43. See *generally* TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERV. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2011). For more

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To make matters worse funding to organizations providing legal aid to the poor is under constant threat of being severely reduced or eliminated altogether.<sup>44</sup> The combination of these funding cuts and lack of available resources has created the existing justice gap that threatens the availability of legal services to those in need. The legal landscape is ripe for change, and a constitutional convention would be a prime forum to debate a civil right to counsel constitutional amendment.

The “civil-*Gideon*” approach would guarantee that all litigants in the state of New York have access to counsel to help safeguard their basic rights. Establishing such an amendment would fundamentally change the course of legal representation in New York for the better and would hopefully encourage other states to follow suit to help close the civil justice gap nationwide.

#### IV. Conclusion

While it is challenging to get voters out to the polls in off-election years, New York State voters have a unique opportunity this November to effect positive change in New York to improve the life of our citizens. This article has discussed two significant reforms that should be explored—reforming the judiciary article and expanding access to civil justice across the state. These reforms are only the tip of the iceberg regarding the issues a constitutional convention might take up. The possibilities for meaningful change are energizing, and New Yorkers should seize the once-in-twenty-year opportunity to change the direction of our state on issues as diverse as elections, the environment, education, civil rights, and local governance. It is my fervent hope that we all get the chance to see a New York Constitutional Convention come to order on April 1, 2019, for the benefit of each and every citizen of our state.<sup>45</sup> While a convention may not be able to reach an agreement for reform in each and every area proposed, we will all benefit from the dialogue, and the recommendations of the convention will be

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damaging statistics on access to civil justice, see Lippman, *supra* note 38.

44. See Lippman, *supra* note 38, at 18.

45. The New York State Constitution dictates that the convention shall be held on the first Tuesday of April in the year following the election of delegates to the convention. See N.Y. CONST. art. XIX, § 2.

voted upon by the ultimate arbiter of constitutional reform—the people!