NEW YORK STATE BAR ASSOCIATION
Journal
OCTOBER 2017
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The Time Is Now

SPECIAL ISSUE ON THE CONSTITUTIONAL CONVENTION VOTE

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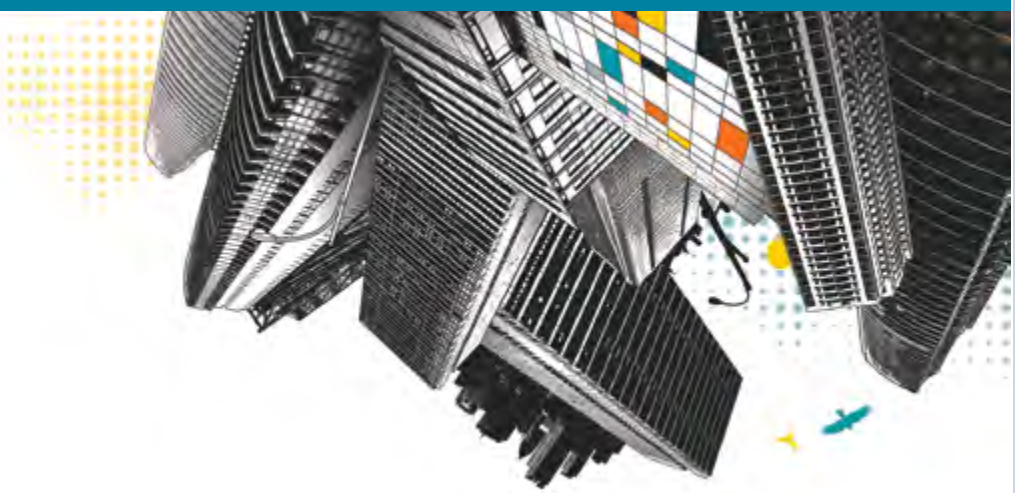

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EUGENE C. GERHART
(1912 – 2007)
Editor-in-Chief, 1961 – 1998

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DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $210 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

PRESIDENT'S MESSAGE

SHARON STERN GERSTMAN

NYSBA, Politics and a Constitutional Convention

On June 17, 2017, our House of Delegates voted (111–28) to support a "Yes" vote on the November 7 ballot question: "Shall there be a convention to revise the Constitution and amend the same?" Following this vote, NYSBA created a political committee, as required by the New York State Election Law, in order to allow us to advocate for this "Yes" vote.

The creation of this political committee, as well as the House of Delegates vote, was a departure from our normal apolitical stance. We try very hard to remain politically neutral in order to enhance our reputation as an objective, balanced voice when advocating on the issues that matter most to us as an Association: The improvement of law for the benefit of the citizens of the state, the preservation of an independent judiciary, and the independence and integrity of the legal profession. To be sure, we have advocated for constitutional amendments in the past, most notably amendments to the Judiciary Article and the constitutional provisions dealing with voting rights. This time, however, we have gone whole hog – we support the convention and we are actively advocating for a "yes" vote.

We have had the chance to do this before, and have declined. In 1997, when this was last on the ballot, we did not support a convention. What is so different this time? In 1997, we were still hopeful that court reorganization could be accomplished by the legislative amendment process. In addition to the process of amendment allowed by a constitutional convention, the constitution can be amended by a proposal's passage through two successive legislatures and its ratification by ballot. A proposal for court reorganization was passed by the legislature in 1986, but failed to pass a second time. We thought that we could work with the legislature to fine tune the proposal and seek its passage. This simply did not happen.

In 1997, we had recently witnessed (1995) the enactment of a law reinstating the death penalty. NYSBA leaders were fearful of the election of convention delegates who would seek to diminish cherished constitutional rights like aid to the needy, workers' rights and the "forever wild" clause protecting our parks and forests. While there is still a risk of loss of these rights, we believe the current populace would not elect convention delegates who would diminish these rights. In fact, we believe that the delegates elected by the citizens of New York in 2018 are likely to be those interested in enlarging rights granted by the State Constitution. Since 1997, we have seen the general expansion and acceptance of rights for all citizens by the people of New York. We believe this is the right time to have a convention.

The articles in this issue of the *Journal* explore the potential we have to create a magnificent new constitution. It is an issue of hope – about all the good we can do. Peter Galie and Christopher Bopst show us what a modern constitution could look like. Gerald Benjamin outlines a balance between municipalities' autonomy and a cohesive statewide policy in his discussion of home rule. Stephen Younger and William Schmedlin summarize all of the policy positions of NYSBA with respect to the Judiciary Article that could be fulfilled with a convention. Nicholas Robinson shows the need for environmental rights and what constitutional protection for the environment could look like beyond the "forever wild" clause. Lillian Moy, who has dedicated her life to solving the legal problems of the indigent, tells us why she is willing to risk the "aid to the needy" clause in order to solve so many problems rooted in the current constitution. These articles are meant as further enhancement of the possibilities a constitutional convention holds. They supplement the excellent work of the Committee on the New York State Constitution, chaired by Henry Greenberg, which includes five comprehensive reports, available to you at www.nysba.org/constitutioncommittee.

Our hope is that all of our members use this issue and the material available on our website as a resource to be shared with family and friends who may call on you to advise them on the ballot question. We believe the potential a constitutional convention brings warrants our treading into the realm of advocacy for a "yes" vote on November 7, 2017. We hope you agree. ■

SHARON STERN GERSTMAN can be reached at ssterngerstman@nysba.org.

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Tentative Schedule of Upcoming Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

Conducting SCPA 1404 Discovery
October 23 New York City
October 25 Buffalo
October 26 Rochester

Henry Miller – The Trial
October 18 New York City
November 8 Albany

Forensic Accounting
(1:00 p.m. – 3:30 p.m.; live & webcast)
October 10 New York City

Lobbying and the Legislative Process
(9:00 a.m. – 12:50 p.m.; live & webcast)
October 12 Albany

Risk Management 2017
(9:00 a.m. – 1:00 p.m.)
October 13 Buffalo
October 20 Rochester
October 27 Long Island
October 30 Albany
November 3 Syracuse
November 17 New York City

Basics of Matrimonial Practice 2017
October 16 Buffalo, New York City
October 17 Westchester
October 18 Albany, Syracuse
October 19 Long Island

Nuts & Bolts of an Uncontested Probate Proceeding
(11:00 a.m. – 12:15 p.m.; live & webcast)
October 17 Albany

Hope for the Best & Prepare for the Worst: Live & Die by the Prenup
(1:30 p.m. – 5:00 p.m.; live & webcast)
October 17 Albany

Workers' Compensation: Law & Practice Updates
October 20 New York City, Syracuse
November 17 Albany, Buffalo

Fair Trial/Free Press Conference
(12:00 p.m. – 2:15 p.m.)
October 23 New York City

Deposition Boot Camp
(9:00 a.m. – 12:45 p.m.)
October 24 Long Island
November 3 Rochester
November 4 Buffalo
November 17 Westchester
December 1 Albany
December 2 Syracuse
December 8 New York City

Legal Ethics in the Digital Age Fall 2017
(9:00 a.m. – 12:50 p.m.; live & webcast)
October 25 New York City

Drone Law: Regulatory and Data Collection Issues
(2:00 p.m. – 4:00 p.m.; live & webcast)
October 25 New York City

Food Truck Law
(3:00 p.m. – 4:00 p.m.; live & webcast)
October 26 New York City

Celebrity Endorsements: Legal Considerations
(4:00 p.m. – 5:00 p.m.; live & webcast)
October 26 New York City

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The Time Is Now

Special Issue on the Constitutional Convention Vote

Every November New Yorkers go to the polls to elect the leaders who will shape their lives. In some years, the elections involve national and state candidates, and in off years the candidates, and the offices they hope to occupy, are largely locally based. But once every 20 years New Yorkers have an opportunity to vote for someone other than a political candidate or party – they can vote for, or against, themselves. That's because the drafters of the New York State Constitution wisely provided an opportunity for the people to revise and update that document once in every generation, to reflect the times and conditions of present day New York, and to prepare for changes to come. No one political candidate, no matter how popular, or one political party or movement, can make that decision. It's the people's prerogative. If they vote "yes" in November to call for a constitutional convention, they will be voting to empower themselves to shape their future – New York's future. If they vote "no," they will be voting to disenfranchise themselves.

This year, it's seems like such an easy choice to vote yes. Why deny ourselves the opportunity to bring our constitution in line with the times? And yet old suspicions linger from prior years when voters opposed a constitutional convention on various grounds – fear that precious rights will be sacrificed for narrow partisan or ideological agendas, or that new restrictions will be introduced and adopted, or that money needed to conduct a convention could be used for myriad other worthy causes. The list goes on.

We at the New York State Bar Association believe these concerns are unfounded and that it is time – past time – for a constitutional convention. As an organization that serves lawyers, we believe a constitutional convention presents an opportunity to overhaul the state's court system to better serve all New Yorkers – reforms that are way overdue. This edition of the *Journal* contains articles that make the case for reform on several fronts, but all with the common theme that the present document is archaic and unwieldy. As the State Bar's *Report and Recommendations Concerning Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention* makes clear, the state's massive court system forces New Yorkers to enter into a maze of trial courts that make up a "costly

and byzantine system that few understand and no one can justify."

In their article, *A Constitutional Convention – Opportunities to Restructure and Modernize the New York Courts*, Stephen P. Younger and William F. Schmedlin note that it has been decades since there last was comprehensive reform of Article VI, which creates the operating system for New York courts. As a result New York has 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."

But it's not only the judiciary that needs restructuring. There are other reforms that are necessary as well, and some of them are discussed in this special issue of the *Journal*. Professor Gerald Benjamin's article explores home rule in New York State and its constitutional implications. As he notes, the line dividing state and local powers has become so eroded over the centuries that it has become harder and harder to discern where it was drawn. The result is an amalgam of directives, including state mandates that must be funded by local taxpayers, not the state lawmakers who imposed them. Professor Benjamin outlines a list of reforms that would clarify "home rule" powers.

In their article, authors Peter Galie and Christopher Bopst show how antiquated our state constitution is in so many areas. They make their case for a constitutional convention by noting that state constitution of today is filled with "provisions that are "obsolete, unnecessary, out of place, have been superseded by subsequent amendments, or conflict with the U.S. Constitution."

In another article, Nicholas A. Robinson paints a disturbing picture of environmental decline, from deferred maintenance of water plants to lack of adequate funding for pollution controls and mitigating climate change emissions. He calls for the constitutional convention to recognize a "fundamental human right to the environment for all New Yorkers, to safeguard against future neglect of resources."

We don't deny that some within our own ranks take issue with our pro-convention stance. Differences of opinion are to be expected in any large organization, let alone one composed of members who have made service to the law their life's work. But on balance, the arguments for a convention far eclipse those against one. That is just the point Lillian Moy makes in her overarching rebuttal to the convention critics. As she notes, for all the fears that the opponents may have of a convention's bad outcomes, one safeguard remains firmly in place – in the end, it won't be the delegates who will decide what to amend or add to the constitution; it will be up to the voters to accept or reject those changes. Who better to have the last word than we the people? ■

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Environmental Human Rights in New York's Constitution

By Nicholas A. Robinson

Nicholas A. Robinson is the Kerlin Professor of Environmental Law Emeritus at the Elisabeth Haub School of Law at Pace University. He also served as General Counsel for the New York State Department of Environmental Conservation from 1983 to 1985.

There is an environmental case to be made in favor of convening a constitutional convention. On the 200th anniversary of the birth of Henry David Thoreau, we can remember his admonition: "Live in each season as it passes; breathe the air, drink the drink, taste the fruit, and resign yourself to the influence of the earth."[1] What has this to do with the Constitution?

New Yorkers suffer today from a deficit of environmental justice. Many have assumed that they are protected by environmental law reforms enacted after discovering Love Canal.[2] The residents of Hoosick Falls know better. Since before 2014, they have had to drink, bathe in, and cook with water laced with toxic perfluorooctanoic acid,[3] long before New York's government acted to protect them.[4] The lax oversight of the Saint-Gobain Performance Plastics Corporation's facility resulted in contamination of village wells and neighborhoods with wastes from producing its fire-fighting foams, coating additives, and cleaning agents. This July, the U.S. Environmental Protection Agency declared this area a superfund site.[5]

Across New York, environmental crises fester. The evidence is alarming. Long Island is dotted with 256 superfund sites, imperiling its three sole-source aquifers, which supply all of its drinking water.[6] Lobsters are entirely gone from Long Island Sound and fish are disappearing too.[7] In New York's counties from Westchester to Erie, persistent air pollution causes one in 10 of the state's citizens to suffer from asthma.[8] The South Bronx has among the worst asthma rates in America, compounding denials of civil rights there with environmental assaults.[9] Invasive species, such as bloody-red shrimp (*Hemimysis anomala*), are aggressively invading New York's upstate waterways, displacing native fish.[10] Expanding woolly adelgid (*Homoptera: Adelgidae*) infestations threaten death to all New York's hemlocks.[11] Numbers of songbirds are thinning across the state.[12] The volume of chemical pesticides used has increased enormously since Dr. Rachel Carson wrote *Silent Spring*.[13] Approximately 17,000 pesticides are in use today and virtually all New Yorkers carry trace amounts of pesticides in their bodies.[14] More than 50 percent of New York's beehive colonies died last year.[15] Moreover, amidst a warming climate, *Aedes aegypti* mosquitos are spreading to New York City's doorsteps, bringing Zika (*Flaviviridae, genus Flavivirus*) and other "new" viruses to the region.[16] Climate change promises additional diverse impacts. Sea levels inexorably rise, with 38 percent of New York City threatened with inundation in coming decades.[17] Extreme weather events range from intensifying summer heat[18] to increasingly heavy precipitation[19] and abnormally severe storms reminiscent of Super Storm Sandy in 2012.[20]

Across New York, state agencies and local governments have done little to strengthen capacity either to cope with predicted climate related impacts or to bolster ways to recover from climate-induced disasters. The Department of Environmental Conservation has a modest program offering technical advice.[21] Albany's timidity pales when compared to the proactive and often robust laws and programs of other nations. Columbia Law School provides these laws for all to study.[22] However, Albany pays scant attention to experts at Columbia or New York's other university centers.

Environmental degradation is bad and getting worse. The calamities noted above are not isolated or one-off events, and the list is longer. It seems like no one in New York government is "connecting the dots." There was a time when citizens annually received a report about these trends. The United Nations still reports about the gathering crisis globally,[23] but within the United States official reporting is scant. The Council on Environmental Quality has not prepared its required annual environmental report since 1997,[24] and upon taking office President Donald Trump expelled CEQ from the White House. Avoiding their duty to warn citizens about environmental threats, political leaders benefit from public ignorance. Civic pressure on politicians is conveniently avoided: "out of sight, out of mind."[25]

Currently the federal government seeks to roll back federal environmental regulations.[26] State agencies, such as DEC, which rely upon federal financial assistance to implement environmental regulations, face cutbacks. The U.S. Environmental Protection Agency (EPA) is being reorganized and diminished.[27] While public interest litigation counters Trump administration violations of environmental statutes,[28] judicial action is slow, and meanwhile federal protection of the public is muted. Demoralized senior civil servants are retiring, and with it their experience.[29] In short, New Yorkers cannot rely on Washington to protect the environment in their state.

Albany once led the nation with its environmental conservation programs. No more. New York is not ready for federal withdrawals from protecting the environment. In recent years the legislature and governor have gradually slashed the funding for the Department of Environmental Conservation to the tune of $32.3 million in 2008-09.[30] Rather than enabling DEC to cope with wide-ranging, environmental crises, this decreased funding is in inverse proportion to the state's escalating environmental crises. By way of illustration, DEC's budgets in 2011-12 were allocated $1,040.6 million, in 2012-13 $872.9 million,[31] and in 2014-15 $870 million.[32] Comptroller Thomas P. DiNapoli reported in 2014 that "[t]he state Division of the Budget projects that total DEC spending will decline this year and in each of the next three years by a cumulative total of 25.9 percent from the SFY 2013-14 level."[33] Such reductions effectively nullify the guarantees in New York's Environmental Conservation Law.

The N.Y. Association of Counties has long complained about deferred maintenance of New York's aging water infrastructure: "deteriorating pipes, struggling wastewater treatment plants and water main breaks have become commonplace throughout the state. Comptroller DiNapoli recently issued a report indicating the State would need an estimated $80 billion to repair, maintain and replace drinking and wastewater infrastructure in New York over the next 20 years."[34] While DEC's core agency budget did not increase, enactment of a bill[35] for long-delayed upgrades in water quality infrastructure it added $228 million to DEC's budget in 2017-18.[36] However, there has been *no* bill to provide comparably adequate funding for maintaining air pollution control infrastructure, or for mitigating climate change emissions, or to curb the spread of invasive species. DEC's dedicated staff is left to do more with less, forced to practice a triage that betrays their agency's statutory duties.

In short, Albany is reactive, not proactive. For example, DEC issues many reports, as is mandated by law,[37] but neither DEC nor the governor offers a synthesis of what DEC does or cannot do. Sensible advice in the reports of the comptroller is disregarded.[38] The legislature does not act. The inattention to environmental regulation tips the scales in favor of "business as usual."

A Convention Could Help

New Yorkers do not deserve environmental gridlock in Albany. The way to remedy this delinquency is found in Article XIX of the State Constitution. Every 20 years, voters are obliged to answer the question: "Shall there be a convention to revise the constitution and amend the same?" Each generation has the duty to decide whether their constitutional system is appropriate for their needs. Thomas Jefferson inspired adoption of this provision.

When polls open on November 7, 2017, voters should reflect on how Albany has failed to protect their environmental quality. A constitutional convention can insist that state government meets its basic responsibilities. It could recommend to the voters that New York's Constitution recognize a fundamental human right to the environment for all New Yorkers. This constitutional right to the environment would ensure that citizens in the future would not endure today's neglect.

Twice before, in similarly troubled times, the voters convened a constitutional convention to protect their environment. In 1894, corruption in state government was rampant and the state witnessed devastation to the forests in the Adirondack and Catskill mountains from unlawful timbering. The remedy was to require in the Constitution that nature within the Forest Preserve "*shall be forever kept as wild forest land. 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.*"[39] The Constitution further provided that this clear right would be enforceable in the courts by any citizen.[40] This fundamental constitutional reform has been observed, enhanced and enforced ever since. In 1911, New York became the first state to create a Department of Conservation as a cabinet agency.

Whenever opposition arose to the "Forever Wild" Forest Preserve, citizens invoked their right to petition courts to enforce the Constitution – and won. More than once legislators enacted proposed amendments that would weaken "forever wild." Voters rejected them all. Thanks to this clearly framed environmental right, explicitly enforceable in court, environmental degradation has never returned to the Forest Preserve.

The second great reforms came in 1969, when the Vietnam War generated anxiety and social unrest among New Yorkers. On the eve of the vast political protests that were to accompany the first "Earth Day" in 1970,[41] all of New York was grossly polluted. Acid rain killed off fish in Adirondack lakes.[42] In the worst "killer smog" incidents, one could see only two to three blocks in Manhattan.[43] Rivers had become open sewers across New York. Landfills were overflowing, often filling in precious wetlands. The convention took action, drafting a "Conservation Bill of Rights." When voters rejected that convention's over-all constitution, for reasons unrelated to the environment, the voters adopted this "Conservation Bill of Rights" by ballot in 1969. It appears as Article XIV, Section 4 in the current Constitution.

After 1969, the Constitution mandated pollution control, protection of the environment, required natural resource stewardship, as well as preserving natural beauty and sustaining agricultural lands. Governor Nelson Rockefeller called on the legislature to observe this "Conservation Bill of Rights" through rapid enactment of new environmental laws[44] and by redesigning the Conservation Department as the Department of Environmental Conservation.[45] During the ensuing decade, many new state environmental laws were enacted and support was given to DEC for their implementation.

It is manifestly time, once again, for a constitutional convention to act. New Yorkers need to reclaim the high standard set by governors Theodore Roosevelt and Franklin D. Roosevelt. Albany has lost sight of its duty to safeguard the state's environmental quality. In the past, governors Nelson Rockefeller and Mario Cuomo led New Yorkers with their clear environmental agendas and a strong DEC.[46] Incredibly since then, legislators and governors have tarnished this tradition by yielding to business lobbying that opposed environmental public health laws.[47]

Is it not time to fix Albany's disdain for the environmental wellbeing of the state's citizens? How can New Yorkers prevent backsliding and erosion of laws that should protect environmental health? *The answer lies in establishing a constitutional right to the environment.* Other states, such as Pennsylvania, Montana, and Hawaii, provide a right to the environment, which would make such neglect unconstitutional. Additionally, 174 national constitutions abroad provide the right to the environment,[48] and worldwide it is customary for courts to enforce this right. Last June, Pennsylvania's Supreme Court ruled that the Constitution's environmental right obliged the Commonwealth to deploy revenues from oil and gas leasing for environmental protection.[49]

Pennsylvania's Constitution's environmental right (Art. 1, Cl. 27) is a model for what New York could provide:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

It is high time that New Yorkers had a proper right to the environment. The existing "Conservation Bill of Rights" – good in its day – has not been sufficient to prevent or anticipate today's environmental crises.[50] Some in Albany's legislature seem to agree. Last spring, Assemblyman Steve Englebright won adoption of a relatively narrow[51] constitutional amendment that would establish a right to clean air and water, by a vote of 103 to 27,[52] but this proposal is now held up in the Senate.[53] It could take three or more years before this sort of amendment – if at all – is ever submitted to the voters. Meanwhile state officials watch the environment degrade, and citizens have no constitutional right to enforce.

New York deserves better. No one should be without a remedy when his or her water is poisoned or breathing air is harmful. An asthma victim's rush to the hospital emergency room is evidence enough. Air pollution kills. Noone should tolerate a state government that allows imposing such injustice on its people. Proverbially, do we not all live in Hoosick Falls? A livable environment is a human right. We trace the recognition of human rights in New York to the Charter of Liberties of 1215. This *Magna Carta*[54] set standards that we still observe: "To no one will we sell, to no one will we refuse or delay right or justice."[55] When electoral campaign contributions result in Albany weakening environmental safeguards, this and *all* other rights that all New Yorkers enjoy are betrayed. This slippery slope will endanger "forever wild." In 1217, *Magna Carta* provided the first guarantees of environmental rights.[56] In 2017, it is time for New York to do the same.

Of course, there will be opposition to recognizing an environmental right. The New York State Bar Association has not taken a position regarding the enactment of a constitutional right to the environment. Weighing pros and cons, its Report last year on the environmental aspects of the Constitution did state that:

> [T]he narrow scope of [the Conservation Bill of Rights in] Section 4 in Article XIV is insufficient to address New York's new environmental challenges. In 1894, the destruction of forests was deemed a crisis worthy of constitutional reform. The "forever wild" mandate was thus born. In 1969, pollution presented a comparable crisis. The "Conservation Bill of Rights" was thus created. Today's analogue may be impacts associated with climate change…[57]

This past August a Task Force on the Constitutional Convention, convened by the NYSBA Section on Environmental and Energy Law, endorsed adopting an environmental rights provision.[58]

What difference might an environmental right make? Like all rights, a citizen could petition a court of law to have it enforced. In 2014 Hoosick Falls could have gone to court at once and not had to wait for more than two years before DEC or EPA responded. The right could ensure that the legislature appropriate at least the minimal funding needed to provide environmental security, just as it does for the State Police or other areas of public safety. Enforcing the environmental right could oblige New York authorities to prepare for climate impacts, for example by bolstering "resilience."[59] Resilience preparation embraces green energy reforms. New York would benefit from having a more robust "green energy" renewables portfolio, as has been adopted in California[60] and Denmark.[61] Without the constitutional duties flowing from an environmental right, New York is hobbled by continuing inertia, combined with lobbying for "business as usual."

Opponents of recognizing the right to the environment will be vocal. Vested interests oppose environmental regulation as being "bad for business," and some politicians

uncritically echo this mantra as a "truth." Contrary to this view, empirical evidence finds that regulation can stimulate competition, inventiveness, and economic growth.[62] Others would sacrifice the public commonwealth for their private, short-term gain. Commercial freeloaders, who avoid costs by passing their own pollution burden over to the ambient environment for all to endure, will object. From another quarter, some environmentalists oppose holding a constitutional convention out of a fear that, were a convention to be held, its delegates might propose weakening the "forever wild" safeguards for the Adirondack and Catskill Forest Preserve.[63] Others worry that the corruption, evident in the legislature,[64] would infect a convention.[65] However, the conventions of 1894 and 1967 demonstrate that elections produced public-spirited delegates who overcame narrow or even corrupt interests in order to embrace an effective constitutional reform.[66] The historical record demonstrates that such efforts, when tried in past conventions, always failed. For instance, each convention since 1894 preserved and enhanced "forever wild." But even if unwanted amendments did emerge, New York's voters could vote them down, just as they have each time that the legislature has tried to weaken "forever wild."[67]

It is because a constitutional convention is a unique and one-time parliament that it has the independence to adopt an environmental human right. Delegates exercise their public duties in a highly visible forum. Delegates are less likely to be swayed by interests who profit from pollution because they do not need financial donations and are not running for re-election. Unlike Albany's traditional decision-makers, convention delegates are not like assemblymen or senators or the governor, who invariably aim to aggrandize their powers ("turf") as they jockey with each other over policies and budgets. Delegates do their work and the electorate votes upon their proposed Constitution directly.

The independence of convention delegates also enables them to address judicial reform. New York has one of the most antiquated court systems in America. Without an effective court system, there is no way for citizens to enforce their Constitutional environmental right, or other rights. Just as New York's legislature and governor have discounted their environmental responsibilities, they also have failed repeatedly to address calls for court reforms.[68] Only a constitutional convention will act on pending bipartisan and professional court reforms.[69]

There have been many sensible proposals to restore "good government" in New York.[70] To date, "good government" reforms made to the legislature have fallen on deaf ears. Had New York a public-spirited legislature, it would have anticipated and prevented the environmental health crises that now confront the state. It could have held budget hearings and decided the levels of funding needed by the DEC. Legislative oversight could have ensured that DEC was attentive to its duties, and did not allow crises to emerge such as at Hoosick Falls. It matters for the environment to have an active legislature.

> The existing "Conservation Bill of Rights" – good in its day – has not been sufficient to prevent or anticipate today's environmental crises.

Most fundamentally, a convention can address lapses in ethical behavior among legislators.[71] Sustaining an environmental right depends on ethical legislators. The convention can provide constitutionally defined standards for legislative conduct, with systems to apply them. Environmental stewardship depends upon having an honest and transparent legislature, capable of acting for the broad environmental public interests. To secure this, reforms should address fair electoral procedures for the state legislature. First, gerrymandering of legislative district lines in New York is alarmingly pervasive. As other states already require, the New York State Constitution should establish an independent commission to draw the lines for Assembly and Senate districts, to ensure fair representation of New Yorkers. Second, anyone who wins public office should be held to a "fiduciary" standard when representing citizens in the Assembly or Senate. The common law over centuries has defined the duties of a fiduciary. It is high time that elected legislative office holders be obliged to meet that standard. Without legislative reform, the laws and budgets needed to protect the environment will continue to be at risk.

A convention can begin restoring ecological integrity and environmental public health in New York. The degraded state of New York's environment is the best evidence of the pressing need to reform the State Constitution. When we allow Albany to disregard its environmental duties, are we not in fact assaulting ourselves, our children and future generations? We learned in 1894 that with a strong constitutional guarantee, we could safeguard our "forever wild" Forest Preserve. Future generations have carried this mission forward. Today we are only two generations away from when we began our struggle in 1969 to clean up pollution, and we now see the weakness of our "Conservation Bill of Rights." Our contaminated environment symbolizes a rot that weakens the framework of New York State government. Both are tainted and call out for attention. If saving our environment were the *only* reason for voting yes on November 7, it would be sufficient.

A convention can restore nobility to governing. There is merit in trying, for we cannot know if we shall succeed until we try. Emulate Teddy Roosevelt's gumption! We need not be resigned to environmental degradation. It is time for New York to reclaim its leadership by recognizing the human right to the environment. We can again, with Thoreau, enjoy resigning ourselves to what is good in the Earth. Should we fail to convene a constitutional convention to begin this task, we shall be complicit in today's mugging of our public health and ecological integrity. ■

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65. Jerry Kramer, Patronage, Waste & Favoritism: A Dark History of Constitutional Conventions (2015, with Anthony M. Figliola and Maria Donovan) (recalled that, at the 1915 Constitutional Convention, when timber interests sought to cut back the1894 Constitution's "Forever Wild" Forest Preserve's restrictions, the civil liberties lawyer Louis Marshall, a delegate, "took the floor and read out loud the name of every single delegate who had accepted money from the timber industry, as a way to get them to vote in favor of retaining "Forever Wild" protections, that way ensuring that the 1915 convention would continue with the state's strong environmental protections.").

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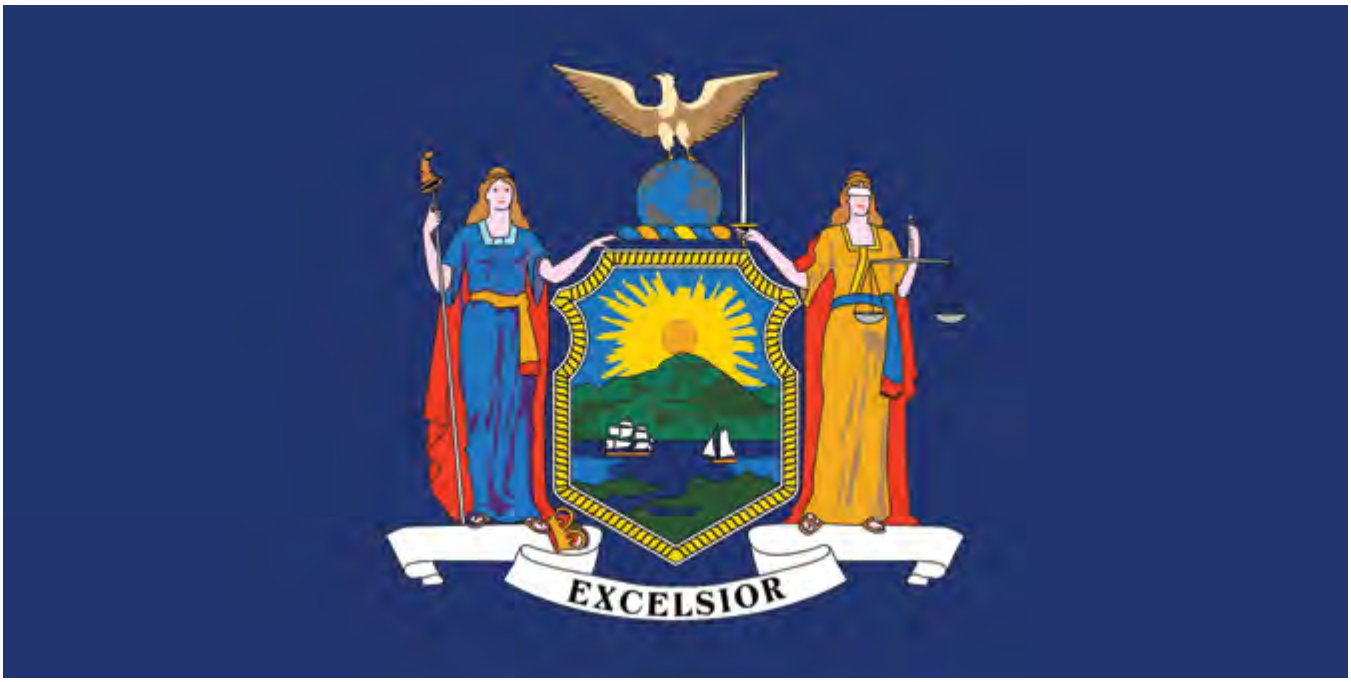

"It Is a Constitution We Are Writing": A Concise, Clear and Coherent Constitution for New York

By Peter J. Galie and Christopher Bopst

Introduction

The first decade of the 21st century witnessed a meticulous cleaning and restoration of the New York State Capitol. New Yorkers can now take pride in their beautifully restored Capitol building. Unfortunately, they cannot take the same pride in their State Constitution, adopted in 1894, five years before the opening of the Capitol. The oddities, anachronisms, redundancies, archaic words and phrases, and incoherencies found in the state's fundamental charter constitute the stuff that has cluttered and expanded the document, making it barely readable, let alone understandable.

Our State Constitution is a concatenation of legal texts, some fundamental and appropriate for a constitution, others a maze of obsolete or meaningless statutory detail.[1] The current document is a bloated, disorganized, 52,500-word behemoth[2] characterized by detritus and disorder. New York's Constitution, like the building in which it is debated and amended, is in need of some good housekeeping.[3]

Notwithstanding the intertwined history and common goals of the federal and state constitutions, the treatment given the U.S. Constitution and the New York State Constitution have been quite different. We point to the national Constitution with pride and admiration. Read, studied, and celebrated, it is the closest thing to a sacred text that is allowed in a secular republic. The Rotunda of the National Archives Building in Washington, D.C. is its shrine. Preserved in a massive, bronze-framed, bulletproof, moisture-controlled, vacuum-sealed glass container, the Constitution sits in the Rotunda by day and is lowered into a multi-ton, bombproof vault by night. Printed versions of the text are readily available in pocket form, and we have designated a day to celebrate the document.

Contrast this with our treatment of the New York State Constitution. The document is not honored or celebrated, and is wholly unknown to many New Yorkers. To our great embarrassment, hundreds of government officials

have admitted, subsequent to their swearing to uphold the Constitution, that they had never read it! Those who have are aware of its incomprehensible prose and quaint provisions. Nearly 60 years ago the Inter-Law School *Report on the Problems of Simplification of the New York State Constitution* wrote that it was "literally amazed by the extent to which the Constitution of New York contains hollow phrases, defective provisions, and creakingly antiquated policies."[4] The Temporary Commission on the Revision and Simplification of the Constitution echoed these sentiments, calling the State Constitution "almost unreadable" and "not a constitution in a proper constitutional sense. It is a mass of legal texts, some truly fundamental and appropriate to a constitution, others a maze of statutory detail, and many obsolete or meaningless in present times."[5] Since then, the document has only gotten longer and more unwieldy!

This article focuses on provisions of the New York State Constitution that are obsolete, unnecessary, out of place, have been superseded by subsequent amendments, or conflict with the U.S. Constitution. It lays bare an unkempt constitution encrusted by dozens of such items best described as constitutional detritus that have undermined its initial coherence. By trivializing its content, these provisions have done more than discourage reading: they have derogated from the Constitution's character as a fundamental document, engendering disrespect, if not ridicule.

Our purpose is not to rewrite the Constitution – that is a task best suited for a constitutional convention; we will, however, suggest changes that would rescue the State Constitution from the neglect and embarrassment occasioned by these features.

The Crown Jewels: A Necessary Caveat

Lest the reader think that we believe the State Constitution, in toto, unworthy of a founding document, we begin our analysis by acknowledging its brightest stars – provisions that reflect the best of our constitutional heritage. These include, among others, a Bill of Rights[6] that has provided greater protection of individual liberties than is afforded by the national document.[7] It contains the "Forever Wild" provision that protects the Adirondack forest preserve from commercial or industrial development;[8] a "bill of rights for labor;"[9] a provision requiring the state to care for the needy;[10] and an article facilitating the state's role in providing low-income housing.[11] New Yorkers are justifiably proud of these provisions – all of which we hasten to add were the work of constitutional conventions, not legislatively proposed amendments.

Cleaning House

The provisions under consideration will be analyzed under the following categories:

- Obsolete or transitional
- Superseded or unconstitutional
- Misplaced
- Superfluous
- Statutory

A. Obsolete/Transitional

The current New York State Constitution was adopted in 1894 and revised by subsequent legislative amendments and the constitutional convention of 1938. Many of the Constitution's provisions, however, are carry-overs from the state's three earlier Constitutions.[12] Adopted when the positive role of government was still constitutionally suspect, these sections are museum pieces. Other provisions serving no current purpose are those that are transitional in nature, meant to effect a transfer from earlier structures and processes, such as how pending cases are to be handled under a new Judiciary Article. Examples of obsolete or transitional provisions include:

1. Article I, section 7 provides that private property shall not be taken for public use without just compensation. The section also includes subsections allowing the opening of private roads and declaring that the drainage of swamp or agricultural lands is a public use. Remnants of an age where judicial interpretations of public use were less deferential, these subsections were deemed outdated *60 years ago* by the Inter-Law School Committee appointed to study the Constitution.[13]

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2. Article I, section 9(1) includes among fundamental rights to assembly and petition a provision requiring that divorces be granted only by judicial proceedings. Inserted in 1846 when legislative divorces were a possibility, the provision seems entirely out of place in a state having no-fault judicial divorces.
3. Article I, section 18 permits the legislature to enact a "no fault" workers' compensation system, in which employees are compensated for workplace injuries regardless of fault. Adopted in 1911 in response to a decision of the N.Y. Court of Appeals invalidating a no-fault compensation system on state due process grounds,[14] nobody today would dispute that a no-fault system is permissible even absent this section. The Inter-Law School Committee recommended removal of this section.[15]
4. Article IV, section 5 provides that the lieutenant-governor shall act as governor when the governor "is absent from the state." Dating back to New York's first Constitution of 1777, this provision was necessary when travel outside the state meant communications delays of days or weeks. The Temporary Commission on the Revision and Simplification of the Constitution called for removal of this provision in 1961,[16] and the proliferation of sophisticated communications devices in the intervening decades have magnified the anachronism.
5. Article V, sections 2–3 concern executive departments in the state government. Section 2 sets a bright-line rule of no more than 20 civil departments. That rule is then undermined in section 3, which permits the legislature to create scores of other entities, so long as they are not called "departments." The legislature has utilized this loophole by creating an "executive department" in which it lodges more than 100 boards, agencies, commissions, and committees. The limitation in section 2 is rendered useless by section 3, and the elimination of section 2 would make section 3 superfluous as the legislature has discretion to create departments without specific constitutional authorization.
6. Article VI, sections 34, 35, 36, 36-a, 36-c and 37 are all "take effect" provisions. Inserted into the Constitution when the new Judiciary Article was adopted in November 1961, these sections concern questions such as the status of cases pending in courts that were being abolished when the new article took effect and the status of judges serving in these courts. Any cases pending in 1961 have either been resolved or their jurisdiction in the new court has been settled, and any judges serving at that time would be long retired. There is no need to retain any of these sections.
7. Several provisions of the State Finance Article[17] authorize the issuance of bonds that have long been retired. Section 14 authorizes the legislature to create debt to eliminate railroad crossings at grade. When the section was adopted in 1925, it was necessary in order to avoid the requirement that all general obligation debt be submitted to the voters for approval under certain conditions.[18] These bonds were satisfied during the 1987-88 fiscal year. Section 18 permits the state to borrow money to pay a bonus to veterans of World War II.[19] This section remains notwithstanding that the bonds authorizing the bonuses were retired in 1958! Section 19 allows the legislature to issue debt to provide funds for the construction and renovation of the state university system. These bonds were retired in 2007. The retention of these three sections gives no indication of the current financial picture of the state and adds nothing to the State Constitution other than confusion and additional verbiage.
8. The Local Finance Article limits the amount of debt that local governments may incur.[20] Over the years numerous exceptions have been added to the Constitution to exempt from these limits debt incurred for certain types of projects, and these exceptions often remain in the Constitution long after they have been exhausted. Section 6 excludes the sum of $10 million from the debt limitations of Buffalo and Rochester and excludes $5 million from Syracuse's debt limit. Added in 1927, these exemptions are long exhausted. Section 7 affords New York City several "one time only" exceptions to the city's debt limit for specific purposes – dock purposes, construction of new rapid transit railroads, construction of hospitals, and rapid transit construction and reconstruction – all of which have been long exhausted. Another exception to New York City's debt limit, found in section 7-a, excluded debt 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."[21] This one-time exclusion has long been utilized.
9. Article VIII, section 8 is a "savings clause," inserted to ensure that debts issued before the enactment of the Local Finance Article would not be invalidated. Perhaps necessary at the time the article was adopted, the validity of these debts are not in question.
10. The State Constitution prohibits the state and its municipalities from giving or loaning credit to any other person or entity, including public authorities.[22] Specific exceptions to this prohibition exist, and amendments allowing the state to guarantee debt of a public authority often remain in the document long after the debt is retired. Article X, section 6 allows the legislature to make the state liable for bonds issued by the New York State Thruway Authority. The maturity dates for these bonds ranged from 1985 to 1995. Article X, section 7 autho-

rizes the state to guarantee bonds issued by the Port of New York Authority for the purchase of railroads and other assets. The section expired no later than January 1, 1997. Obsolete for decades, both these sections should be removed.

11. Article XIII, section 14 allows the legislature to regulate and fix pay and hours of work for state or local government employees and contractors performing work for governmental entities. The section was added in 1905 in response to a decision of the Court of Appeals striking down prevailing wage legislation.[23] There has been no serious dispute about the government's power to regulate wages and hours for more than 75 years.
12. Article XIV, section 1, the "Forever Wild" provision keeping the Adirondack and Catskill preserves as wild forest lands, is the longest section in the Constitution. It contains 19 amendments allowing, *inter alia*, ski slopes, roads, power lines, and various land exchanges. The section could be dramatically shortened and remain effective by stating that the lands shall be kept forever wild "as heretofore guaranteed" – freezing in the Constitution all the exceptions and exchanges spelled out in the current document while permitting them to be omitted.

We estimate that removing this obsolete, unnecessary, and unconstitutional material would reduce the size of the Constitution by about 25 percent.

B. Superseded/Unconstitutional

A number of provisions of the State Constitution have been held to violate the U.S. Constitution. Yet rather than amend the state charter to bring it into conformity with the U.S. Supreme Court's interpretation of the national Constitution (or perhaps even expand the rights afforded by the State Constitution), these provisions sit inoperative. Still other sections of the State Constitution have been superseded by later amendments to the document. Examples of provisions falling into this category include:

1. Article I, section 6 contains a provision requiring that a public official who refuses to waive his or her privilege against self-incrimination involving the performance of official duties be terminated from employment. This provision was held unconstitutional by the U.S. Supreme Court nearly half a century ago[24] as violating the official's Fifth Amendment right against self-incrimination. The questioning allowed by the state's clause is also considerably broader than that permitted by the Supreme Court's decision.[25]
2. Article I, section 8 contains New York's protection for freedom of speech. It has not, however, kept up with federal jurisprudence in this area. It provides that truth is a defense in criminal proceedings, but it fails to state that truth is also a defense in civil libel cases, which has been the case for decades.[26] Moreover, it only protects truth "published with good motives and for justifiable ends," a limitation no longer passing constitutional muster.[27]
3. Article III, sections 3–5 detail the apportionment schemes for members of the state Senate and Assembly. These schemes were designed to favor the interests of sparsely populated rural areas at the expense of more densely populated urban areas. The Senate apportionment utilizes a "ratio" system having the county as the basic unit; this system provides different ratios for more populous counties than for less populous ones, affording comparatively less representation for the populous counties. The Assembly apportionment requires all but one county to receive an Assembly seat regardless of population, resulting in a significant imbalance: counties having a majority of the state's population elect a minority of the state Assembly members. A 1964 U.S. Supreme Court decision held that both these schemes violated the Equal Protection Clause requirement that seats in a state legislature must be apportioned substantially on a population basis.[28] That decision was the catalyst behind the 1967 constitutional convention. The work of that convention was rejected by voters, and no amendment to remedy the unconstitutional nature of these sections has been passed. A 2014 amendment established a redistricting commission to draw Assembly and Senate lines, but did not eliminate any material previously deemed unconstitutional.
4. Article III, section 17, originally inserted in the 1846 Constitution, lists 14 areas in which the legislature is prohibited from passing a private or local bill. The list, which includes items such as locating county seats, incorporating villages, and providing for the election of members of boards of supervisors, is an early attempt at "home rule," the notion that the state legislature should refrain from intruding upon matters of local, rather than state, concern. The adoption of a Home Rule Article in 1963[29] containing detailed requirements as to when the legislature may act by special law "in relation to the property, affairs or government of any local government" supersedes many of the items in this section.

C. Misplaced

Several provisions of the State Constitution do not appear to belong in the place where they are located. Examples of misplaced provisions include:

1. The first section of the Constitution, Article I, section 1, opens with the most famous and lofty clause in the Magna Carta: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers." This statement is followed by a clause authorizing, but not requiring, the legislature to dispense with uncontested primaries. The juxtaposition of these two clauses is jarring and diminishes the significance and rhetorical power of the former. We recommend the latter be placed in Article II, the Suffrage Article.
2. Article I, section 9, the section containing the rights to assembly and petition (and the abovementioned prohibition against legislative divorces) also includes a prohibition against gambling. This prohibition is immediately followed by more than 500 words of detailed, prolix, and statute-like exceptions to that prohibition. Leaving aside the question of whether a gambling prohibition (especially one with so many exceptions) has claim to a continuing place in the document, it clearly does not belong in the same article and section as fundamental rights. It should be repositioned.

D. Superfluous

Unlike the federal government, which is a government of enumerated powers, state governments are governments of plenary powers. State governments are permitted to take any action so long as it is not forbidden either by federal law (e.g., by the U.S. Constitution or by federal statute) or by its own State Constitution. Consequently, it is unnecessary for a State Constitution to enumerate the powers of the state legislature. The New York Constitution contains numerous "superfluous" provisions – provisions that purport to authorize the state to act when such authorization is not needed, provisions that give the legislature discretionary power but do not mandate anything, and provisions that lay down a rule or provision and then grant the legislature the power to ignore that rule. Examples of provisions falling into this category include:

1. Article III, section 6 provides that members of the legislature shall receive a salary to be fixed by law. This provision is wholly unnecessary, as the legislature has the power to fix its members' salaries absent the directive. The section further details such unnecessary information as when members can receive per diem expenses and allowances for serving in additional capacities. Although we advocate removal of the needless material, we do not advocate eliminating the section's protections against arbitrary manipulations of compensation and "allowances" (i.e., lulus) during a term.
2. Article III, section 8 provides that elections for legislators shall be held on the Tuesday after the first Monday in November, "unless otherwise directed by the legislature." By detailing a particular action and then giving the legislature discretion to adopt a contrary requirement, the provision is purely advisory – and wholly unnecessary.
3. Article VI, section 4(a) creates the state's four judicial departments, and establishes which judicial districts are contained in each department. Section 6(a) of the article specifies which counties are located in each judicial district. The article gives the legislature discretion to modify both the boundaries of the appellate departments and the composition of the judicial districts. As the state has added two judicial districts since the adoption of these two sections, the needless specificity has led to incompleteness and inaccuracy.
4. Article X, section 1, concerning the formation of corporations, is purely advisory. It first states that corporations may be formed by general law, which would be true even without this grant of power. The section then bans the practice of creating corporations 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." In other words, the legislature cannot form a corporation by special law unless it wishes to do so!
5. Article X, section 2 provides that the legislature may make the "corporators" (shareholders) of a corporation liable for the corporation's debts. Since corporations are creatures of statute, it stands to reason that the legislature could determine, even absent this section, which debts may fall upon the shareholders.
6. Article XVII imposes governmental oversight responsibilities for institutions engaged in social welfare functions, such as mental hospitals, prisons and childrens' homes. Section 2 of the article requires the state board of social welfare to inspect all public and private charitable institutions that receive public funds as well as any institution exercising custody over dependent, neglected or delinquent children, regardless of whether it receives public funds. Section 4 provides that the care and treatment of individuals suffering from mental illness may (but not must) be provided by the legislature and imposes inspection requirements upon the head of the department of mental hygiene for institutions providing mental illness care. Correctional facilities are dealt with in section 5, which permits the legislature to provide for these institutions and mandates that the state commission of correction inspect these institutions. Section 6 provides a savings clause to make sure the dictates of the article do not invalidate any other visits or inspections.

These sections suffer from identical infirmities: they authorize what could be established in their absence; grant powers to the state that nobody challenges; and allocate tasks and procedures to agencies the legislature may subsequently believe can be eliminated or consolidated – a trifecta of inefficiency, redundancy, and unnecessary legislative detail.

7. Article XVIII, sections 8 and 9 concern the acquisition of land by the state and municipalities in order to promote low-income housing and slum clearance. Section 8 grants these entities the power of excess condemnation, i.e., the power to take property in excess of that required for immediate public use, and section 9 affords them the authority to purchase, condemn or otherwise acquire property that they may deem "ultimately necessary or proper," even if "temporarily not required." Since nobody seriously questions the authority of municipalities to take these actions, these sections are superfluous.
8. Article XVIII, section 10 provides the legislature the power to "make all laws which it shall deem necessary and proper for carrying into execution" the powers afforded by the Housing Article. As a government of plenary powers, a "necessary and proper clause" comparable to the one found in the U.S. Constitution is unnecessary.

E. Statutory

Because state constitutions are more policy-laden than the U.S. Constitution, it is not unusual for them to contain material that is statutory in nature. These provisions, once inserted, often grow in size due to necessary amendments to keep them current and to reflect changing policies within the state. Statutory provisions in the State Constitution include:

1. Article II, section 3 specifies in significant detail who is constitutionally excluded from voting in the state. Adopted during the 19th century to deal with election chicanery, fraud, and wagering on the outcomes of elections, the language reads like an election code – and is more properly placed there.
2. Article III, section 24 constitutionalizes the state's policy for employment of prisoners, meticulously detailing the definition of non-profit organizations that may reap the benefit of such labor. This section evidences the danger with putting such statutory provisions in the Constitution – the section has grown considerably since its initial insertion in 1894, with the most recent addition being in 2009.
3. Article V, section 6 provides a preference for military veterans in civil service matters. A worthwhile goal when added in 1949, the section is filled with statutory language. The detailed nature of the section preordained the need for future amendments: six have been adopted in the intervening years, four since 1997. A simple statement mandating that the legislature provide reasonable preferences for veterans would serve the requisite purpose with fewer words and the need for fewer amendments.
4. Article VI, section 19 deals with transfers of actions and proceedings in the court system. It is about twice as long as Article III of the U.S. Constitution. Section 26 of the article addresses temporary assignments of judges. Both these sections provide unlimited permutations of case transfers and judicial assignments, and are written more suitably for an administrative code than a constitution. These sections could be rewritten to reduce their length significantly and to make them more readable.
5. Article X, section 4 defines the term "corporations" and provides that "all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons." This material is statutory in nature and is adequately covered in the state's corporate laws.
6. Article XVII, section 6 limits low-income housing to "persons of low income as defined by law" and gives preference to persons who live or shall have lived in such area or areas." Ambiguous and legislative in nature,[30] the section is unnecessary as the notion that the legislature would create low-income housing and not provide some threshold defies the very purpose of low-income housing. The section has proved little value in halting the replacement of low-income housing with market rate units.[31]

Conclusion

We estimate that removing this obsolete, unnecessary, and unconstitutional material would reduce the size of the Constitution by about 25 percent. Moreover, the lack of coherent organization that characterizes much of the document should be addressed by relocating provisions improperly placed in the rights article and by inserting in that article those rights provisions that are scattered throughout the document. These are tasks much better suited for a constitutional convention than for the legislature. Legislatures lack the time, focus and institutional knowledge of constitutional revision to provide meaningful reform. Previous conventions in 1915 and 1967, though ultimately unsuccessful, proposed streamlining and modernization of the Constitution that had not been forthcoming from the legislative branch.

In addition to simplifying and consolidating, a convention could address substantive problems that have been put off or ignored for the past half century, problems that have left the state with, among others:

- a judiciary that wastes millions of dollars annually in inefficiencies while failing, in too many cases, to deliver prompt justice to litigants;
- an electoral system that ranks among the lowest in the nation in participation;
- a legislature caught up in a pay-to-play culture,

unwilling or unable to address reforms that will unshackle it, restore the trust of citizens, and enable it to take its rightful place in the governing process;
- a home rule system that fails to deliver meaningful local control to municipalities while saddling them with debt and tax restrictions and unfunded mandates;
- a budget process that raises questions about transparency and the proper balance of legislative-executive roles in that process;
- debt provisions that have failed to limit state and local debt or ensure fiscal responsibility;
- an education funding system best described as a "political football;" and
- no constitutional right to clean air or clean water.

The needs are pressing; the task is daunting. But we believe a constitutional convention is the best, nay the only, realistic option to provide the extensive reconstruction required to give 21st century New York the Constitution it deserves.

1. This is hardly a new observation. A *New York Times* editorial written nearly 60 years ago stated that the Constitution was characterized by "haphazard arrangement, slipshod and confusing phraseology, relics of long-gone fears, verbosity, frustrated efforts to fit law to new circumstances, a testimonial to the force of inertia." Editorial, *A Simpler Constitution*, N.Y. Times, June 2, 1958, p. 26.

2. Even with computers, estimates of the word count for the New York State Constitution vary wildly. We do not include in our count the title page, the table of contents, section titles that are not included in the document itself, bracketed material such as summaries of certain provisions, and each provision's amendment history. We do include, however, the two-word title "The Constitution," article headings, and section outlining characters (i.e., letters and numbers at the start of each provision). Using these conventions, the document totals 52,526 words.

3. This article draws on our more extensive treatment of this topic in Chapters 1 and 2 of New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness (Peter J. Galie, Christopher Bopst & Gerald Benjamin, eds., 2016).

4. State of New York, Special Legislative Committee on the Revision and Simplification of the Constitution, Inter-Law School Committee Report on the Problems of Simplification of the Constitution (N.Y. Leg. Doc. No. 57, 1958), 221.

5. State of New York, Temporary Commission on the Revision and Simplification of the Constitution, First Steps Toward a Modern Constitution (N.Y. Leg. Doc. No. 58, 1959), 2.

6. N.Y. Const., art. I.

7. Scott N. Fein & Andrew B. Ayers, eds., Protections in the New York State Constitution Beyond the Federal Bill of Rights, April 17, 2017, https://www.albanylaw.edu/centers/government-law-center/publications/Documents/Protections-in-the-New%20-York-State-Constitution.pdf.

8. N.Y. Const., art. XIV, sec. 1.

9. N.Y. Const., art. I, sec. 17.

10. N.Y. Const., art. XVII, sec. 1.

11. N.Y. Const., art. XVIII.

12. The other three constitutions were adopted in 1777, 1821, and 1846.

13. Inter-Law School Committee, *supra* note 4, at 16 n.3.

14. *Ives v. South Buffalo Railway Co.*, 201 N.Y. 271 (1911).

15. Inter-Law School Committee, *supra* note 4, at 57–58.

16. State of New York, Temporary Commission on the Revision and Simplification of the Constitution, Simplifying a Complex Constitution (N.Y. Leg. Doc. No. 14, 1961), 41.

17. N.Y. Const., art. VII.

18. N.Y. Const., art. VII, sec. 11.

19. The court of appeals had invalidated a law providing for the issuance of bonds by the state with the proceeds to be paid as bonuses to veterans of World War I, holding it was an unconstitutional loan of state credit. *People v. Westchester County National Bank*, 231 N.Y. 465 (1921). This section prevented a similar result.

20. N.Y. Const., art. VIII, sec. 4.

21. N.Y. Const., art. VIII, sec. 7-a(A).

22. N.Y. Const., art. VII, sec. 8; N.Y. Const., art. VIII, sec. 1.

23. *People ex rel. Rodgers v. Coler*, 166 N.Y. 1 (1901).

24. *Gardner v. Broderick*, 392 U.S. 273 (1968).

25. The section allows the official's employment to be terminated for the refusal to "answer any relevant question concerning such matters before such grand jury." The *Gardner* Court held that an officer could be dismissed for the refusal to answer "questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself." *Id.* at 278.

26. *Guccione v. Hustler Magazine*, 800 F.2d 298, 301 (2d Cir. 1986).

27. *See, e.g., James v. DeGrandis*, 138 F. Supp. 2d 402, 416 (W.D.N.Y. 2001) (holding that truth is an absolute defense regardless of malice or evil motives).

28. *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964).

29. N.Y. Const., art. IX.

30. The preference confused the 1967 Temporary State Commission on the Constitutional Convention. State of New York, Temporary State Commission on the Constitutional Convention, Housing, Labor, Natural Resources (1967), 42.

31. *Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511 (2009).

Home Rule: Elusive or Illusion?

By Gerald Benjamin

Why does the state government in Albany get to decide: Who runs the New York City schools? How much sales tax St. Lawrence County can collect? The size of cups of soda for sale in Times Square? Whether you can call Uber in Syracuse? Whether your groceries may be packed in a plastic bag at the supermarket in Queens?

These are clearly local matters. Shouldn't local governments be deciding them?

This is the "home rule" issue. It has been an intractable one for much of New York's history. Over more than 400 years, law and politics interacted as the colony/state was settled, grew, and became more diverse; New York's economy and governmental systems developed, transformed and re-transformed; democracy advanced; and alternative ideas of governance best practices fully or partially displaced each other. Across eras, finding the proper balance in this dynamic environment between state and local government and among localities has been persistently elusive. This article summarizes the origin, evolution, and effect of some of the most important dimensions of this relationship and what experience suggests may be fruitful potential focal points for constitutional reform to make home rule in New York State something more than an illusion.

Local Governments as "Creatures of the State"

Colonial and then state governments, established by sovereign authority, created the early local government system in New York. The Shire and riding system, first used by the British, was abandoned in 1683, and counties were systematically established, along with towns within them. Towns and counties, when established, were not regarded in law as municipal corporations; they had "governmental or public powers" but not "corporate or proprietary powers."[1] Possessing no direct relationship with the sovereign authority, these local governments were *"creatures of the state"* established at its initiative under its authority, through processes it established, with functions it specified, to serve its purposes.

New Amsterdam was chartered by the Dutch in 1653, and re-chartered by the British as New York City on June 12, 1665 and Albany on July 22, 1686. Charter inviolability was a principle of British law; corporations holding charters were sheltered from sovereign intervention. Municipal corporate status thus gave New York City an unusual combination of public and private powers. Post-revolutionary local politics were animated by demands upon the state legislature for democratization of city government.[2] The selection of local officials by election came into general use, and fed demands for greater local autonomy. By the middle of the 19th century the vestiges of New York City's legal autonomy were gone. And all other cities were chartered by the legislature by statute, under terms that it specified and, at the time, only it could change.

Villages were also initially chartered by special law in response to local request, to meet local service and governance needs beyond the scope towns' powers. Legislative control of cities and villages was directly specified in the 1846 State Constitution. Legal distinctions among types of local governments were substantially removed finally in 1892, when the first general municipal law specified that "the term municipal corporation, as used in this chapter, includes only county, town, city and village."[3]

The Incremental Development of Constitutional "Home Rule" in New York

Republican use of the state's power to control and exploit New York City in following decades fueled the city home rule movement. The "home rule" idea now applies to all general purpose local governments (see below), but politically it emerged and was sustained as a central aspect of the conflict between New York City-based Democrats and Albany-based Republicans for control of the city's wealth and patronage. Thus ironically, the same local democratic impulse that led the city to become subject to state's authority, as were other local forms of govern-

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ment, became a basis for claiming greater autonomy from the state.

By the time the term "home rule" was first used by Governor David B. Hill in 1886 with reference to municipal government in New York in a veto message, downstate Democrats had consistently been seeking to restore greater autonomy for New York City through constitutional change from state government for decades.[4] After an extended debate, the 1894 Republican-controlled constitutional convention placed the state's cities in three classes by size of population, and required legislative actions to be by general law affecting all cities within a class. Matters applying to fewer cities than in the entire class, or to a single city, were made subject to a suspensive mayor veto. That city's mayor was given 15 days to say if the measure was acceptable to it; if not, legislative re-passage was required. This was the first adoption of a home rule restriction on the legislature.

During the brief period of Democratic control of state government in 1913 and 1914 the legislature passed two major home rule measures. The general city law was amended to allow each city in New York "to manage and control its property and local affairs." It specified "twenty three wide ranging powers of cities allowing them to obtain resources, build and maintain public works, provide for public safety and welfare, regulate economic activities, care for those in need and conduct its own business." (Land use control was added in 1917.) Remarkably, this law included a clause modeled after that in Article II of the U.S. Constitution allowing each city to "exercise all power necessary and proper for carrying into execution the powers granted to the city."[5] The second measure offered six alternative forms of government for governance of the second or third class (defined by population) that might be sought through a popular initiative and referendum process.[6]

Home rule for cities finally entered the State Constitution in 1923; the adoption of a Municipal Home Rule Law followed in 1924. The two general substantive objectives of the amendment – constraint on state power and empowering cities – provided a recognizable foreshadowing of the current constitutional design. Under the amendment, legislation applicable to cities had to be general and "apply alike to all cities." The suspensive veto was removed, but a law applicable to the "property, affairs of government" of a city that was "special or local in either its terms or effect" could be passed only upon the declaration of an emergency by the governor and with the concurrence of two thirds of the members of each legislative house.[7] Cities were empowered to "adopt and amend local laws not inconsistent with the constitution and laws of the state" regarding their governmental structure, staffing and conditions of employment, conduct of their business, regulating the conduct of and protecting their residents' "property, safety and health" and could be further empowered by the legislature at its discretion.[8] Power was explicitly reserved to the legislature, however, "to enact laws relating to matters other than the property, affairs or government of cities."[9]

In a clear effort to restrain the further expansion of Greater New York, but with consequences far beyond this for future efforts to achieve local government consolidation, a constitutional amendment passed in 1927 barred annexation of additional territory to a city was without the consent of the people of the place to be annexed.[10]

Two constitutional amendments, in 1921 and 1927, laid the groundwork for successful state legislation leading to the adoption of the first county charters, in Nassau (1935) and Westchester (1937). Another amendment, passed in 1935, directed that the legislature offer counties a range of governance options, as it had done decades earlier for cities.[11] The 1935 amendment explicitly authorized the "transfer of any or all of the functions or duties of the county and the cities, towns, villages, districts and other units of government contained in such county to each other or the state, and for the abolition of offices, departments, agencies or units of government when all of their functions are so transferred" notwithstanding other provisions of the constitution.[12] In a provision similar to that for cities, it barred legislative action by special law applicable to the "property affairs or government" of a county except pursuant to an emergency message from the governor with the required two-thirds legislative majority, with an added local referendum requirement for structural change in local government offices by state law.[13]

The 1938 constitutional revision brought city and county home rule provisions together into a single article, but still treated counties and cities distinctly within it. It originated the local home rule request process as an additional means for the initiation of special legislation for both cities and counties. And if a special bill was passed on gubernatorial initiative, without local request, a city (but not a county) could repeal, supersede or modify it by local action.[14]Additionally, the 1938 Constitution introduced the idea of concurrent majorities for the transference of functions from one class of government to another in a county in connection with change in the county's form of government. Finally, the 1938 constitutional convention for the first time added a constitutional home rule provision for villages with 5,000 people or more, but without the local overrule of "emergency" measures passed without local initiative.[15]

A constitutional amendment passed in 1945 empowered county governments to initiate home rule requests for special legislation without the participation of their executive officers. A 1958 amendment extended home rule provisions to the largest towns, those of the first class.

The Bill of Rights of Local Governments adopted in 1963 as the State Constitution's article IX is thus the evolved culmination of two-thirds of a century's incre-

mental development of home rule. All home rule provisions were gathered in the Constitution in one place and language made generally applicable. An initial statement of policy made "effective local self-government and intergovernmental cooperation . . . purposes of the people of the state." "Liberal construction" of the "rights, powers, privileges and immunities of local government" was directed.

Much of the 1963 amendment was restatement. Powers of localities were specified and the legislature directed to act to effect them. Limitations on legislative ability to act regarding single local governments were continued, even strengthened.

But much was also new. Home rule was extended to all of New York's municipal corporations, including the smaller villages and towns – the later evolved from rural entities linked tightly to counties and governed in town meetings to municipalities headed by elected boards, with functions largely analogous to those performed by cities and villages. Constitutional language was generalized so that the home rule principle had the same meaning and same detailed elements for every class of local government. Process restrictions on annexation were extended to all local governments, further diminishing – perhaps entirely blocking – prospects for serious local government restructuring. Concomitantly, constitutional references to the possible elimination of local governments were removed.

One very important thing, however, did not change: the repeated and consistent use of the term "property, affairs or government" to refer to local powers. This effectively assured continuity in the interpretation of home rule by the courts.

State and Localities: Clash of Laws

The adoption of constitutional home rule and its development added to the great accumulation of constitutional and statutory provisions in state law regarding local government that had developed incrementally over centuries, with periodic codification or recodification as New York's governments developed and their functions became more numerous in response to population growth and economic and social change. In an essay written in 1994, Professor Richard Briffault of Columbia Law School found that, in addition to its home rule provision, the New York Constitution directly addressed local government in six articles, those pertaining to: the Legislature (III), Local Finance (VII), Corporations (X), Public Officers (XII), Taxation (XVI) and Housing (XVIII).[16] To these may be added general provisions that affect all of New York government, for example concerning election administration (II), requiring merit hiring of public employees (V), guaranteeing public employee pensions (V) and defining a system of courts (VI). Also, according to one count, there are 19 volumes of the state's consolidated laws that have major significance for local government.[17] This munificence of state law concerning local government made inevitable (even routine) clashes of state with local laws enacted under evolving home rule authority, with both state and local actions originating with elected officials empowered by popular mandate.

Home Rule in Context

According to the National League of Cities, effective home rule for a local government has four key dimensions:

- Structural authority – Choices about governmental form and process;
- Personnel authority – Choice about who works for the government, and the terms and conditions of their employment;
- Functional authority – What local government actually does, services delivered, regulations adopted and enforced; and
- Fiscal authority – Decisions regarding taxing, borrowing and spending, where to get money and how much and what to buy with it.[18]

In all four of these areas, home rule is not fully enjoyed by New York's local governments. Governmental structures and processes for villages, towns and counties that have not adopted charters are specified in state law (albeit with a limited range of local choice). Leadership selection processes, eligibility for public office and election timing and processes are specified by the state. Personnel authority for local government is limited by overarching civil service rules and, as noted, collective bargaining and pension requirements. New York is famously decentralized in its service delivery; state-mandated functions, with accompanying required local costs for local government, abound. The Constitution prohibits the delegation by the legislature of taxing authority.[19] All local taxes must therefore be authorized by the state, within limits and parameters set by the Constitution and state law.

All this leads to regular clashes between state and local actions. The potential for these conflicts is elevated because state legislators are elected from geographically specified (local) districts, and disciplined local voting blocks are consequential in local and statewide elections. So elected New York City politicians based in Albany clash with elected New York City politicians in city offices regarding whether the use of plastic bags should be eliminated in the city.[20] Or Hudson Valley–based legislators seek state law to constrain the growth of the Hasidic Village or Kiryas Joel, with the governor weighing in, mindful of the importance and deliverability of this voting bloc in statewide elections.[21]

To allow state intervention in local affairs desired by state legislators, techniques have been developed to systematically bypass the intention of constitutional home rule provisions. One well known example is the passage of laws general in form but specific in effect, such as the plethora of measures applying to localities with popula-

tions of a million or more. New York City, of course, is the only local government in the state in this class. A similar approach, general legislation with a singular effect, was used to create the Kiryas Joel school district.[22] Less well known, the requirement for a home rule message for special laws to renewal of sales tax authority for counties and cities has become the start of a negotiation between state legislators and local governments on the terms and conditions for obtaining needed state law.[23]

Interpretation of Home Rule

Chief Judges John F. Dillon and Thomas Y. Cooley were both born in New York. Dillon set out his defining specification of the relationship between states and their local governments in 1868, while serving as Chief Justice of the Iowa Supreme Court: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature," he wrote. "It [the legislature] breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control."[24] In direct contrast, while serving as Chief Justice of the Michigan Supreme Court three years after Dillon wrote, Cooley argued: "local government is [a] matter of absolute right; and the state cannot take it away."[25]

Dillon's view came to be definitive when embraced by the U.S. Supreme Court in 1907 in the case of *Hunter v. City of Pittsburgh*.[26] According to Justice William H. Moody, writing for the court:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.[27]

An adherence to the idea of subordination of localities to the state persisted in New York after the adoption of constitutional home rule in 1923. The seminal case of *Adler v. Deegan* concerned the state passage in 1929 of a multiple dwelling law, revising the tenement house law of 1901.[28] The statute applied only to New York City, but was enacted without using the process then required by the Constitution for a special law. In upholding the law, the Court of Appeals established the "state concern" doctrine, best captured in Judge Benjamin Cardozo's famous concurrence. If the object of legislation "be in a substantial degree a matter of State concern," Cardozo said, "the Legislature may act, though intermingled with it are concerns of the locality."[29] Citing precedent in interpretation of earlier use in law of the term "property, affairs or government" Cardozo also noted that the meaning of statutory language was a matter for "the Court of Appeals to define, not Webster's dictionary."[30] Even after repeated revisions of the State Constitution's home rule article, court decisions persisted in an expansive definition of the range of state action and a narrow one for the action of local governments.[31] The effect has been so widespread that a recent bar association report on constitutional home rule concluded that: "Today the line between matters of State concern and matters of local concern is increasingly indistinct. Few constraints exist on the Legislature's ability to interfere in local affairs by special law."[32]

Because the state has plenary power to act on matters of state concern, it preempts the field if local government has been determined by the courts to have acted in a manner that comes into direct conflict with it. State preemption may be explicit in the law or implied. Implied preemption occurs, the courts have said, when "either the purpose and scope of the regulatory scheme will be so detailed or the nature of the subject of regulation will be such that the court may infer a legislative intent to preempt, even in the absence of an express statement of preemption."[33]

The state does not always prevail in litigation in which implied preemption is at issue. In a very important recent case, the courts found that the town of Drydens' land use power, not directly preempted by state Oil Gas and Solution Mining Law, allowed it to ban fracking.[34] The problem is one of ambiguity. Attorneys advising local government are likely to counsel caution, or even inaction, if local authority is unclear. The tangle and expense of proceeding is a major disincentive. It this way, local power becomes self-limiting.[35]

Finally, and paradoxically, political considerations may mitigate against the home rule principle being advanced by local leaders who might be expected to be its greatest advocate. Assertion of a principle is easily sacrificed to gain a desired outcome. Having failed to gain adoption by the New York City Council, Mayor Michael Bloomberg turned to the state legislature for the passage of his proposed "HAIL ACT, [which] for the first time, allowed livery cabs to accept passengers in the outer boroughs and outside Manhattan's central business district who hail . . . [them] . . . from the street, and also expanded the number of traditional yellow cabs accessible to passengers with disabilities."[36]

Achieving Greater Home Rule

The persistent effort, now approaching a century and a half in duration, to obtain constitutional home rule in New York has had, at best, limited success. Assuring continued state capacity to address genuine statewide matters, along with achieving a greater range of local discretion and more effective limitations on state intervention when matters are local, remain high priority goals for those committed to improved governance for New York. Some ideas to consider:[37]

1. State purposes – Remove the "phrase property, affairs and government" from the State Constitution and replace it with alternative language; perhaps

return to a local "necessary and proper clause" so as to encourage reconsideration of the Court of Appeals definition of the constitution's home rule intent.

2. Presumption of local authority to legislate – Specify a constitutional presumption regarding the primacy of local action in constitutionally specified areas of local action.
3. Preemption – Condition state preemption of local law upon explicit intention to do so.
4. Mandates – Many states have passed mandate limitations, payback provisions and fiscal impact requirements to constrain mandates' use and elevate their visibility for political effect. These have had limited effect.[38] Instead, sort out state and local government functions so governments at each level are fully responsible and must fully finance their own activities, mitigating the need for major mandates.
5. Finance – Create a constitutional basis for local government access to and use of property and sales taxes.
6. The local government bar – In areas constitutionally preserved to localities, but in which there may be some ambiguity, engender a predisposition toward asserting local authority in the state's local government bar.
7. Reorganization of local government as a condition of greater home rule – Assertion of local authority requires a concomitant commitment to simplifying and reordering New York State's "non-system" of local government to assure its efficiency, effectiveness and democratic accountability. One approach is to establish constitutional criteria for local government viability and effectiveness, condition the continuation of each local government on its meeting these criteria, and create a constitutionally based entity to apply, interpret and enforce these criteria. ■

1. Gerald Benjamin, *The Evolution of New York State's Local Government System* (prepared for the Local Government Restructuring Project, Rockefeller Institute of Governments, Albany, 1990, typescript, files of the author), p. 7, citing New York State, Temporary State Commission on the Constitutional Convention. *Local Government* (The Commission, 1967), Vol. 13.

2. Jon Teaford, The Municipal Revolution in America (University of Chicago Press, 1975), p. 71.

3. 1890 N.Y. Laws ch. 569, § 2; 1892 N.Y. Laws ch. 686, § 2 and ch. 685, § 1 (cited in Benjamin, at p .9).

4. Peter Galie, Ordered Liberty: A Constitutional History of New York (Fordham University Press, 1996), p. 148.

5. Benjamin, *supra* n. 1, at pp. 42–43; 1913 N.Y. Laws ch. 247; 1917 N.Y. Laws ch. 483.

6. 1914 N.Y. Laws ch. 444.

7. Constitution in force in 1938, Article XII, § 2.

8. Constitution in force in 1898, Article XII, §§ 3, 5.

9. Constitution in force in 1938, Article XII, § 4.

10. Constitution of 1938, Article IX, § 14.

11. Benjamin, *supra* n. 1, at pp. 16–22.

12. Constitution in force in 1938, Article III, § 26.2.

13. Constitution in force in 1938, Article III, § 26.4.

14. Constitution of 1938, Article IX, § 11.

15. Constitution of 1938, Article IX, § 16.

16. *Intergovernmental Relations*, The New York State Constitution: A Briefing Book, p. 119.

17. New York State Local Government Handbook (2011), pp. 30–32, https://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf.

18. Cities 101—Delegation of Power, National League of Cities, Dec. 13, 2016, www.nlc.org/resource/cities-101-delegation-of-power.

19. Article XVI, § 1.

20. Jesse McKinley, *Cuomo Blocks New York City Plastic Bag Law*, N.Y. Times, Feb. 14, 2017, https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html.

21. *See* Gerald Benjamin, *The Chassidic Presence and Local Government in the Hudson Valley*, Albany L. Rev. (forthcoming 2017).

22. Gerald Benjamin, *The Political Relationship*, The Two New Yorks: State and City in a Changing Federal System (Gerald Benjamin and Charles Brecher, eds.) (Russell Sage Foundation, 1988), p. 117; Louis Grumet and John Caher, The Curious Case of Kiryas Joel (Chicago Review Press, 2016).

23. Gerald Benjamin, *Winning the Battle, Losing the War: How Sales Tax Renewal Thwarts Constitutional Home Rule*, Rockefeller Institute of Government, Aug. 2017, www.rockinst.org/observations/benjamin/2017-08-03_benjamin.aspx.

24. *City of Clinton v. Cedar Rapids & Missouri River Railroad Co.*, 24 Iowa 455 (1868).

25. *People ex rel. Le Roy v. Hurlbut*, 24 Michigan 44, 108 (1871).

26. 207 U.S. 161 (1907).

27. *Id*. at 178.

28. 251 N.Y. 467 (1929).

29. *Id*. at 491, quoted in N.Y.S. Bar Ass'n Committee on the New York State Constitution, Report and Recommendations Concerning Constitutional Home Rule (April 2, 2016), p. 23, www.nysba.org/homerulereport.

30. Cited in Gerald Benjamin, *The Political Relationship* (1988), p. 117.

31. Caselaw is detailed in the NYSBA Report on Home Rule (2016), pp. 22–26.

32. *Id*. at pp. 26–27 (footnotes omitted).

33. *Id*. at p. 18, citing Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 Brooklyn L. Rev. 321, 349 (1999). The bar association report details cases involving implied preemption at pp. 18–19.

34. *Wallace v. Town of Dryden*, 23 N.Y.3d 728 (2014); *see Wallach v. Town of Dryden: New York Court of Appeals Holds That State Oil and Gas Law Does Not Preempt Town Zoning Ordinances Banning Hydrofracking*, 128 Harv. L. Rev. 1542 (March 10, 2015).

35. *See* New York State Commission on Local Government Efficiency and Competitiveness, 21st Century Local Government (2008), p. 36.

36. Roberta A. Kaplan and Jacob H. Hupart, *Can New York City Govern Itself? The Incongruity of the Court of Appeals' Recent Cases Regarding Regulation of New York City by New York City*, 78 Alb. L. Rev. 105 (2014), p. 106.

37. This list draws some of its ideas from Richard Briffault, *Local Government and The New York State Constitution*, 1 Hofstra L. & Pol'y Symp. 79 (1996), at p. 82.

38. *See generally* Robert. M. Shaffer, *Comment: Unfunded State Mandates and Local Governments*, 64 U. Cin. L. Rev. 1057 (Spring 1996); Janet Kelly, *Unfunded Mandates: The View from the States*, Public Administration Review, Vol. 54, No. 4 (July-August 1994), pp. 405–08.

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

By Stephen P. Younger and William F. Schmedlin

At 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.

Despite its lofty statement that "there shall be a unified court system,"[1] 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.[2] 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[3] and a Court of Appeals.[4] The 1894 Constitution introduced many aspects of the framework of today's judiciary, such as the jurisdiction of the Court of Appeals[5] and the four departments of the Appellate Division.[6]

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.[7] These reforms included the creation of the "Unified Court System" and the formation of an Administrative Board to promulgate statewide policies and procedures.[8]

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[9] 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[10] 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"[11] 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.[12] 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.

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.[13] 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.[14] 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.[15] 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.[16]

The State Constitution also divides the state's courts into 11 Judicial Districts, which can only be increased once every 10 years.[17] 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.[18] 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.[19] 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.[20] 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."[21] It also specifies the contours of federal jurisdiction[22] and the protection for the right to jury trial.[23] 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."[24] 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.[25]

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."[26] 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.

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; *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, *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; 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; 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.

Why New York Needs a Constitutional Convention

By Lillian Moy

Editor's Note: On May 30, a joint subcommittee of the Committee on Legal Aid and the President's Committee on Access to Justice took issue with the report submitted to the House of Delegates in support of calling a state Constitutional Convention. The subcommittee members are Ronald Tabak, Harvey Epstein, Sally Curran, Dennis Kaufman, Susan Horn, Jeffrey Seigel, Joseph Kelemen, Lillian Moy, and Saima Akhtar. All members except Ms. Moy and Ms. Akhtar signed on to the dissent, which is based on four major points of contention:

1. *The report to the House of Delegates incorrectly assumes that voters can reject changes they view as improper. It is more likely that special interests will work toward an "up or down" vote on a package of amendments in order to slip through regressive measures such as putting the death penalty into the constitution, or restricting women's rights.*
2. *The report incorrectly assumes that changes the State Bar supports would be enough to attract voters to go to the polls, but as 2019 is an off-year election it is "extremely dubious" that voters will come out in large numbers, except for hotly contested local races.*
3. *The convention could make New York an initiative and referendum state, at the mercy of those seeking regressive proposals or rolling back constitutional guarantees.*
4. *The delegate selection process is flawed because it disadvantages poor and minority voters.*

Contrary to the subcommittee's majority position, I believe the New York State Bar Association should support the 2017 ballot question calling for a constitutional convention. I am a lifelong legal aid lawyer and, at my core, I think of myself as a hopeful and optimistic person. Calling for a constitutional convention resonates with the hope and optimism that infuses my life's work because a constitutional convention could create substantial new rights for our low-income clients. As we have known for many years, the benefits of court reorganization alone would greatly

simplify the rights of low-income litigants. Multiple court appearances, coupled with multiple types of proceedings, make it extremely hard for a low-income person to participate in the justice system. No other solution has come to pass in spite of many years of support for court reform.

A convention is the one practical opportunity this generation of the Association has to modernize, clean up and restructure the Constitution.

A constitutional convention provides the opportunity to establish new positive rights. With respect to access to justice, the constitutional convention gives us the chance to establish a right to counsel outside of the city of New York. This is a right that is unlikely to be developed or funded by local cities and towns outside of New York City. At the moment, there is no practical alternative for creating a civil Gideon in the rest of state. The constitutional convention is our only hope for establishing this right outside of New York City in our generation. As the House of Delegates recognized, there is no practical alternative to a convention for enacting many needed and desired reforms.

Nor is there empirical evidence to believe that long-held constitutional rights such as the "forever wild" clause and Article 17 protections for the poor and needy would be eliminated by convention delegates. It is "unlikely constitutional delegates in sufficient numbers would roll back established rights, given the state's history and political demographics."[1] Moreover, any such unlikely attempted rollback would also have to be approved by the voters.

The majority dissent is wrong on all its major points.

1. The dissent is wrong in suggesting that voters cannot reject changes they don't want. While it is true that it would be better if voters could vote on each amendment separately, the fact remains that even if they are given only the option of voting on a package, they will have a dispositive say – and they can reject changes they disfavor. That's what happened after the 1967 convention, when voters had only the "up or down" option on a package that included a highly controversial proposal to remove the barriers to state aid for parochial schools. Voters said no to the whole package of reforms rather than approve that proposal. Whether you agree with that vote or not, there is no disputing that voters *can* reject changes they do not want.
2. The fears of low voter turnout are a distraction. The fact that 2019 will have no national or state races is actually a plus. If there were hotly contested races at the federal or state level, the constitutional convention would likely take a back seat in news coverage. But without those races, the only newsworthy state issue will be the convention. Thus, news outlets will provide extensive coverage of what is at stake and voters will be more informed on the issues – including the need to make their voices heard rather than yield to the special interests.
3. The fear of an initiative and referendum state is exaggerated. New York need not repeat the mistakes of referendum states like California and Massachusetts, but instead can learn from their mistakes. Indeed the convention could propose a limited referendum along the lines of what Gov. Mario Cuomo proposed long ago – namely, that voters be given the chance, through referendum, to force the legislators to vote on issues they would rather bottle up in committees. In short, a limited form of initiative and referendum could be a good thing.
4. While there are fears that there will be a legal challenge to the election process, there is no evidence of any group or individual who has suggested mounting one. What's more, history shows that a constitutional convention has helped the poor – the 1938 convention proposed, and voters endorsed, an anti-poverty measure that did just that.

Finally, it is indisputable that no convention in New York State's history has ever resulted in the loss of a major right or protection. Rather, conventions have only added new ones.[2]

A constitutional convention is the one practical opportunity this generation of the Association has to modernize, clean up and restructure the Constitution. I am glad that the New York State Bar Association has joined with the League of Women Voters, Citizen Union of the City of New York, as well as former Chief Judge Jonathan Lippman in voting for hope on behalf of low-income clients throughout the state and supporting a vote for a constitutional convention.[3] ■

1. Report of the Committee on the New York State Constitutional Convention, page 26.

2. Peter J. Galie, Ordered Liberty: A Constitutional History of New York, Fordham University Press, 1996.

3. *Fix this government and vote this fall for a Constitutional Convention*, N.Y. Daily News, May 22, 2017, www.nydailynews.com/opinion/fix-government-vote-constitutional-convention-article-1.3180479.

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BY DAVID PAUL HOROWITZ

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Stay in the Zone

Introduction

A frequent topic of this column has been deposition practice in New York State courts, and a frequent sub-topic has been the evolution, or devolution, of case law developments impacting the use of deposition testimony in summary judgment motions where the deponent has submitted either a deposition *errata* sheet or an affidavit making significant changes to the deposition testimony.[1] Add to the mix a third line of cases where a party has made an admission and then walks the admission back at deposition.

The trend, such as it is, has been to sanction, and in some cases mandate, the rejection of the subsequent "modified testimony," regardless of the form in which it is submitted. However, a 2016 Court of Appeals decision, *Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*,[2] may impact cases across the spectrum of what is, and is not, permitted by way of subsequent testimony used in summary judgment motions.

Three Paths to Rejection

CPLR 3116(a) Deposition Corrections

A deponent is permitted to make "any changes in form or substance which the witness desires to make [and those changes] shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them."[3] The right to make these changes is not granted by case law, or court rule, but by statute, specifically CPLR 3116(a), although the right to make changes to deposition testimony had been recognized at least as far back as 1926.[4] The pre-CPLR procedure for deposition corrections was set forth in *Columbia v. Lee*:[5]

> Before the witness signs and subscribes his testimony he may add to the foot thereof a statement that certain of his answers (indicating the answers to which he refers) are incorrect, giving the reason therefor: either that it is an incorrect transcript or that his present recollection of the facts is more accurate, and he may then state what his corrected answer is and give any other explanation he desires with respect to his prior answer. After adding such a statement he must sign and subscribe his testimony. This will leave available to the trial court the original form of answer, which may then be compared with the second form of answer to determine which one may or should be credited.[6]

In what is likely the first appellate decision applying CPLR 3116, decided two months after the CPLR took effect, the Fourth Department in *Marine Trust v. Collins*,[7] held the procedure set forth in *Columbia v. Lee* "should be followed" in applying the then-new CPLR 3116.

Traditionally, CPLR 3116(a) was understood to permit changes of any kind, including changes that could be outcome determinative, illustrated by a 2006 Second Department decision:[8]

> [The deponent] testified at his deposition that although he signed the document he had no affirmative recollection of having ever reviewed the document or of personal knowledge of the basis for the claim. Shortly thereafter Gizzi furnished an errata sheet in accordance with CPLR 3116 (a), in which he corrected the substance of his deposition testimony, claiming that after refreshing his recollection about a meeting he attended before preparation of the notice of claim, he now recalled that he had adequate knowledge about the basis of the claim and had in fact reviewed the document before he signed it.[9]

The First Department in *Cillo v. Resjefal Corp.*[10] permitted "substantive" changes that were accompanied by a statement of the reason for the changes, noting that credibility issues created by the deponent's deposition transcript changes were for the finder of fact:

> Defendant's motion to strike plaintiffs' amended errata sheets or for further depositions was properly denied since a witness may make substantive changes to his or her deposition testimony provided

> the changes are accompanied by a statement of the reasons therefor. Plaintiffs' amended errata sheets are accompanied by such a statement. The changes raise issues of credibility that do not warrant further depositions but rather should be left for trial.[11]

The Third Department has held "witnesses have the explicit right to change deposition testimony provided that they do so in accordance with CPLR [] 3116(a)."[12]

However, with its 2013 decision in *Ashford v. Tannenhauser*,[13] the Second Department, with support from prior authority, held that where the deponent "failed to offer an adequate reason for materially altering the substance of his deposition testimony, the altered testimony could not properly be considered."[14] In *Ashford*, the reason given for submitting deposition corrections was that the deponent "was nervous," which the Second Department held was inadequate as a matter of law.[15]

Last year the Second Department expanded on its *Ashford* holding and enunciated a black letter rule barring certain changes, regardless of the reason: "[M]aterial or critical changes to testimony through the use of an errata sheet is [] prohibited."[16]

So, while there appears to be a split between different departments in the Appellate Division, Second Department authority not only permits but mandates the preclusion of certain deposition corrections that are submitted in full compliance with CPLR 3116(a).

The "Feigned" or "Tailored" Affidavit

When subsequent testimony is furnished in the form of an affidavit in opposition to a summary judgment motion, those that contradict critical elements of the affiant's deposition testimony have been labeled as "feigned" or "tailored," designed "to raise feigned issues of fact to avoid the consequences of [the deponent's] testimony."[17] Thus labeled, such affidavits have been found to be "insufficient to defeat summary judgment."[18]

The rationale behind the holding was explained by the First Department in *Fernandez v. VLA Realty LLC*:[19]

> Issues of fact and credibility are not ordinarily determined on a motion for summary judgment. But where self-serving statements are submitted by plaintiff in opposition that "clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of h[is] earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment" (citation omitted).

Many courts have rejected the affidavits, considering only the deposition testimony, with the result that summary judgment is generally granted to the other side.

An Earlier Admission

A third variant permitting subsequent testimony, including deposition testi-

mony, to be precluded when the subsequent testimony contradicts an admission, follows the rationale set forth in the feigned affidavit cases above. In *Garzon-Victoria v. Okolo*,[20] a party's affidavit was precluded because of a prior admission:

> Plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability by submitting his affidavit stating that defendants' yellow cab struck him as he was crossing within a crosswalk, with the pedestrian light in his favor, and after he had looked for oncoming traffic (citations omitted).
>
> In opposition, defendants failed to raise a triable issue of fact. Defendant driver Michael Okolo himself admits in his affidavit that both he and plaintiff spoke with the police. Because Okolo's statement constitutes an admission against interest, it is admissible (citations omitted). Okolo's affidavit containing a different version of the facts appears to have been submitted to avoid the consequences of his prior admission to the police officer and, thus, is insufficient to defeat plaintiff's motion for partial summary judgment (citations omitted).[21]

Citing *Garzon-Victoria*, the First Department, in *Estate of Mirjani v. DeVito*,[22] precluded a party's deposition testimony on the same basis:

> Here, the certified police report and the officer's deposition testimony unequivocally state Behrouz did not remember how the accident happened. Indeed, Behrouz, at his deposition, acknowledged telling this to the police but went on to testify that he regained his memory several months later when he visited the scene. His testimony regarding how the accident occurred was flatly contradicted by that of DeVito, Riso and Fulcoly, as well as by plaintiff Kerendian, who was a passenger in Behrouz's vehicle. Behrouz's testimony therefore "appears to have been submitted to avoid the consequences of his prior admission to the police officer and, thus, is insufficient to defeat [defendants'] motion for . . . partial summary judgment" (citations omitted). The motion court properly rejected this testimony since the totality of Behrouz's submissions create only a feigned issue of fact, and they are therefore insufficient to defeat defendants' motions (citation omitted).[23]

The Court of Appeals *Red Zone* Decision

In *Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*,[24] a decision both short and short on facts, the Court held it was error to preclude an affidavit submitted in opposition to summary judgment motion seeking to strike a defendant's statute of limitations affirmative defense:

> Viewing the evidence in the light most favorable to defendant as the non-movant (citations omitted), material triable questions of fact exist regarding whether defendant failed to exercise the ordinary reasonable skill and knowledge commonly possessed by members of the legal profession (citation omitted). While a party may not create a feigned issue of fact to defeat summary judgment (citation omitted), contrary to plaintiff's assertion here, the affidavit of the attorney who represented plaintiff did not flatly contradict his prior deposition testimony. Therefore, the affidavit should have been considered in opposition to plaintiff's motion.[25]

Thus, in the world of affidavits submitted in opposition to a motion for summary judgment, while affirming the validity of the "feigned affidavit rule," the Court made clear that the affidavit may only be precluded where it "flatly contradict[s]" the prior deposition testimony.

Conclusion

What impact, if any, does *Red Zone* have on CPLR 3116(a) *errata* sheets? Does *Red Zone* lay down a black-letter rule barring all subsequent affidavit testimony that "flatly contradict[s]" prior deposition testimony? And does *Red Zone* intrude upon the jury's role of evaluating credibility.

Frankly, I have no idea, but I have about a month to figure it out and will return to *Red Zone* in the next issue. Until then, enjoy the forthcoming kaleidoscope of fall foliage! ■

1. In fact, less "a frequent sub-topic" and more an obsession.
2. 27 N.Y.3d 1048, 34 N.Y.S.3d 397 (2016).
3. CPLR 3116(a).
4. *Van Son v. Herbert*, 215 A.D. 563, 214 N.Y.S. 272 (1st Dep't 1926).
5. 239 A.D. 849, 264 N.Y.S. 423 (2d Dep't 1933).
6. *Id.* at 850.
7. 19 A.D.2d 857, 243 N.Y.S.2d 993 (4th Dep't 1963).
8. *Breco Envtl. Contrs., Inc. v. Town of Smithtown*, 31 A.D.3d 359, 818 N.Y.S.2d 244 (2d Dep't 2006).
9. *Id.* at 360.
10. 295 A.D.2d 257, 743 N.Y.S.2d 860 (Mem) (1st Dep't 2002).
11. *Id.* at 257.
12. *Boyce v. Vazquez*, 249 A.D.2d 724, 726, 471 N.Y.S.2d 724 (3d Dep't 1998).
13. 108 A.D.3d 735, 970 N.Y.S.2d 65 (2d Dep't 2013).
14. Three of the four cases cited by the *Ashford* Court involved cases where no reason was furnished, but the fourth, *Kuzmin v. Visiting Nurse Serv. of N.Y.*, 56 A.D.3d 438, 866 N.Y.S.2d 781 (2d Dep't 2008), held the trial court "properly struck the affidavits of correction submitted by the plaintiff inasmuch as she failed to provide a sufficient explanation for the significant changes to the deposition testimony," and *Kuzmin* cited earlier authority for the same proposition.
15. *Id.*
16. *Torres v. Board of Education of City of New York*, 137 A.D.3d 1256, 1257, 29 N.Y.S.3d 396 (2d Dep't 2016).
17. *Kudisch v. Grumpy Jack's, Inc.*, 112 A.D.3d 788, 791, 977 N.Y.S.2d 663 (2d Dep't 2013).
18. *Id.*
19. 45 A.D.3d 391, 391, 845 N.Y.S.2d 304 (1st Dep't 2007).
20. 116 A.D.3d 558, 983 N.Y.S.2d 718 (1st Dep't 2014).
21. *Id.*
22. 135 A.D.3d 616, 24 N.Y.S.3d 263 (1st Dep't 2016).
23. *Id.*
24. 27 N.Y.3d 1048, 34 N.Y.S.3d 397 (2016).
25. *Id.*

How an Uncommonly Silly Law Led to a Host of Very Consequential Supreme Court Decisions

By C. Evan Stewart

In 1879, Connecticut passed a law barring the use of "any drug, medicinal article or instrument for the purpose of preventing conception"; the penalty was "not less than fifty dollars" or between 60 days and one year in prison. And the state legislature also made it a crime to aid or abet such activity.

Connecticut's law was challenged repeatedly in the years thereafter, even reaching the U.S. Supreme Court several times, but without effect. In 1965, the Court decided to address the law head-on, a law one Justice derided as "uncommonly silly." Yet the outcome of that case, *Griswold v. Connecticut*,[1] was far from silly. For the first time the nation's highest court declared that the Constitution implied a fundamental right to privacy, thereby setting in motion the direct doctrinal basis for some of the most consequential social policy rulings of our time – *Roe v. Wade*[2] (abortion), *Lawrence v. Texas*[3] (right of same sex sex), and *Obergefell v. Hodges*[4] (same-sex marriage). All of those decisions, whether acknowledged or not, involved the Court's application of substantive due process.

"Bad" Substantive Due Process

The Supreme Court's track record on substantive due process is far from stellar. It made many terrible decisions before it began experimenting with substantive due process in what many people consider a "good" way in the 1960s. The *worst* decision, in my judgment, was the *invention* of substantive due process in *Dred Scott v. Sandford*,[5] where the Fifth Amendment was held to protect the right to travel with one's "property" (i.e., one's slave). The Court thereafter expanded on that "original sin," via the 14th Amendment, into protecting the right of economic free will in *Lochner v. New York*,[6] which struck down a New York law that sought to regulate the number hours

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a baker could work per week. The Court rejected New York's "arbitrary" and "unreasonable" interference with an individual's "freedom of contract"; *Lochner* was subsequently used to promote "laissez-faire constitutionalism" throughout the first part of the 20th Century, as one by one the Court struck down virtually all of President Roosevelt's "New Deal" legislation. It likely would have continued on that path were it not for FDR's threat to pack the Court in 1937. In response to that constitutional crisis, the Court did an abrupt 180-degree turn.[7]

Many lawyers and political scientists have been very critical of the foregoing substantive due process decisions by the Court; and a good number of those critics have not liked unelected Justices weighing in on obviously political matters, as well as the policy ends promoted by those decisions (e.g., racism, striking down "progressive" legislation, etc.). But what if substantive due process were to be used going the other political way?

"Good" Substantive Due Process

The first time the Court started experimenting with substantive due process in a "good" way came in the 1960s, and involved the "uncommonly silly" Connecticut law that had been challenged over the years – but always unsuccessfully. In 1961, the Supreme Court seemed to put an end to all repeal efforts in *Poe v. Ullman*,[8] when it dismissed a lawsuit directed against the Connecticut law for failure to state a case or controversy. In his dissent, however, Justice John Marshall Harlan II suggested a legal path forward through a broad reading of liberty rights under the 14th Amendment:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints,…and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

That language would become transformative for much of the Supreme Court's 14th Amendment jurisprudence over the next six decades.

A Test Case Is Born

In addition to Harlan's doctrinal approach, Justice William Brennan's concurrence in *Poe* – that a "true controversy" did not exist because no one had been arrested in violation of Connecticut law – provided the law's opponents with a plan. Planned Parenthood decided first to open a clinic in Connecticut and thereafter to "get Estelle Griswold [the Executive Director of Planned Parenthood's Connecticut operation] arrested." On November 1, 1961, the facility opened in New Haven. Several days later, New Haven police detectives began assembling prearranged evidence which demonstrated that Griswold and Leo Buxton, a professor at Yale Medical School and the medical director at the clinic, were giving birth control devices, as well as advice related thereto, to a number of local, married women. On November 10, arrest warrants were issued for both Griswold and Buxton for violating the aiding and abetting provision. The test case had begun.

At the trial stage, the defendants were found guilty and each fined $100. The intermediate appellate court affirmed the verdict (the court declined to pass judgment on the "wisdom or unwisdom" of the law unless it was "plainly violative of some constitutional mandate"). On April 28, 1964, the Connecticut Supreme Court affirmed the lower courts, noting that "every attack now made on the statute . . . has been made and rejected" by each and every court, over many years. Next up: the U.S. Supreme Court.

On to the Supremes

Griswold and Buxton's lawyers invoked 28 U.S.C. § 1257 (where a statute is "repugnant to the Constitution") in their petition to the Court, invoking Amendments One, Four, Nine, and Fourteen as the affected Constitutional provisions. In December of 1964, a unanimous Court agreed to grant certiorari, and briefing took place at the beginning of the next year.

On March 29, 1965, the Court began to hear oral argument, and it was tough sledding for both sets of advocates; each was constantly interrupted by questions, unable to get to many of the points they had intended to raise. At one point, Justice Hugo Black suggested to appellants' counsel that his side was advocating the same kind of (discredited) substantive due process doctrine endorsed by *Lochner* and its progeny; that led to some very heated back and forth. Notwithstanding, appellants' counsel did try to focus on that which had been advanced in the briefs – what Harlan had been getting at in *Poe*: an emerging Constitutional right of privacy, grounded in the First, Third, Fourth, Fifth, and Ninth Amendments. Justice Harlan piped in at that point and asked whether appellants' counsel was planning to say anything more on the First Amendment issue. His reply: "Well, I'm not getting far on any of my arguments . . . ." After laughter throughout the courtroom subsided, he concluded: "I can't guarantee that I'll get back to the First Amendment, no." The argument then moved on to the fact that the Connecticut law did not "conform to current community standards."

Counsel for the State of Connecticut was equally hammered, especially on the fact that Connecticut was the *only* state that prohibited the use of contraception. The

Court adjourned midway through his presentation, and took up argument the following day. The focus the next day was on whether the statute was a proper use of Connecticut's police power and whether the seldom-enforced law was really a "dead letter."

In his rebuttal, appellants' counsel tried to focus on broad public policy issues. But then a series of questions from the Court on the unbriefed subject of abortion took center stage. At one point, Justice Byron White observed: "I take it abortion involves killing a life in being, doesn't it? Isn't that a rather different problem from conception?" Appellants' counsel agreed, but was unable to stop Justice Black from probing farther on this hot-potato issue and its possible application to the case before the Court.

Finally, at 10:45 a.m. on March 30, oral argument concluded. And as with most cases argued before the Court, no one could predict how the nine Justices would resolve the weighty matters briefed and orally vetted.

The Court Decides

On June 7, 1965, Justice William Douglas (who had not asked a single question at oral argument) delivered the opinion of the Court. Justice Arthur Goldberg wrote a concurring opinion, which was joined by Chief Justice Earl Warren and Justice Brennan. Justice Harlan wrote a separate opinion, concurring in the result, as did Justice White. Justices Black and Potter Stewart each wrote dissenting opinions.

Justice Douglas noted at the outset that there was not a problem of standing (which had defeated a prior challenge to the statutes) because Griswold and Buxton had been found guilty of the aiding and abetting provision. That was the easy part.

Moving on to the merits, Douglas, in striking down Connecticut's law, recognized that the result might sound a lot like *Lochner* and its substantive due process progeny. Not so: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." Instead, the Court was *only* substituting its wisdom for the Connecticut legislature because the legislators had passed a law that "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."

In justifying the Court voiding the law, Douglas first invoked Harlan's dissent in *Poe*; but then he went a step farther, finding that various provisions of the Bill of Rights (the First, Third, Fourth, Fifth, and Ninth Amendments) have privacy guarantees which "have *penumbras*, formed by *emanations* from those guarantees that help give them life and substance" (emphasis added). Douglas then cited a number of prior Supreme Court "penumbra-like" cases which "bear witness that the right of privacy which presses for recognition here is a legitimate one."

Obviously concerned about how wide a door he might be opening by recognizing a Constitutional "right of privacy" for the first time in the country's history, Douglas indicated that this new right would be a *very* limited one:

> We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Justice Goldberg's concurrence agreed with the newly discovered Constitutional "right of marital privacy" (even though it "is not mentioned explicitly in the Constitution"). His justification, however, was not based upon "penumbras" or "emanations." With the help of his imaginative law clerk, Stephen Breyer, Goldberg emphasized the importance of the Ninth Amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). Why emphasize the Ninth Amendment? Because "this Court has had little occasion to interpret" that Constitutional provision, so perhaps the jurisprudential vacuum could be used to say that the "forgotten" amendment actually "lends strong support" to this new right of marital privacy. The sole authority for this dubious assertion, however, was a "cf." citation to a prior opinion of the Court interpreting the Hatch Act! As for how to determine "which [other] rights are fundamental" enough to receive Constitutional protection, Goldberg provided a facile solution: "look to the 'traditions and [collective] conscience of our people'."

Perhaps recognizing the foregoing was not on the most solid ground (and anticipating caustic attacks from Black and the usually mild-mannered Stewart), Goldberg spent the rest of his concurrence agreeing and re-agreeing with Harlan's dissent in *Poe*.

Justice Harlan concurred with the result, but rejected the imaginative way the majority got there. Rather than trying to avoid the *Lochner* stigma – by invoking "penumbras" and "emanations," let's call a spade a spade: obviously, this is substantive due process; but now it is being used (as he wrote in *Poe*) not in a bad *Lochner* way, but instead to vindicate one of the "basic values implicit in the concept of ordered liberty." As for those who would worry about opening a Pandora's Box with this approach, don't worry: "Judicial self-restraint" will ensure that the Court does not go crazy in the future. And such self-restraint will be achieved through (i) respecting history, (ii) recognizing the aforementioned "basic values," and (iii) appreciating federalism and the separation of powers.[9]

Justice White, also concurred in the result, but took on an even more direct approach than did Harlan. In essence, he wrote that Connecticut's law was so stupid, it violated due process. In an opinion littered with "cf."

citations, White questioned how a ban on contraception affecting married people could somehow prevent illicit sexual relations. Because of the broad impact of the statute on compelling societal interests (i.e., children), Connecticut was bound to justify the laws; and because the state could not, the law must be voided.

Justice Black's dissent, while less famous than Stewart's, presented a telling critique of the opinions of his judicial brethren who voided Connecticut's law. While initially agreeing that the Connecticut law was dumb, he wrote that that did not rise to a Constitutional violation. As for a Constitutional right of privacy, obviously it exists nowhere in the Founders' document (nor are there any "emanations" therein); indeed, the first time the concept emerged is in an 1890 article in the *Harvard Law Review*! With respect to the embrace of substantive due process, Black wrote that he thought the Court had rid itself of that noxious doctrine when the Court did its pivot in the 1930s and stopped voiding FDR's New Deal legislation. In any event, "[s]uch an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them . . . [the former is] a power which was specifically denied to federal courts by the convention that framed the Constitution." As to White's burden point, Black countered that White got it exactly wrong: laws are *presumed* to be Constitutional. Regarding Goldberg's proposed standard of the "traditions and [collective] conscience of our people," where and/or how does the Court determine them?: "Our Court certainly has no machinery with which to take a Gallup Poll." Finally, as to the notion that the Court must "keep the Constitution in tune with the times," that is precisely what led to all the mischief in *Lochner* and its progeny; if people want to update the Constitution, the Founders provided a precise mechanism to do that (a mechanism which does *not* involve the Court). On this last point, Black ended by quoting the late Judge Learned Hand's disparaging of judges using substantive due process to favor their "personal preferences": "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

Justice Stewart began his dissent with his famous observation: "this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case." He then warmed to the task at hand, chastising the majority for being afraid to label what they were really doing: reviving substantive due process – at least Harlan and White had the courage to call it what it is. As for Douglas's "emanations" and "penumbras" of marital privacy, they are nowhere to be found in any of the enumerated Amendments. And as for Goldberg's hyping of the Ninth Amendment, that is "to turn somersaults with history": "the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder." Stewart then addressed the comment made at oral argument about non-conformity with "current community standards": "it is not the function of this Court to decide cases on the basis of community standards." If people do not like a law, the correct way to proceed is "to persuade their elected representatives to repeal it. That is the constitutional way to take [a] law off the books."

Pre- and Post-Blowback

Well before the various opinions were made public, it was evident to some Court insiders that what was to come would have great significance. Most importantly, two memoranda written by Warren's clerk, John Hart Ely, foresaw much of what lay ahead. The first was dated February 26, 1965, before oral argument, and it was distributed beyond Warren to a number of the other Justices. In his memorandum, Ely warned that "some of [the arguments] urged by appellants have dangerous implications": "Just as I think the Court should vigorously enforce each clause in the Constitution, I do not think the Court should enforce clauses which are not there. No matter how strong a dislike for a piece of legislation may be, it is dangerous precedent to read into the Constitution guarantees which are not there. Despite Justice Brandeis's lifelong crusade for a right of privacy , . . . the Constitution says nothing about such a right." And as for Justice Harlan's approach in his *Poe* dissent, that would constitute "in my opinion, the most dangerous sort of 'activism.'" Ely concluded his February memorandum by advising Warren that to reverse the lower courts on a right to privacy ground "would, in my opinion, have very dangerous implications."

Later on, when Douglas was circulating drafts of his opinion, a number of other Supreme Court clerks were taken aback by the weakness of the analysis, with a few openly mocking his "penumbras" and "emanations." More ominous was Ely's second memorandum to Warren, written after Douglas's nearly finalized opinion: "This opinion incorporates an approach to the Constitution so dangerous that you should not join it."

It appears that the only person in the Supreme Court's building who actually liked what Douglas had come up with was Justice Tom Clark. On April 28, he penned a note to Douglas: "Bill, Yes I like all of it – it emancipates femininity and protects masculinity–- TC."

After the ruling, the immediate reaction by the media was fairly predictable. The liberal press (e.g., the *New York Times, Washington Post, Life*, *New Republic*) hailed the Court's action to protect "the people" from troglodyte state legislators. The mainstream press (e.g., *Richmond Times-Dispatch*), however, thought the dissents were right: "The fact that members of the court simply *don't like* a law is no basis for throwing it out." (emphasis in original); and a number of publications (e.g., *Waterloo Daily Courier*)

lampooned and/or lambasted Douglas's "penumbras" and emanations."

Perhaps more important were the first wave of law review articles. The annual Supreme Court edition published by the *Harvard Law Review* in 1965 opined that the two approaches endorsed by Douglas and Harlan "differ more in tone than in results to which they lead." What the *Review's* editors found more curious was Goldberg's hyping of the Ninth Amendment, which had *never* been the basis for a single decision by the Court since its adoption in 1791. Later in 1965 came an entire issue of the *Michigan Law Review* devoted to *Griswold*; while most of the legal academics praised the result – a Constitutional right to privacy – many questioned the means to get there. Professor Paul Klapper, for example, found Douglas's opinion: "curious," "puzzling," "confusing," "uncertain," and "ambiguous." Professor Robert Dixon wrote: "The actual result of *Griswold* may be applauded, but was it necessary to play charades with the Constitution?" And a consensus among the various academics seemed to form around the notion that – notwithstanding the various approaches of Douglas, Goldberg, Harlan, and White – they all were, at bottom, "treading a worn and familiar path." And that path subsequently became known as "liberal *Lochner*-ism."

The Future of *Griswold*

While Douglas's new Constitutional right was expressly limited to "marital privacy," it did not stay there for long. As noted above, *Griswold* subsequently became the direct doctrinal basis for *Roe v. Wade*; *Lawrence v. Texas;* and *Obergefell v. Hodges.* Will it be extended even further? That probably depends upon the make-up of the Court.

We have all witnessed bruising nominations to the Supreme Court. First came President Barack Obama's 2016 nomination of Judge Merrick Garland, upon which the Senate never took action. Next up was President Trump's nomination of Judge Neil Gorsuch, who was confirmed (after the "nuclear option" was invoked) by a 55–45 vote in the Senate on April 7, 2017 (he is now the 101st Associate Justice of the Court). If Justices Kennedy and/or Ginsburg are the next retirees from the Court, it is likely that the nomination process for their successors will reach new heights of contentiousness (on both sides of the political aisle). Among other things, the fate of "good" substantive due process will likely hang in the balance of who succeeds these Justices.

Postscripts

- For those who wish to know more about *Griswold*, the first stop should be John Johnson's *Griswold v. Connecticut*: *Birth Control and the Constitutional Right of Privacy* (Kansas Press 2005). The 1965 *Michigan Law Review* referenced *supra* is in Volume 64. A more recent scholarly law review take on *Griswold* is Ryan William's "The Path to Griswold," 89 *Notre Dame Law Review* 2155 (2014). And Jill Lepore has weighed in on *Griswold* (and related subjects) in two recent *New Yorker* articles: "To Have and to Hold" (May 25, 2015); "The History Test" (March 27, 2017).
- Justice Stewart's "uncommonly silly law" phrase was later cited with approval by Justice Clarence Thomas in his dissent in *Lawrence v. Texas.*[10]
- Goldberg's Ninth Amendment opinion in *Griswold* would be his last as a Supreme Court Justice. At President Johnson's importuning, he left the Court to replace Adlai Stevenson as the U.S. Representative to the United Nations. His seat on the Court was filled by Abe Fortas. Goldberg's law clerk, of course, is now Justice Breyer.
- John Hart Ely became one of America's leading legal scholars (ranked as the fourth most cited legal authority – after Richard Posner, Ronald Dworkin, and Oliver Wendell Holmes), and served as Dean of the Stanford Law School. His 1980 book, *Democracy and Distrust: A Theory of Judicial Review* (Harvard Press) is considered one of the most important and influential books about Constitutional law ever written. In 1973, after the Court had decided *Roe v. Wade*, Ely published an article in the *Yale Law Journal* (Volume 82). In it he posited that the two rights discovered by the *Griswold* and *Roe* Courts were made from the same "whole cloth" as *Lochner*. He went on to write that "although *Lochner* and *Roe* are twins to be sure, they are not identical. While I would hesitate to argue that one is more defensible than the other in terms of judicial style, there are differences in that regard that suggest *Roe* may turn out to be the more dangerous precedent." Ely supported the availability of abortions as a matter of public policy, but *Roe* (he wrote) "is not constitutional law and gives almost no sense of an obligation to try to be." ■

1. 381 U.S. 479 (1965).
2. 410 U.S. 113 (1973).
3. 539 U.S. 558 (2003).
4. 576 U.S. ____, 135 S.Ct. 2584 (2015).
5. 60 U.S. 393 (1856).
6. 198 U.S. 45 (1905).
7. *See West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
8. 367 U.S. 497 (1961).
9. Ironically, Harlan's grandfather, John Marshall Harlan, had espoused exactly the *opposite* approach in his *Lochner* dissent. Underscoring that a basic tenet of our democracy is a restrained judiciary, he wrote: "If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to the end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere."
10. 539 U.S. 558 (2003).

The Next Wave of Security

By Brian Podolsky

Brian Podolsky leads the Enterprise Content Management (ECM) Practice Group in the New York office of Kraft & Kennedy, Inc. He has extensive experience implementing and supporting Microsoft Office, iManage, NetDocuments, OpenText eDOCS, and Worldox document management systems, as well as third-party integrated add-ons to these systems. He also drives Kraft Kennedy's research on the latest ECM technologies including email management, enterprise collaboration and search, and provides guidance and best practice standards to clients implementing ECM solutions.

It happens all the time. Every year clients seem to want heightened security from their legal representation. New technology and products promise to meet all your security needs, but then clients knock you back with a new wave of even newer security policy demands. It can be daunting both for attorneys and their firms' IT and risk managers.

Years ago, for example, the firewall was the first security barrier most firms deployed. Firms could stay safe by allowing only certain activity (for example, inbound email and Citrix remote access) into the network. Today, however, malware and phishing from emails often defeat firewalls. This has led firms to invest in email hygiene engines such as Mimecast. Unfortunately, hackers always seem to be one step ahead of these solutions, so they are not foolproof. Moreover, firewalls and email hygiene scanners do nothing to protect firms from internal threats.

Anticipating the future demands of clients is the key to ensuring a safe enterprise. It can also lead to a prosperous enterprise if you can quickly prove you can answer a security audit completely and to the client's satisfaction.

The Threat Within

To control access within the internal network, firms implement identity-based access lists and content-based ethical walls. The idea is simple. Certain users have permissions to particular areas of their computers and networks. The problem with this solution is that it requires an extremely strong password policy to ensure that credentials are not stolen or shared. Weak passwords can be hacked relatively easily by malicious scripts.

Attorneys are sometimes required to use complex passwords, but many take the highly inadvisable step of writing them down on a Post-It stuck to their desks or monitors. It's also common for a partner to provide login information to an associate or administrative assistant. Common, but still a major no-no. Additionally, attorneys and staff are often the targets of email phishing campaigns, where a hacker spoofs the email address of an IT admin, making it seem like IT is asking a user for their credentials to troubleshoot a computer issue. Never send your password to anyone over email.

With ethical walls, certain content within a document management system (DMS) or elsewhere can be restricted such that only particular users know it even exists. The problem here, however, is that the method relies on proper filing of the material. A

secure document can accidentally be saved into a public matter, and *poof*, it's not secure when an attorney thought it was.

The one thing all these security caveats have in common is they involve you, the attorney. The individual user is the hidden riptide that can pull a firm into the sea of data breaches. You don't see it, but it's there, it's dangerous, and it's a killer. Sometimes the intent is malicious, but usually it's not. The results are the same, and they can be costly. If confidential data leaves the walls of the firm and gets into the wrong hands, the firm can suffer major losses to its data, reputation, and finances.

Security to the Rescue

There are several new technologies and philosophies gaining steam in the legal industry to meet the latest security requirements. First is a shift from an optimistic to a pessimistic security model. In other words, rather than assuming that a document should be publicly available to the entire firm by default, the security is instead granted on a "need-to-know" basis. The thought process behind this is that the fewer documents exposed to the entire firm, the lower the risk of content being shared inappropriately. While this may make it tougher for employees to find relevant documents, firms shouldn't shy away from the "need-to-know" security model.

As Keith Lipman notes in his July 2017 article *Knowledge Management in the Age of Need to Know Security*,[1] firms can track additional metadata for the matter into a matter profile. With information such as matter type, area of law, tags, deal/settlement amounts, court, jurisdiction, or industry saved into matter profiles, attorneys can determine which matter or responsible attorney to contact and can obtain the relevant information they need.

Next, major legal vendors are beginning to provide solutions that bring Digital Rights Management (DRM) technology to law firms. We've seen DRM technology in consumer products for years. It's the reason you couldn't copy music from certain CDs and why you could only use Keurig coffee pods in Keurig machines. Over the past few years several technology vendors have brought DRM to electronic documents and files. The process works by essentially attaching the electronic equivalent of a physical string to the document at all times, no matter where the document lives, so you can always have a connection to the document. The string checks and verifies that the person attempting to access the document has the proper permissions to do so. At any point, you can pull the string and take access away from the recipient.

The challenge with DRM has always been ease of use, both when sharing and collaborating on files. Without going out of the way, can an attorney easily secure a document? Is it straightforward for the recipient to view or open a document? Vendors have tried for years without much success. Some products required program wrappers around the file, meaning that the recipient had to install special software to view and edit the file. Others required viewing within a web browser only. Understandably, none of these workflows have been deemed acceptable in the legal workplace.

The proper solution should be seamless and integrated into both the Windows desktop environment and the DMS. Recently, two products are showing signs of breaking the usability barrier and integrating with the legal DMS. Litera IRM and Seclore Rights Management are integrating with major DMS players in the market. Each offers a different DRM engine, with Litera leveraging Microsoft's Azure Rights Management and Seclore with its own proprietary policy engine. DMS vendors may look to bring this technology within their systems as well to ensure security of firm work product both inside and outside the confines of the DMS.

The challenge with DRM has always been ease of use, both when sharing and collaborating on files.

Finally, with security audits and assessments growing more and more demanding, some legal vendors are going right to the source and designing their systems to meet the latest requirements of these audits. It started as encryption in transit, but has evolved to encryption at rest and now encryption in use. NetDocuments, for instance, has been spending time and effort on meeting the demands of the JP Morgan Outside Counsel Manual. Once it does, it will be compliant with HIPAA, SEC and FINRA, SOC2 Type 2, and SOC 2+ regulations. The idea is if it's good enough for JP Morgan, it should be good enough for law firms. It's a solid theory.

Law firms need to see the next wave coming to avoid getting blindsided. By being proactive, firms can protect themselves from malicious actors and from themselves. ■

1. 3 Geeks and a Law Blog, July 7, 2017, www.geeklawblog.com/2017/07/knowledge-management-in-age-of-need-to.html.

What's Hiding in Your Documents: The Dangers of Metadata

By Nina Lukina and Eric Christiansen

Have you ever repurposed a contract or other largely boilerplate document by changing some names, dates, and a few other specifics? We've all done it, and that's OK. It's perfectly reasonable to avoid duplicating work.

The practice, however, carries hidden dangers that should make attorneys wary. The risks do not lie in the clearly visible aspects of a document, but in its metadata. Documents, such as contracts and deals, which undergo various rounds of revisions, are also particularly susceptible.

Metadata is data *about* data, and it is embedded in digital information like emails, SMS messages, and – since nowadays they are created and transferred exclusively using computers – legal documents. Metadata had a long moment in the spotlight following Edward Snowden's revelations in 2013 that the NSA was collecting the metadata of millions of citizens' communications. The widespread concern following the revelation was justifiable; while metadata doesn't reveal the substance of a message or document (the data itself), it does give away a surprising amount of sensitive information. This may include the current and previous author(s) of a document, timestamps showing when it was cre-

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ated and modified, and, perhaps most worryingly, tracked changes and comments that you may have thought you cleared before sending off your work product to a client or opposing counsel.

Needless to say, this can result in embarrassment or, more seriously, a breach of confidentiality. Some e-filing websites even show a warning that the filer is responsible for scrubbing metadata prior to submission.

Some metadata, such as timestamps, can be found by looking at the "properties" on a document. Most hidden metadata can only be found using special software, but it can also be exposed if a file is corrupted – and risk of corruption rises significantly with repurposed documents – or not converted properly.

Don't panic. This doesn't mean that you have to start every document from scratch or revert to using paper. There are precautions you can take using what you already have on your desktop as well as several products that cater to the need for metadata scrubbing among attorneys.

Scrubbing Tools

Several software solutions check legal documents for metadata that should be wiped before sending. They offer various levels of integration with email applications like Outlook and document management systems like iManage and NetDocs.

Workshare and Litera offer similar metadata-scrubbing features and are probably the most popular tools among law firms. These tools are designed specifically for the legal industry. The latest versions run quietly alongside your email and document applications, with minimal bothersome pop-ups. They do have a different look and feel, and it would be worth trying a demo of each to see which you prefer.

Litera allows attorneys to have comprehensive control over document scrubbing at the cost of a few extra steps in their workflows.

Similarly, DocsCorp, which you may know for its PDF document management, offers a popular solution called cleanDocs, which promises to clean a 100-page document in under half-a-second. BigHand also offers a product called Scrub, and PayneGroup sells Metadata Assistant for the metadata-wary.

While a specialized scrubbing tool is your best bet for removing metadata, there are also ways to be cautious with what you already have. Consider disabling or avoiding the "fast save" function in Microsoft Word – that's the kind of save we perform by clicking CTRL+S or on the plain floppy disk icon as opposed to "Save As." This kind of save only registers the appended or changed information and leaves a map of edits behind. Certain versions of Office products also allow you to specify that certain metadata not be saved in the security settings. As for PDFs, always save them in the "locked" form in Adobe Acrobat before sending.

Keep in mind that metadata is subject to discovery in litigation and sometimes needs to be preserved. The most important thing is to know when to scrub and when to preserve it. ■

BY PETER SIVIGLIA

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Termination, Evergreen, and Severance Clauses and Some Warnings

Les Préludes

A. Your writing is your mind walking naked across the page.

B. What the wheel is to the world of mechanics, grammar is to the world of writing – especially the writing of contracts.

C. The task of transactional attorneys is to place commercial litigators on the endangered species list.

A. Termination Clauses

Often have I struggled with termination clauses. If the contract terminates, shouldn't some provisions survive? Does the contract even need a provision terminating it?

Typical provisions that should survive termination of a contract are warranties and indemnities and those provisions dealing with confidentiality, insurance, arbitration and submission to jurisdiction. Some provisions, like non-compete clauses, because of their very nature, survive termination.

There are some contracts, though, that need not – and should not – be terminated. Examples are licenses, leases, and, yes, even employment contracts. Instead of terminating the contract, the contract should just terminate the arrangement or the relationship: that is, terminate the license, the lease term, or the employment. Since the contract lives on, the struggle for survival perishes.

Contracts that do terminate should either (i) include a clause listing those provisions that survive termination, or (ii) include in each provision that should survive, a clause stating it will survive termination of the contract.

Caution: In transactions involving the sale of goods, § 2-309(3) of the Uniform Commercial Code

> (i) requires, in those situations in which a party may terminate the contract on notice, "reasonable" notice of termination except in the case of termination based on a specified event; and
>
> (ii) states that "an agreement dispensing with notification [of termination] is invalid if its operation would be unconscionable."

B. Evergreen Clauses

An evergreen clause provides that the term of the contract will automatically renew for successive periods unless either party gives notice of termination. A typical clause might read as follows:

> This agreement will remain in effect until _[X Date]_, and it will continue thereafter for successive 12-month periods measured from _[X Date]_ and from each anniversary thereof unless and until either party gives the other written notice of at least 90 days prior to _[X Date]_ or as the case may be, prior to the end of the then current 12-month period, that this agreement will terminate on __[X Date]__ or, as the case may be, at the end of that 12-month period.

Beware, though, that for certain types of contracts, New York imposes statutory limitations on evergreen or automatic renewal clauses. In the case of leases of personal property and contracts for the service, maintenance or repair of real or personal property, §§ 5-901 and 5-903 of the General Obligations Law require the lessor or the person providing the service to notify the other party of its right to terminate. These sections must be

Beware, though, that for certain types of contracts, New York imposes statutory limitations on evergreen or automatic renewal clauses.

examined carefully in order to comply properly with their requirements. Failure to do so will void the renewal clause.

C. Severance Clauses

Severance clauses do fall within the realm of termination. So below is a model for a severance arrangement that I have used in employment contracts, primarily for executives, when the employer has the right to terminate the contract without cause. It contains a comprehensive definition of "proper cause" and definitions of some other terms that may be useful in other contexts.

If the Company terminates the Employee's employment for any reason *other than* "proper cause" (as defined below),

1.1.1 the Company will pay the Employee the salary to which the Employee is entitled at the time of termination until the first of the following to occur: (A) the expiration of one (1) year from the date of termination, or (B) the date the Employee's employment was scheduled to terminate under this agreement, or (C) the commencement of the Employee's employment with another company; and

1.1.2 if the Employee elects COBRA, the Company will pay the Employee's cost of the COBRA coverage *[consider: less the amount of the employee contribution to the cost of such insurance]* until the first of the following to occur: (A) the expiration of one (1) year from the date of termination, or (B) the date the Employee's employment was scheduled to terminate under this agreement, or (C) the commencement of the Employee's employment with another company.

The Employee will promptly notify the Company of the commencement of the Employee's employment with another company.

"Proper cause" means any of the following: (A) misappropriation of any asset or opportunity of the Company or any affiliate of the Company or any other act of self dealing or a breach of a fiduciary duty to the Company or any affiliate of the Company; (B) an act of fraud, embezzlement or bribery; (C) *[consider: gross]* negligence, wilful misconduct or any other act that, in each case, has or is reasonably likely to have *[consider: an adverse effect // a material adverse effect]* on the business or reputation of the Company or any affiliate of the Company; (D) indictment for any felony; (E) demonstrated evidence of unlawful harassment or any other unlawful misconduct regarding the Company or any affiliate of the Company or any employee of the Company or of any affiliate of the Company; or (F) any *[consider: material]* breach of this agreement and, if the same is capable of being cured, failure to cure the same within fifteen (15) days after the Company notifies the Employee of the same.

An affiliate is any corporation, partnership or other entity that controls, is under common control with, or is controlled by the Company.

Control means the ability, either directly or through one or more entities, to control or determine the management of any corporation, partnership or other entity, whether by election of those members who can determine the decisions of the board of directors or other governing body or by any other means.

The provisions of this Section are in lieu of any claim the Employee might have by reason of the Company's terminating the Employee's employment without proper cause other than the Employee's rights to *[specify any exceptions such as reimbursement of expenses and accrued deferred compensation].*

D. Conclusion

As my good friend, Porky Pig, would say: "Th . . . , th . . . , that's all, folks."

"Well, the boss did say we would be given a Forum."

ATTORNEY PROFESSIONALISM FORUM

Dear Forum:

On my return home from a summer vacation, I almost had a panic attack standing in line at U.S. Customs. The person in front of me was carrying a laptop with a flash drive and the customs agent instructed him to turn the laptop on, plug in the flash drive, and open certain documents on it. My laptop was in my bag hanging over my shoulder. I started thinking about what was on my laptop. I had been reviewing documents on a very sensitive deal between two well-known public companies that I am sure my client does not want anyone to know about. I am very careful about cybersecurity and the laptop required two-factor authentication to access any documents. But this border agent was directing the person to enter a password and show him information on the computer with a number of people in the immediate vicinity who could see the screen. Fortunately, I went through the checkpoint without having to even turn on my computer. But I travel frequently and I always bring my laptop with me. I know that a number of the attorneys at my firm regularly travel abroad and many of them take their laptops and phones with them. I am now very concerned about even carrying my laptop to the airport.

Under what circumstances can a customs agent demand to search through a passenger's electronic devices? Are there any limitations for what the customs agent can and can't search? Can they make copies of materials on my devices? Are there exceptions for attorneys who are carrying devices with sensitive or confidential client information? If an agent directs me to show them client information, should I explain to the agent that I am an attorney and carrying sensitive information that I cannot disclose?

If the agent insists on viewing the information despite my protests, is there anything else I can do? Am I violating any ethics rules by following the directions of the agent? Am I breaking any laws by refusing to comply with the agent? If an agent does review my devices and confidential or sensitive client information, what are my ethical responsibilities to my client? Does it matter if I have sensitive or confidential information from a potential client that has not yet retained me? What if the same issue arises with a customs agent from another country? Is there anything I should do to my devices the next time I travel abroad to prevent disclosure of client information?

Very truly yours,
Justin Cancun

Dear Justin:

Most attorneys are aware of the constant threat of cyberattacks and the potential harm to clients that can result from hackers gaining access to sensitive information. We have previously written about the use of Wi-Fi hot spots and have cautioned the bar about the need to protect client confidentiality when using smartphones and similar devices in public spaces, including airplanes. *See* Vincent J. Syracuse and Matthew J. Maron, Attorney Professionalism Forum, N.Y. St. B.J., May 2013, Vol. 85, No. 4. More recently, we looked at the issue from another angle, emphasizing the need to be vigilant about protecting client data and identifying attorney's best cybersecurity practices that will help minimize these threats. *See* Vincent J. Syracuse, Maryann C. Stallone, Richard W. Trotter, Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., June 2017, Vol. 89, No. 6. But your inquiry creates a whole new conundrum: An American government official may be demanding that you remove the very cybersecurity barriers you created to prevent an invasion of your client's confidential information. We understand your concern and near panic attack.

The inherent conflict between national security and an individual's civil rights during air travel is not new. For years, there has been a vigorous debate about the need and legality of numerous airport security measures including scanners, pat downs, forcibly removing passengers from airplanes, and even the removal of shoes. These measures, however, generally address concerns over immediate physical threats during travel or illegal physical activities such as drug trafficking and terrorist attacks. Your situation appears to be focused more on data suggesting to us that this border investigation may not have been focused on an immediate physical threat. While we have no way of knowing what information this border agent was seeking or what immediate threat he was working to thwart, scanning an individual's documents on computers in routine searches is invasive and should cause great concern to all attorneys traveling with their client's sensitive or confidential information.

The New York City Bar Association (NYCBA) Committee on Professional and Judicial Ethics recently addressed many of the issues that attorneys face in connection with international travel in Formal Opinion 2017-5. Under its policies, agents of U.S. Customs and Border Protection (CBP) are permitted

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

to search electronic devices at the U.S. border when travelers enter or leave the United States including the information that is physically stored on the devices. NYCBA Comm. on Prof'l & Jud. Ethics, Op. 2017-5 at 2 (2017). This includes searching emails, text messages and electronically stored documents on devices carried by travelers. *Id.* According to its policies, CBP agents may demand disclosure of social media and email account passwords and seize devices during an inspection and they are not required to have a reasonable suspicion to do so. *Id.* Although the extent of such searches have been legally challenged and depends on the circumstances, a number of federal courts have held that reasonable suspicion is not needed for customs officials to search a laptop or other electronic device at the international border. *See* Robert T. Givens, *The Danger of U.S. Customs Searches for Returning Lawyers*, 30 GPSolo 3 (ABA 2013); *United States v. Levy*, 803 F.3d 120, 122 (2d Cir. 2015) (holding "[w]hen the evidence at issue derives from a border search, we recognize the Federal Government's broad plenary powers to conduct so-called 'routine' searches at the border even without 'reasonable suspicion that the prospective entrant has committed a crime.'") (citations omitted); *United States v. Arnold*, 533 F.3d 1003, 1009 (9th Cir. 2008). This suggests that CBP agents can search an electronic device of any traveler at random in their efforts to protect the borders and fulfill their customs, agriculture, and counterterrorism missions.

In 2009, the CBP issued CBP Directive No. 3340-049, *Border Search of Electronic Devices Containing Information*, which includes its guidelines for searching, reviewing, and retaining information obtained from border searches of electronic devices. (CBP Directive No. 3340-049, https://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf). This directive includes a section addressing a CBP agent's special procedures for handling information claimed to be protected by the attorney-client or attorney work-product privileges:

> If an Officer suspects that the content of such a material may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of CBP, the Officer must seek advice from the CBP Associate/Assistant Chief Counsel before conducting a search of the material, and this consultation shall be noted in appropriate CBP systems of records. CBP counsel will coordinate with the U.S. Attorney's Office as appropriate.

CBP Directive No. 3340-049 § 5.2.1. This directive also requires that CBP agents "encountering business or commercial information in electronic devices shall treat such information as business confidential information and shall protect that information from unauthorized disclosure." CBP Directive No. 3340-049 § 5.2.3. Any privileged or sensitive information obtained in a search may only be shared with federal agencies that have mechanisms in place to protect such information under this directive. CBP Directive No. 3340-049 § 5.2.4. A CBP agent may only seize and retain an electronic device, or copies of information from the device, if "they determine that there is probable cause to believe that the device, or copy of the contents thereof, contains evidence of or is the fruit of a crime that CBP is authorized to enforce." CBP Directive No. 3340-049 § 5.4.1.1. In other words, by the terms of its own internal guidelines, the agents' authority to review information on electronic devices is broad even when an attorney specifically identifies that such information is protected or sensitive. It is likely that these policies may be applied differently from agent to agent. Further, it is possible that different CBP commissioners or administrative officials may have more expansive or restrictive interpretations of these guidelines or revise the guidelines. It certainly would not hurt to carry this directive with you when traveling in the event a certain agent is unfamiliar with these guidelines.

According to the Acting Commissioner of CBP, the CBP's authority to conduct border searches is limited to information *physically* residing on a device and does not extend to information located solely on remote servers. *See* June 20, 2017 *Due Diligence Questions for Kevin McAleenan, Nominee for Commissioner of U.S. Customs and Border Protection (CBP)* at 3, http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/170712-cpb-wyden-letter.pdf. The Acting Commissioner also stated that "CBP does not condition entry of U.S. citizens based on provision of a password, and has not denied entry into the United States to any U.S. citizen because of a refusal by such person to provide a password that would unlock their accompanying electronic device." *Id.* at 5. It is noted, however, that CBP Directive No. 3340-049 does not explicitly prohibit searching remote servers or prohibit denying entry for refusal to provide passwords. In any event, it may be advisable to store and access highly confidential client information through your firm's remote server, rather than saving documents to any local drives and email accounts or storing data on your portable electronic devices.

Under New York's Rules of Professional Conduct (RPC), you have a duty to protect your client's confidential information. As the NYCBA Committee on Professional and Judicial Ethics recently opined in NYCBA Formal Opinion 2017-5, this obligation applies while traveling abroad and carrying confidential client information and potentially undergoing a border search. Under RPC 1.6(c), which was recently amended, attorneys must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to," confidential information obtained from prospective, current, and former clients. RPC 1.6(c). This obligation is also implicit in the duty of competence under RPC 1.1. *See* NYCBA Formal Opinion 2017-5 at 4, citing ABA Formal

Op. 11-459 (Aug. 4, 2011). Comment 8 to RPC 1.1 specifically notes that in order "[t]o maintain the requisite knowledge and skill, a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information." RPC 1.1 Comment [8]; *see* New York County Lawyers Association Professional Ethics Committee, Formal Op. 749 (2017) ("[a] lawyer's competence with respect to litigation requires that the lawyer possesses a sufficient understanding of issues relating to securing, transmitting, and producing [electronically stored information]. . . . If a lawyer is unable to satisfy the duty of technological competence associated with a matter, the lawyer should decline the representation."). "The duty to protect client confidences from 'unauthorized access' refers to access that is not authorized by the *client*." NYCBA Ethics Op. 2017-5 at 4, citing RPC 1.6 Comments [5] & [13]. Whether an attorney is making "reasonable efforts" to prevent unauthorized disclosure will inherently depend on the facts and the situation. Comment 16 to RPC 1.6, however, includes a nonexclusive list of factors to consider when making such a determination:

(i) the sensitivity of the information;
(ii) the likelihood of disclosure if additional safeguards are not employed;
(iii) the cost of employing additional safeguards;
(iv) the difficulty of implementing the safeguards; and
(v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or software excessively difficult to use).

RPC 1.6 Comment [16].

There is an exception to these rules which permits attorneys to disclose a client's confidential information in certain limited circumstances. RPC 1.6(b)(6) permits an attorney to reveal confidential information when required "to comply with other law or court order." RPC 1.6(b)(6). Comment 13 to RPC 1.6 is instructive in a border search situation: "Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason." Rule 1.6 Comment [13]; *see* NYCBA Ethics Op. 2017-5 at 8–9. Attorneys are not, however, required to risk violating their own legal or ethical obligations in seeking to challenge a law on behalf of their client. *See* NYSBA Comm. on Prof'l Ethics Op. 945 (2012) (indicating that "when the law governing potential disclosure is unclear, a lawyer need not risk violating a legal or ethical obligation, but may disclose client confidences to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law, even if the legal obligation is not free from doubt"); NYCBA Ethics Op. 2017-5 at 9.

The NYCBA Committee on Professional and Judicial Ethics has said that "Rule 1.6(b)(6) permits an attorney to comply with a border agent's demand, under a claim of lawful authority, for an electronic device containing confidential information during a border search." NYCBA Ethics Op. 2017-5 at 9. We agree with that opinion, and likewise agree with their opinion that to be in compliance with this provision, attorneys must first take reasonable efforts to "dissuade border agents from reviewing clients' confidential information or to persuade them to limit the extent of their review" by informing the agent that they are attorneys, requesting that the devices not be searched or copied because the devices contain confidential or privileged information, and asking to speak to a superior officer if these requests are denied. *See id.* at 10. It is advisable to carry attorney identification with you when you travel abroad and be familiar with the CBP's authority and procedures including CBP Directive No. 3340-049. In addition, you should familiarize yourself with the laws of the country to which you will be traveling to determine the scope of materials that other country's border agents may search in accordance with their own laws. In the event that your device is searched or seized at the border, you have an obligation to promptly inform your clients, past clients, and potential clients of the information which the agent may have accessed. The RPC require that an attorney promptly inform the client of "any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules" and to "keep the client reasonably informed about the status of the matter." RPC 1.4(a)(1)(i) and 1.4(a)(3); NYCBA Ethics Op. 2017-5 at 11. Comment 13 to RPC 1.6 also suggests that in the event of an adverse ruling after an attorney challenges the disclosure of confidential information, "the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge . . . ." RPC 1.6 Comment [13]; NYCBA Ethics Op. 2017-5 at 11. Although informing your clients of the disclosure may be difficult, this will allow the clients to determine the best methods to prevent any possible damage from the disclosure. *See* NYCBA Ethics Opinion 2017-5 at 11.

So in the face of all of these rules, what should lawyers do to best protect their client's confidences? As an initial matter, lawyers traveling internationally with electronic devices should be mindful of Comment 16 to RPC 1.6 and the various factors discussed above when determining what level of protection is reasonably necessary to protect a client's confidential information. If you are working on very sensitive deals between well-known public companies, the first factor of RPC 1.6 Comment 16 suggests that you should be taking the strongest possible efforts to ensure that confidential information is not accessible in a routine border search. RPC 1.6 Comment [16]. In addition to encrypting devices with passwords as a basic precaution, some other methods to protect confidential information include using a blank "burner" phone or laptop and

then only accessing confidential information remotely from secured online locations. *See* NYCBA Ethics Op. 2017-5 at 7–8. To ensure that confidential information does not inadvertently get copied to the phone or laptop, software designed to securely delete information may be placed on the device, cloud service syncing should be turned off, web-based services should be signed out, and applications that provide local or remote access to confidential information should be uninstalled prior to crossing the border. *Id.* at 7. Lawyers should also avoid using removable storage devices to carry sensitive information and downloading the information they wish to protect on to a hard drive. Like it or not, if you are not sure how to implement these measures on your devices, and find it necessary to travel with highly sensitive confidential information, it may be advisable to contact a technology security consultant before you leave.

Sincerely,

The Forum by
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Maryann C. Stallone, Esq.
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Carl F. Regelmann, Esq.
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Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I'm currently representing a client whose honesty (or lack thereof) is becoming a problem. The litigation involves a dispute between siblings regarding a family business and, like many familial disputes, is highly contentious. I've always had a suspicion that given the opportunity, my client might try to pull something to get a leg-up on his siblings, but there haven't been any specific incidents that alarmed me until now. While preparing him for his deposition recently, the client all but told me that he intends to lie when asked a particular question by opposing counsel. Although I had my suspicions that something like this might happen given my client's personality and the nature of the dispute, I was still shocked. I always assumed that his brash statements and frequent outbursts were a product of his frustration with the whole case. I reminded the client that he would be testifying under oath during his deposition and warned him of the risks of perjury, but he was unfazed. He intends to go forward with his "strategy" during his deposition, and I'm not sure what to do. I know the client will decline any request I make to be relieved because it will be expensive for him to get a new attorney up to speed on this matter.

We have a status conference coming up before the court-appointed referee, and I'm considering moving to be relieved before the conference. Can I move to be relieved instead of notifying the court of the client's intent to lie at the deposition? If I am not relieved before the conference, do I have an obligation to tell the court referee what he said during our prep session even though my client hasn't actually committed perjury yet? What about opposing counsel? If I am obligated to inform the court referee and/or opposing counsel, are there any particular precautions I should take in order to safeguard my client's rights? In the event that I can no longer ethically represent this client, and am relieved as counsel, do I have to tell his next attorney of his apparent intention to lie during his deposition? On the off chance that the client does allow me to withdraw as counsel, if he decides to represent himself as a pro se litigant, do I still have an obligation to inform the court of his intent to lie under oath?

Another issue involving this troublesome client is also looming on the horizon. In the event that I am relieved as counsel, I'm certain that he will be furious with me. On prior occasions, he's been slow to pay his legal bills and has dissected many of my time entries, asking questions about every little task. I'm actually still waiting on him to pay his most recent bill, and I'm concerned that I'm not going to get paid after he finds out that I've made a motion to be relieved. If I do have to bring an action against this client to collect my fees, to what extent am I obligated to maintain attorney-client confidentiality especially in light of my reason for seeking to be relieved?

Very truly yours,
I. M. Forthright

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Hailey Alexandra Bair
John Richard Balaes
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Humzah Khan Soofi
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Kevin David Horvitz
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Hironori Iwatani
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Ilana Sari Jacobs
Majesty Eve Lagrada Jala
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Gianina Carlie Jean-Baptiste
Dennis Lyle Jenkins
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8. The defense attorney spent more time arguing about the plain view doctrine instead of the third-party doctrine.
9. Defense counsel admitted that the defendant did assault his wife and that a trial would determine only the severity of the assault.
10. Court officers protect judges by not allowing people to enter the courthouse without walking through metal detectors, encouraging court personnel to use different entrances and exits, and escorting criminals in handcuffs.

Subject/Verb Proximity

Good sentences keep their subjects and verbs next to each other. The shorter the distance between the subject and verb in a sentence, the greater the cohesion and understanding. A short distance — or no distance — between the subject and the verb also reduces wordiness.

Exercises: Subject/Verb Proximity

Rewrite the following sentences.

1. Information about the surgical procedures Ms. Flores has undergone in the last ten years will be required by the court.
2. My paper, though it exceeded the page limit set by the professor, was accepted and given an A-.
3. Charlie, who is set to become the owner of the company after his father's death, wasn't at the board meeting discussing the future of the company.
4. The trial, which involved testimony from dozens of witnesses, some of whom flew here from places as far as California, lasted for almost two months.
5. Sentences should have their subjects and verbs located next to each other so that they can be most easily understood.
6. The brief, although it was flawlessly written, was submitted late and therefore not accepted by the court.
7. Copies of Eduardo Galvez's immigration papers, as well as of his marriage certificate and subsequent divorce papers, will likely be requested by the prosecuting attorney.
8. "Don't ask, don't tell," the United States' official policy on military service by gay men, bisexuals, and lesbians, which had garnered the support of five federal Courts of Appeal, was repealed in 2011 under President Barack Obama.
9. My cousin, furious after finding out that her fiancé had cheated early in their relationship, called off the wedding and flushed her engagement ring down the toilet.
10. My bedroom, although it still smells like paint, is finished being remodeled by my dad.

Usage and Placement of Transition Words

You can't eliminate transition words entirely, but you shouldn't use a transition at the beginning of a sentence unless you want to be dramatic or emphatic. Sometimes it's counterintuitive to use transitions at the end of your sentences. Doing do emphasizes the transitions and forces readers to look back to earlier sentences. If drama, emphasis, or contrast is not desired, place the transition after the subject, in the first part of the sentence. There's a difference between "Although Paul's always late, he's a good worker" and "Although Paul's a good worker, he's always late." The meaning of this sentence depends on the emphasis of the transition word *although*.

Don't be afraid to begin sentences with "and" or "but." But don't start every sentence with them. The rules of plain speaking and plain writing provide that it's better to begin a sentence with "and" or "but" than with a heavy and weighty conjunctive adverb like "moreover" or "however." If beginning a sentence with "and" or "but" is formal enough for the front page of the *New York Times* and the *Wall Street Journal*, it's formal enough for legal writing.

The best writing repeats key words, names, phrases, and concepts but doesn't repeat transition words. When possible, eliminate transition words altogether. If the logic that moves your ideas forward is sound, your readers will connect the thoughts without needing transitional devices like *furthermore*, *however*, *moreover*, and *therefore*. (If the transition word can't be eliminated completely, put a conjunctive adverb a third into the sentence.) To ensure that your ideas are being developed soundly, move sentences from short to long, from simple to complex, and from old to new, ending with power and climax. Include a topic sentence — a sentence that clearly states what you'll be discussing in the paragraph and what conclusion you'll draw — at the start of every paragraph. And include a roadmap, or thesis, paragraph at the start of each point. Roadmaps tell your readers what's being discussed, what you're arguing, and in which paragraph(s) of your brief they can find the information they desire or need.

Exercise: Usage and Placement of Transition Words

Read the paragraphs below and edit them by using the transition usage and placement rules to create a new, better paragraph.

> On July 4, 2015, New York City native Joshua Brandt, along with his seven-year old daughter, Carly, was at his neighbor's house celebrating Independence Day by setting off fireworks. First, they began with small-scale fireworks, such as sparklers, pop-rocks, and tanks. Afterward, they moved onto larger fireworks, like Roman candles and cakes. Presumably because shooting off fireworks as a private resident has been illegal in New York for decades, the group was setting them off in the backyard. However, the backyard was small and no one was able to put much space between them and the explosives.

Consequently, everyone present was at risk of getting burned. Regrettably, Carly was helping her neighbor set off a Roman candle firework when it exploded prematurely. Carly and her neighbor, forty-year-old Dominic Amato, were both injured in the blast. All things considered, they got off easy, but both had to be hospitalized afterward. Amato sustained first-degree burns on his abdomen, and Carly suffered second-degree burns to her face and chest. Ultimately, Amato was arrested for possessing illegal fireworks. Also, Brandt was arrested, but his charges were dropped. However, he has since brought a lawsuit against Amato, alleging that Amato is responsible for Carly's injuries and that he should therefore pay for damages.

1. Change the placement of the transition word in Sentence #2.
2. Combine Sentence #2 with Sentence #3 to eliminate the transition word in Sentence #3.
3. Replace the transition word in sentence #4 with another word.
4. Change the placement of the transition word in Sentence #5.
5. Combine Sentence #5 with Sentence #6 to eliminate the transition word in Sentence #6.
6. Get rid of the transition word in Sentence #7 by replacing it with the time of the incident described. (You can make up the time.)
7. Rearrange Sentence #10 and Sentence #11 to eliminate the transition word in Sentence #11.
8. Change the placement of the transition word in Sentence #12.
9. Replace the transition word in Sentence #13 and change the placement of the transition word.
10. Make whatever other changes you deem necessary.

Now that you've completed the exercises (we hope you didn't peek at the answers), study the *Legal Writer*'s answers and compare them with yours.

Answers: Specificity

1. You should specify which granddaughter lives with Mr. Katz, especially if he has more than one granddaughter or if not all his granddaughters live with him. In addition, should specify where he lives. *Corrected Version*: Mr. Katz's youngest granddaughter, Caitlin, lives with him in his house in Marietta, Georgia.
2. This sentence can be made more specific. *Corrected Version*: At the time of the alleged incident, my client was food shopping at ShopRite.
3. Specify *which* bag was stolen. It's likely that you have more than one bag. *Corrected Version*: My floral Vera Bradley bag was stolen.
4. Specify which bill you're talking about. *Corrected Version*: The health care bill doesn't have bipartisan support.
5. Specify which bananas don't look ripe by using the demonstrative adjective *these*. *Corrected Version*: These bananas don't look ripe yet.
6. Specify *which* lawyer seems competent and get rid of the qualifier. *Corrected Version*: The plaintiff's lawyer seems competent.
7. Specify which building was destroyed in the fire by using the demonstrative adjective *that*. In addition, specify *when* the building was destroyed. *Corrected Version*: That building was destroyed in a fire last weekend.
8. This sentence can be made more specific by briefly describing Ms. Patterson's illness. *Corrected Version*: Ms. Patterson is suffering from end-stage renal failure.
9. This sentence is convoluted and vague. *Corrected Version*: After the teacher caught Kevin giving Isabella his Scantron sheet, Kevin claimed that Isabella was the cheater and that he was only helping his friend.
10. Specify *where* the airplane crashed. *Corrected Version*: The airplane crashed in a corn field in South Carolina.

Answers: Parallelism

1. This sentence sounds incomplete. It should be rephrased to sound clearer. *Corrected Version:* The court clerks were afraid not only of the judge but also of the court attorney.
2. There are two errors in this exercise. The first is that the word *that* is repeated. The second is that the acronym (NGRI) is not in parenthesis. *Corrected Version*: The defense attorney pleaded that because his client was not guilty by reason of insanity (NGRI), the defendant should be committed to a psychiatric facility.
3. Keep correlative conjunctions parallel to make the sentence legible. Also, eliminate all wordiness from this sentence. *Corrected Version*: Officer Rodriguez saw both the defendant and the plaintiff at the crime scene.
4. Keep signals parallel to reflect parallel ideas within lists. *Corrected Version*: The validity of the waiver of *Miranda* rights depends on whether the waiver was willing, knowing, and intelligent.
5. This sentence contains poorly coordinated elements. Make all the verbs past tense to make

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1/1/17 - 9/20/17 _____ 6,108

New Law Student Members
1/1/17 - 9/20/17 _____ 870

Total Regular Members
as of 9/20/17 _____ 57,342

Total Law Student Members
as of 9/20/17 _____ 7,178

Total Membership as of
9/20/17 _____ 64,520

the items parallel. *Corrected Version:* The defendant stated that the day of the alleged crime he washed his car, mowed his lawn, and fed his hungry grandma.

6. This sentence isn't parallel. Repeating the word *who* will make this sentence parallel. *Corrected Version:* A defense lawyer who had over fifty years' experience and who's respected in the court system suddenly passed away.
7. Matching introductory words creates parallelism. *Corrected Version:* The plaintiff's lawyer introduced evidence that was prejudicial and irrelevant to his case.
8. The sentence would make more sense if simply compared using the word *than*. *Corrected Version:* The defense attorney spent more time arguing about the plain view doctrine than about the third party doctrine.
9. Defense counsel admitted that the defendant assaulted his wife and that a trial would determine only the severity of the assault.
10. Because one item in this list is in the negative, repeating the introductory word *by* will make the sentence more parallel. *Corrected Version:* Court officers protect judges by not allowing people to enter the courthouse without walking through metal detectors, by encouraging court personnel to use different entrances and exits, and by handcuffing criminals before escorting them anywhere.

Answers: Subject/Verb Proximity

1. This sentence can be rewritten in the active voice so that the subject and the verb are closer together. *Corrected Version*: The court will require information about Ms. Flores's surgical history from the last decade.
2. The subject is at the beginning of the sentence, while the verb is near the end of the sentence. *Corrected Version*: Although my paper exceeded my professor's predetermined page limit, he accepted it and even gave it an A-.
3. This sentence can be rewritten so that the subject and the verb are closer together. *Corrected Version*: Although Charlie is set to become the company's owner after his father's death, he wasn't at the board meeting to discuss the company's future.
4. The subject is at the beginning of the sentence, while the verb is near the end of the sentence. Also, it's important to be specific. *Where* is "here"? *Corrected Version*: The trial lasted for almost two months because it involved lengthy testimony from dozens of witnesses, some of whom had to fly to New York from places as far as California.
5. This sentence can be rewritten so that the subject and the verb are closer together. *Corrected Version*: Sentences are easier to understand when the subjects and the verbs are positioned close to each other.
6. The subject is at the beginning of the sentence, while the verb is in the middle of the sentence. Correct this by making the sentence active and writing it in the positive. *Corrected Version*: Although the brief was written flawlessly, it was submitted late, and therefore the court rejected it.
7. This sentence can be rewritten so that the subjects and the corresponding verb are closer together. You should also eliminate "likely." *Corrected Version*: The prosecuting attorney will request copies of Eduardo Galvez's immigration papers, marriage certificate, and divorce papers.
8. This sentence is convoluted. It can be rewritten so that the subject and the verb are closer together. *Corrected Version*: The United States official policy regarding military service by gays, bisexuals, and lesbians was "don't ask, don't tell." Despite its having been upheld by five federal Courts of Appeals years before, this policy was repealed in 2011 under President Barack Obama's leadership.
9. This sentence can be rewritten so that the subject and the verb are closer together. Wordiness can also be eliminated in this sentence. *Corrected Version*: After my cousin found out that her fiancé cheated early in their relationship, she called off the wedding and flushed her engagement ring down the toilet.
10. This sentence is convoluted. It can be rewritten so that the subject and the verb are closer together. *Corrected version*: My dad finished remodeling my bedroom, but it still smells like paint.

Answers: Usage and Placement of Transition Words

On July 4, 2015, New York City native Joshua Brandt, along with his seven-year-old daughter Carly, was at his neighbor's house celebrating Independence Day by setting off fireworks. The first fireworks they set off were small — pop-rocks, sparklers, tanks, etc. — but as the evening progressed they began setting off larger fireworks, including cakes and Roman candles. Since shooting off fireworks has been illegal for private residents in New York for decades, though, the group was setting them off in the backyard. The neighbor's backyard was small, however, and everyone present was at risk of getting burned because it was impossible to put much space between them and the explosives.

At approximately 10:00 p.m., Carly was helping her neighbor, 40-year-old Dominic Amato, set off a Roman candle. It exploded prematurely, and both Carly and Amato were injured in the blast. Amato, who sustained first-degree burns to his abdomen, and Carly, who suffered second-degree burns to her face and chest, both had to

be hospitalized. After Amato was discharged from the hospital, he was arrested for possessing illegal fireworks. Brandt was also arrested, but his charges were dropped. He later sued Amato, alleging that Amato is responsible for Carly's injuries and should therefore pay for the damages.

The *Legal Writer* will resume this series in a future issue. Until then, the next series, beginning in the next issue of the *Journal*, will consist of four parts entitled *The Worst Mistakes in Legal Writing*. ■

GERALD LEBOVITS (GLebovits@aol.com), an acting New York State Supreme Court justice, is an adjunct at Columbia, Fordham, and NYU Law Schools. He thanks judicial interns Alexandra Dardac (Fordham University) and Rosemarie Ferraro (University of Richmond) for their research.

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BY LUKAS M. HOROWITZ

Lukas M. Horowitz, Albany Law School Class of 2019, graduated from Hobart William Smith in 2014 with a B.A. in history and a minor in political science and Russian area studies. Following graduation, he worked for two years as a legal assistant at Gibson, McAskill & Crosby, LLP, in Buffalo, New York, and with the New York Academy of Trial Lawyers hosting CLE programs. Lukas can be reached at Lukas.horowitz@gmail.com.

Keep Calm and Law School On!

> The more relaxed you are, the better you are at everything: the better you are with your loved ones, the better you are with your enemies, the better you are at your job, the better you are at yourself. – Bill Murray

The first month of my 2L year has already passed. As I walk to class now, I look at the fresh new first year faces. So much ambition! So much life! What can I do, but smile? I look forward to seeing them closer to their first finals period. Ah, I remember those days.

So far 2L year reminds me of riding a bike after not having ridden for a while. A little wobbly at first, but quickly returning to top speeds with plenty of wind blowing through my handlebar streamers. Learning to ride, i.e. 1L year, is always the hardest part.

I'm cruising now! My stress is at a relatively comfortable low point as compared to this time last year (other than when I am watching the Bills play on Sunday afternoons). I think this feeling is due to a greater sense of ease, which I feel not only in myself, but in my fellow classmates. This better hold on managing school has helped enhance class lectures and readings. Thirty pages of reading go by a heck of a lot quicker when you are actually able to read and have a basic understanding of the content on a first read rather than having to re-read something three times over (Don't get me wrong, that still happens!). There is a notable distinction in quality of life when you are more relaxed, and when I look back to last year, it seems as if I am looking at a completely different person. I cannot stress it enough. Life. Is. Good.

This second year has brought a positive shift in my view of law school. While I found the core classes of my first year stimulating, being in classes now that I have chosen for myself has changed the ball game. One of my favorite classes is Business Organizations. The best part about this class is that while the focus is on the organization of corporations, enterprises, etc., I am also being afforded the opportunity to learn an entirely new subject separate from the law. I had always been interested in economics during my years in college, but as those classes did not count toward my major or minor, I avoided them. Now I am reading about *de jure* corporations, hedge funds, principle-agent relations, and so much more. This overlap in learning sparks a feeling of accomplishment, for while I am striving toward a law degree, I am incidentally broadening my overall knowledge.

This second year has brought a positive shift in my view of law school.

Last week I submitted a paper assignment for my Land Use Planning class. The paper required me to figure out, by researching zoning ordinances/regulations, whether I would be able to open and operate a law office in my current residence. While the short answer to the question is no, the level of complexity and nuance in zoning law is quite a challenge! Sign permits, rezoning, multi-family residence versus two-family dwellings. I had no idea just how complex and in depth zoning was in a city. And then to think of the zoning issues in even larger cities, like New York City or Los Angeles. I am not envious of the city planners who are responsible for zoning in those places, and I question whether I possess the brain power or patience to deal with such things!

While I do enjoy rambling on about my law school experience, I must shift my attention back to my 1,900-page Constitutional Law textbook for tomorrow's reading. I hope everyone is enjoying these final days of summer weather. And remember: Relax. ■

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BY GERALD LEBOVITS

Legal-Writing Exercises: Part IV

In the last issue of the *Journal*, *The Legal Writer* reviewed important concepts in legal writing, including wordiness, when to use *that* vs. *which* vs. *who* vs. *whom*, professional tone, and absolutes and adverbial excesses. This issue of our multipart series reviews other important stylistic concepts for legal writing: specificity, parallelism, subject/verb proximity, and the usage and placement of transition words. At the end of each section are editing exercises. You can add words, change words, delete words, or rearrange words — whatever you think is best. After completing all the exercises, look at the answers at the end of the article to see whether your answers are correct.

Specificity

Concision is key, but legal writers should never sacrifice specificity for brevity. In legal writing, specificity is more important than concision. Just as ambiguity in a contract benefits the party that didn't draft the contract, ambiguity in legal writing benefits adversaries. The law is precise; there should be no room for possible misinterpretations or misunderstandings. Be precise. Repeat sentence subjects if you must. When in doubt, specify. Don't use vague pronouns or referents like *it* unless the pronoun or referent refers to one thing only. Choose the words that convey the precise meaning you intend. Settle for nothing less than accuracy, clarity, and precision.

Here are some tips to do this:

- Use adjectives to clarify nouns, especially if the noun can refer to more than one person, place, or thing.
- Use demonstrative adjectives (*that*, *these*, *such*, etc.) instead of articles (*the*).
- Remove unnecessary qualifiers from your sentences.

Exercises: Specificity

Rewrite the following sentences.

1. Mr. Katz's granddaughter lives with him.
2. At the time of the alleged incident, my client was shopping.
3. My bag was stolen.
4. The bill doesn't have bipartisan support.
5. The bananas don't look ripe yet.
6. The lawyer seems pretty competent.
7. The building was destroyed in a fire quite recently.
8. Ms. Patterson is very sick.
9. When Kevin and Isabella were caught cheating, he identified her as the one who was cheating and himself as only helping.
10. The airplane crashed in a field.

Parallelism

Parallelism requires all elements in a list or a sentence to be presented in a similar — or parallel — fashion. By using the same or similar grammatical form for coordinated elements, parallelism makes the content of a sentence apparent and accessible. ("Similar grammatical form" means that nouns are matched with other nouns, verbs are matched with other verbs, prepositional phrases with other prepositional phrases, and so on. Coordinated elements include "and," "but," "or," "nor," and so on.) Match key words in each sentence. Coordinating conjunctions, correlative conjunctions (such as either/or, neither/nor, both/and, not only/but also), and comparisons should also be parallel.

Exercises: Parallelism

Rewrite the following sentences.

1. Not only were the court clerks afraid of the judge but also the court attorney.
2. The defense attorney pleaded that his client was not guilty by reason of insanity, NGRI, and that his client should be committed to a psychiatric facility.
3. Officer Rodriguez saw the defendant and plaintiff at the scene of the crime.
4. The validity of the waiver of *Miranda* rights is determined if the waiver was willing, the defendant knew what he was doing, and intelligence.
5. The defendant stated that on the day of the alleged crime he was washing his car, mowed his lawn, and his grandma was hungry so he fed her.
6. A defense lawyer with over fifty years' experience and who is respected in the court system suddenly passed away.
7. The plaintiff's lawyer introduced evidence that was prejudicial and that lacked relevance to his case.

Concision is key, but legal writers should never sacrifice specificity for brevity.

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