

The Constitutional Convention and the NYS Judiciary

This Election Day - November 7, 2017 - New York voters will have the opportunity to decide whether a Constitutional Convention should be held within the next two years. Voters will be asked to answer the question:

“Shall there be a convention to revise the constitution and amend the same?”

This right and responsibility is granted in New York State’s Constitution¹ and the opportunity for the voters to decide whether to convene a convention occurs once every twenty years² or “at such times as the legislature may by law provide.”³ Article XIX, §2. The last time the voters approved convening a convention, it was held in 1967. The voters did not approve convening a convention in 1957, 1977 and 1997.

New York’s Constitution also provides that amendments to the Constitution may be proposed at any time by the Legislature, and if approved by the voters they become a part of the Constitution.⁴ This method has produced several major beneficial changes⁵, including the way judges are selected for New York’s highest court, the Court of Appeals.

If the voters approve holding a convention, delegates will be chosen in the November 2018 election, and any changes or additions to the Constitution accepted by the delegates will be submitted for voter approval “at an election which shall be held not less than six weeks after the adjournment of such convention.” Article XIX, §2. November 2019 is the likely timeframe for this vote.

There are many issues that could be addressed during a Constitutional Convention and many provisions that could be changed.

The Fund for Modern Courts will only address those issues that concern the courts and judiciary - matters contained within Article VI of the Constitution.

¹ <https://www.dos.ny.gov/info/constitution.htm>

² The Convention of 1938 reset the twenty year cycle for the voters to consider convening a convention to begin in 1957 and continue thereafter at twenty year intervals thereafter, that is in 1977, 1997 and 2017.

³ In 1965, the Legislature passed a resolution to consider convening constitutional convention, which the voters approved, and a constitutional convention was held in 1967. Although the convention recommended a new Constitution, it was rejected by the voters in the 196[8] election. The twenty year cycle required by the Constitution was not affected, so the question appeared on the ballot in 1977 and 1997, but the voters did not approve holding a convention.

⁴ Article XIX §1 provides that amendments to the Constitution must be proposed by the Legislature and passed by two successive legislative sessions with an intervening general election. The proposed amendment then must be approved by a majority of voters in a statewide election before it becomes part of the Constitution.

⁵ Constitutional amendments adopted in recent decades have included the creation of the Commission on Judicial Nomination, which recommends a limited number of highly-qualified nominees to the Governor for appointment to the Court of Appeals, subject to Senate confirmation; granting the Chief Judge of the Court of Appeals the authority to administer the Unified Court System; and establishing the Commission on Judicial Conduct.

Modern Courts is not taking a position on whether there should or should not be a Constitutional Convention and will rely on an informed electorate to make that decision. However, we do believe that if there is a convention, there are many ways in which the Judiciary Article could be improved and we discuss those matters below.

There a number of issues affecting the courts that can only be addressed by amending Article VI, the Judiciary Article of the Constitution, including:

- Structure of the Courts

Modern Courts believes the current organization of the courts is needlessly complicated and inefficient.

- Public Policy Relating to Judicial Selection

Modern Courts believes that judicial selection must be improved by adopting a qualification commission-based system to select all judges.

- Judicial Resources

Modern Courts believes that increasing the number of judges is essential to ensure the fair administration of justice and access for all.

Questions that should be addressed in a Constitutional Convention if the voters approve the convening of a convention fall into the following categories:

Importantly, if there is a Convention, some provisions of the current Constitution **must** be preserved in order to maintain the integrity of the judicial system and keep the courts functioning. These include provisions in the existing Constitution which:

- establish the Commission on Judicial Nomination and the qualification commission-based appointment system for selecting New York's Court of Appeals judges;
- provide the Chief Judge of the Court of Appeals with the authority to administer the Unified Court System;
- provide that judges of the Family Court and Criminal Court in New York City are appointed by the Mayor[, along with some judges of the New York City Civil Court]; and
- establish the Commission on Judicial Conduct which has the authority to conduct, receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness and performance of official duties of any judge or justice in any court.

The Structure of the Courts

Merger of Trial Courts

New York State has eleven different trial courts – more trial courts than any other state: the Supreme Court, which has justices sitting in all 62 counties; the Court of Claims, which sits statewide; Surrogate’s Courts in each county; County Courts in each county outside New York City; Family Courts in New York City and in each county outside New York City; a New York City Civil Court; a New York City Criminal Court; a separate City Court for each city other than New York City; District Courts for parts of Long Island; and Town and Village Justice Courts in most towns and villages. In some less populated counties one judge may serve in multiple courts.

Modern Courts believes that the current court structure is too complex, confusing and costly. It impedes rather than helps litigants, both private citizens and businesses, in fully pursuing their rights. Consolidating the eleven courts of record into a simplified system will provide greater efficiencies and improve the administration of justice. In addition, consolidation will enhance public confidence in the court system and promote better public understanding about how the justice system operates.

Modern Courts supports the merger of trial courts by the creation of a two-tiered structure, comprised of a statewide Supreme Court of general jurisdiction and a statewide District Court with more limited jurisdiction.

The Special Commission on the Future of the New York State Courts (“Kaye Commission”) created by Judith S. Kaye, former Chief Judge of the State of New York, like Modern Courts, recommended such a merger and endorsed a two-tiered structure, comprised of a statewide Supreme Court of general jurisdiction and a statewide District Court with more limited jurisdiction, preferably including a small-claims part.⁶

While the primary goal of court merger or simplification is to make our courts more understandable to the public and improve access to justice, the budgetary and economic savings to the court system and to those who use it are real and substantial. According to a 2007 fiscal analysis by the Office of Court Administration (OCA), court simplification would result in budgetary court savings of at least \$59 million annually through the unified treatment of related cases and approximately \$6 million annually by improving the courts’ administrative framework. An additional \$56 million annually in economic savings would be achieved through efficiencies from improved case management, and procedural codes reform.

The Kaye Commission concluded that court simplification would save the public and private sector \$443 million annually in terms of increased productivity, reduced lost wages, and reduced attorneys’ fees and related costs – money that is currently wasted on redundant court

⁶ http://nycourts.gov/reports/courtsys-4future_2007.pdf

appearances, the need to file unnecessary papers and briefs, and delays caused by courthouse backlogs and inefficiencies.

Court simplification also would mean that all judges of the merged statewide Supreme Court would be eligible for designation to the mid-level appellate court (the Appellate Division), as opposed to the current constitutional requirement that limits designation to elected Supreme Court justices.

If merger or simplification was adopted at a convention, but no change made as to how judges are selected, Modern Courts believes that the concept of “merger in place,” which would continue the current selection processes for judges, should be adopted. For example, justices of the Supreme Court would continue to be elected, and judges in the Criminal Court and Family Court in New York City would continue to be appointed, while Family Court judges outside New York City would continue to be elected.

Court merger or simplification has long had the support, not only of Modern Courts, but of the 50 members of the Coalition for Court Simplification⁷. The members of this coalition included representatives from a wide variety of New York State business associations, good government groups, advocates against domestic violence, legal service providers, and bar associations.

Appellate Division - The Fifth Department

Modern Courts believes the Constitution should be amended to permit the Legislature to establish a Fifth Department of the mid-level appeals court, the Appellate Division. This is necessary because the existing four Departments currently suffer from overwhelming and imbalanced caseloads. For example, in 2014 the Second Department heard almost 65% of **all** Appellate Division cases (making it by far the busiest appellate court in the nation), the First Department heard 18%; the Third Department 9.4%; and the Fourth Department 7.6%.

The Kaye Commission, the New York City Bar Association and the New York State Bar Association have recommended splitting the Second Department into two departments. The Kaye Commission took no position on the geographical boundaries of the new department; the City Bar Association recommended that the new Fifth Department have jurisdiction over appeals from courts in Nassau and Suffolk Counties.

In addition to limiting the number of Appellate Division Departments, the Constitution also limits the number of justices in each Department to 7 in each of the First and Second Departments, and 5 in each of the Third and Fourth Departments. Although the Constitution currently provides that Appellate Division justices can be added by the Governor and the court

⁷ <http://moderncourts.org/wp-content/uploads/2013/10/ListofCoalitionMembersJuly2012.pdf>

system based on need⁸, and the number has been increased to 21 in the First Department, 22 in the Second Department, and 12 in each of the Third and Fourth Departments, Modern Courts believes that the Constitution should be amended to reflect the actual number of Appellate Division justices currently in place, while preserving the current Constitutional system for adding justices as needed.

Public Policy Relating to Judicial Selection

Selection of Judges and Justices

Under the existing Constitution, justices of the Supreme Court, the major trial court of the state, are elected after being nominated at judicial conventions organized by political parties. Most other judges in the state are nominated through a primary election process. However, Judges of the Court of Claims are appointed by the Governor and judges of New York City's Family Court, Criminal Court [and some Civil Court judges] are appointed by the Mayor. Because these methods of selection are mandated by the Constitution, they can only be changed by constitutional amendment.

Modern Courts has long held the view that the election of justices and judges must be replaced by a system that would reduce the direct role of party politics in the selection process and take the influence of money out of judicial elections. These changes will help ensure that the best qualified candidates are chosen, and protect the independence of the judiciary. We have taken this position because of our concern that judicial elections require candidates to conduct political campaigns and to raise money. We believe this undermines public perception about both judicial independence and judicial excellence. For example, in its 2004 report to New York State's Chief Judge Judith S. Kaye, the Commission to Promote Public Confidence in Judicial Elections found that 94 % of voters believe campaign contributions have a little, some or a great deal of influence on the way judges decide court cases; and 45% of New York judges polled thought that campaign contributions influence judicial decisions to some degree.⁹

Therefore, Modern Courts believes that the Constitution should be amended to provide for the appointment of all judges of courts of record by means of a “qualification commission based appointive system.” This system would provide for the nomination of a limited number of well-qualified individuals for a judicial vacancy by a commission like the Commission on Judicial Nomination¹⁰ currently used to select New York’s Court of Appeals judges. The list of nominees would be presented to an accountable public official and/or body, which would be responsible

⁸ NYS Constitution, Article VI §4. e. In case any appellate division shall certify to the governor that one or more additional justices are needed for the speedy disposition of the business before it, the governor may designate an additional justice or additional justices.

⁹ <https://www.nycourts.gov/reports/JudicialElectionsReport.pdf>

¹⁰ A diverse, broad-based committee composed of lawyers and non-lawyers, whose members are appointed by executive, legislative, and judicial officials.

for and required to make an appointment from the list within a limited time period. The choice should be subject to a confirmation process.

Thanks to the voters who approved a constitutional amendment in 1979 (which must be preserved), the judges of the Court of Appeals, New York's highest court, are appointed by the Governor after being recommended by the constitutionally created Commission on Judicial Nomination. Appointments to the Court of Appeals are subject to confirmation by the State Senate. By approving this amendment, New York voters took partisan politics out of the selection system for the State's highest court. As a result, the amendment has prevented the negative targeting of independent and experienced sitting judges by special interest groups and advertising, and the influx of money in judicial campaigns, as has occurred in many states that elect their highest court judges.

The logic and common sense of the voters in 1979 strongly suggests that it is time to amend the Constitution to provide for the appointment of all other justices and judges of courts of record by means of a qualification commission-based appointive system.

Judicial Resources

The Constitutional Limit on the Number of Justices in the Supreme Court

The Supreme Court is the statewide trial court of unlimited original jurisdiction that hears cases outside the authority of the lower courts, such as civil matters beyond the monetary limits of the lower courts' jurisdiction, divorce, separation and annulment proceedings, and criminal prosecutions of felonies.

The Constitution provides for the total number of justices of the Supreme Court in each judicial district, including justices designated to the Appellate Divisions of the Supreme Court.[Article VI, §6.d.] Once every ten years the Legislature, may increase the number of Supreme Court justices in any judicial district, "except that the number in any district shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration."

This population-based formula limiting the number of Supreme Court justices significantly undermines the court system's ability to deal with New York's large and complex case load. The elimination of this constitutional cap could provide needed judicial resources and better serve the public who rely on these courts to resolve significant civil and criminal issues.

One example of the inequity of a population-based formula for determining the number of Supreme Court justices can be found in New York County (the 1st Judicial District), with a 2015 population of over 1.6 million. As discussed below, the formula resulted in far too few Supreme Court judicial positions to meet the demands of litigation. The court system has dealt with this imbalance by designating judges who serve in other courts to be "Acting" Supreme Court

Justices. This is a stop-gap measure that negatively impacts the number of judges available to hear cases in other courts. This problem arises because, as documented by the New York City Bar Association's Committee on State Courts of Superior Jurisdiction, the population-based formula does not take into account that over two million non-residents work daily in Manhattan, which also has over 315,000 business associations, over 50 million visitors annually, thousands of out-of-state and foreign firms doing business in Manhattan, along with foreign, federal, state and local government agencies. Thus, New York's status as a world center for finance, communications, other business, tourism and immigration adds immeasurably to the number and complexity of cases that are filed in the courts of New York County.

This issue is not limited to New York County. The population-based constitutional cap allows a maximum of 171 Supreme Court justices in New York City as a whole. Yet only 154 justices are currently authorized to sit in Supreme Court, and of these, only 136 actually serve in trial parts because some of justices are assigned to the Appellate Division or the Appellate Term. This is far too few justices to handle the more than 100,000 cases filed annually in New York City. The court system, according to the Office of Court Administration, has been forced to create an ad hoc fix that "borrows" 35 judges from the New York City Civil Court and 69 judges from New York City Criminal Court, as well as 63 judges from the Court of Claims and even 3 Family Court judges, and make them Acting Supreme Court justices. As a result, the ability of the Civil Court and the Criminal Court to handle their own judicial business has been diminished, which has a significant impact on access to justice for New Yorkers.

A more modern and progressive approach to providing appropriate judicial resources has been advocated by the National Center for State Courts (NCSC). The NCSC approach analyzes the number, value and complexity of cases to determine an analytically sound allocation of judicial resources. Many state court administrators have used the NCSC methodology to study and develop systems to analyze the actual work-load of the courts and use this information to apportion state judicial resources in an effective and less arbitrary way than the antiquated system established in our State Constitution.

If there is Constitutional Convention, the delegates should consider amending the Constitution to permit the Legislature to increase the number of justices of the Supreme Court in any judicial district, eliminating the mandatory, population-based cap and authorizing the Legislature to respond to changes in the nature and the quantity of judicial business by creating new judgeships where needed by appropriate legislation without limitation.¹¹

¹¹ For example, in 2016, the Legislature responded to a clear and documented need by creating 25 additional Family Court judges, a position for which there is no constitutional cap.

Other Matters

There are a number of other matters affecting the fair administration of justice that could be considered if a Constitutional Convention is convened. They include:

Public Financing of Judicial Elections

If the Convention delegates are not willing to support a commission-based appointive system, the delegates should consider public financing of judicial elections in order to eliminate even the perception of inappropriate influence by campaign contributors.

Eliminating or Reforming the Judicial Convention System

The Constitution states that Supreme Court Justices “shall be chosen by the electors of the judicial district in which they are to serve.” [Art. VI, §6(c)]. Under the authority of this provision of the Constitution, the Legislature created a judicial convention system to select the candidates for Supreme Court justice who appear on the general election ballot for the voters to choose. The convention system is controlled and dominated by political parties. As a result, candidates for Supreme Court do not run in primaries nor are they appointed through a qualification commission-based appointment system rather. No other state has judicial conventions like New York’s.

In July 2007, Modern Courts, along with the New York City Bar Association, the New York State Bar Association and the Corporation Counsel of the City of New York, submitted an *amicus* brief¹² to the U.S. Supreme Court in *Lopez Torres v. Board of Elections* supporting U.S. District Court Judge John Gleeson’s decision to enjoin and hold unconstitutional New York State’s current judicial convention system. Although the decision was affirmed by the Circuit Court, it was unanimously reversed by the U.S. Supreme Court. However, Justice Stevens, in a concurring opinion joined by Justice Souter, wrote “I think it appropriate to emphasize the distinction between constitutionality and wise policy” in addressing New York’s judicial convention system.

The delegates to the constitutional convention should consider adding a constitutional provision establishing a qualification commission-based appointment system, similar to the process for the Court of Appeals, for Supreme Court justices. This would eliminate the judicial convention system and the non-democratic way in which it operates.

¹² http://www.nycbar.org/pdf/report/nyc2_677004_51.pdf

Alternatively, at a minimum the Constitutional Convention must consider addressing the serious infirmities of the current judicial convention system, which Judge Gleeson characterized as “an opaque, undemocratic selection procedure that violates the rights of the voters and the rights of candidates who lack the backing of the local party leaders.”

Monetary Jurisdiction of Civil and District Courts

Modern Courts believes that, pending possible merger through a constitutional amendment, the jurisdiction of Civil and District Courts should be increased to reflect the impact of inflation, which was last dealt with in 1983. The Constitution limits the jurisdiction of the New York City Civil Court to \$25,000 and the District Courts to \$15,000. Those limits should be increased to at least \$50,000,¹³ or preferably eliminated entirely to allow the Legislature to set the amount by amendment to the Judiciary Law, which can respond quickly to changing needs.

Housing Court Judges

Although called judges, persons who preside in the housing parts of the New York City Civil Court are not constitutional judges under Article VI. However, Modern Court believes that the responsibilities they exercise and the workloads they carry do not justify treating them differently from Civil Court judges.

Accordingly, Modern Courts recommends that Housing Court judges should be made full constitutional judges. In other words, they would serve in “courts of record,” and be appointed pursuant to a qualification commission-based system, subject to continuation of the current requirements of Section 110 of the New York City Civil Court Act as to particular experience and knowledge.

Mandatory Judicial Retirement

The mandatory retirement age for all judges in New York State is 70 years of age, except for Supreme Court justices who can be “certificated” to serve for three additional two-year terms beyond age 70 until the end of the year in which they reach age 76. [Art. VI, § 25(b)].

Modern Courts has supported increasing the retirement age of judges and justices. The current mandatory retirement age of 70 was adopted by Constitution amendment in 1869, when the average life expectancy was below age 50; while today it exceeds age 80 in New York State. Of course, many individuals older than age 70 have many productive years ahead of them and [most?] states and the federal judiciary permit judges to serve past age 70.

¹³ In November 1995, by a narrow margin, the voters declined to approve a Constitutional amendment which would have increased the monetary jurisdiction of these courts to \$50,000.

Modern Courts supported a Constitutional amendment in 2013 to raise the judicial retirement age on a limited basis to age 80 only for Court of Appeals judges and Supreme Court justices. That proposal was not approved by the voters.

Certification of All Judges

The Constitution permits “certification” of Supreme Court justices, which allows these jurists to continue serving beyond the otherwise mandatory retirement age of 70. The Constitution requires a demonstration that “the services of such judge or justice are necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office.” Certification is limited to three two-year terms, thus allowing judicial service through age 76. [Art. VI, § 25 (b)].

This constitutional provision does not apply to any other judges of courts of record. If there is merger of the courts, as recommended by Modern Courts, judges who are merged into the Supreme Court would be eligible to be certificated.

Absent merger, Modern Courts believes all judges of courts of record should be eligible for certification after the current retirement at age 70.

However, if the retirement age of all judges and justices is increased, there would be no need for the current certification process.

Simplify Article VI

Merger of all trial courts would result in the simplification of the Judiciary Article, because there would no longer be a need to specify in great detail the jurisdiction of "inferior" courts. Even if merger is not achieved, Article VI should be substantially simplified, by giving the Legislature the authority to determine issues of monetary and geographic jurisdiction. As the Constitution currently stands, certain courts have their monetary jurisdiction set out in Article VI (e.g., the Civil Court), while the jurisdiction of other courts is subject to legislation (e.g., the District Court). The Constitution need do no more than establish courts, set forth minimal descriptions of their composition and jurisdiction and provide for the method of selection of the judges. The rest should be left to the Legislature and administrators of the Unified Court System for their determination as situations and needs evolve over time.

For additional information about the Constitutional Convention, the process and the issues which could be considered, please see:

Information about the Constitutional Convention

The Rockefeller Institute, the Government Law Center at Albany Law School

http://www.rockinst.org/nys_concon2017/

The New York State Constitutional Convention Clearinghouse

<http://www.newyorkconcon.info/>

[New York State Education Department](#)

[New York State Constitutional Conventions and Constitutional History](#)

<http://www.nysl.nysesd.gov/scandocs/nyconstitution.htm>

Support for a Constitutional Convention

Citizens Union

http://www.citizensunion.org/vote_yes_for_a_new_york_state_constitutional_convention

New York City Bar Association

http://s3.amazonaws.com/documents.nycbar.org/files/2017129-ConstitutionalConventionTF_FINAL_6.14.17.pdf

New York State Bar Association

<http://www.nysba.org/constitutionreport0617/>