

April 2010

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### Recommended Citation

Eric Lane and Laura Seago, *Albany's Dysfunction Denies Due Process*, 30 Pace L. Rev. 965 (2010)

DOI: <https://doi.org/10.58948/2331-3528.1727>

Available at: <https://digitalcommons.pace.edu/plr/vol30/iss3/6>

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# Albany's Dysfunction Denies Due Process

Eric Lane\* and Laura Seago\*\*

## I. Introduction

The coup that shut down the New York State Senate for over a month last summer brought the State Legislature's dysfunction to the forefront of public consciousness. As the public waited for the approval of several critical budget bills and action on a long list of substantive legislation, two members of the newly elected Democratic majority deserted to the Republican side and then switched back again to caucus with the Democrats, destabilizing the already listing New York ship of state and spreading disgust among their colleagues and the public at large.<sup>1</sup> These events were, unfortunately, not anomalous. The process by which laws are made in Albany has been in shambles for decades. Newspapers throughout the state have long reported on and editorialized against this

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1. See generally Posting of Casey Seiler to Capitol Confidential, Krueger Serves up Double Dose of Frustration in Letter, <http://blog.timesunion.com/capitol/archives/15683/liz-krueger-serves-up-double-dose-of-frustration-in-letter/> (June 17, 2009, 12:25 EST). See also Andrew J. Hawkins, *Fallout Boy*, THE CAPITOL, Sept. 29, 2009, at 1; SIENA RESEARCH INST., NY VOTERS ANGRY AT SENATE, VOW TO REMEMBER IN 2010 (2009), available at [http://www.siena.edu/uploadedFiles/Home/Parents\\_and\\_Community/Community\\_Page/SRI/SNY\\_Poll/09%20July%20SNY%20Poll%20Release%20--%20FINAL.pdf](http://www.siena.edu/uploadedFiles/Home/Parents_and_Community/Community_Page/SRI/SNY_Poll/09%20July%20SNY%20Poll%20Release%20--%20FINAL.pdf).

dysfunction.<sup>2</sup> Over the last six years, this view has been empirically undergirded by the work of the Brennan Center for Justice at New York University School of Law, which has, since 2004, issued three major reports covering a decade of legislative voting records, debate transcripts, and documents that form the basis for legislative history.<sup>3</sup>

The first report, which assessed legislative records produced from 1997 to 2001, compared the Senate and Assembly's legislative rules and standard practices to those of all ninety-seven legislative chambers in other states and concluded that New York's was, by far, the most dysfunctional legislature in the nation.<sup>4</sup> In the intervening years, New York has shown little improvement in the stranglehold of chamber leadership over the legislative process and the four resulting problems of unused committees, inadequate review of legislation, insufficient deliberation, and a lack of public access

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2. See, e.g., Editorial, *Bring Democracy to State Legislature*, N.Y. DAILY NEWS, Aug. 8, 2004, available at [http://www.nydailynews.com/archives/opinions/2004/08/08/2004-08-08\\_bring\\_democracy\\_to\\_state\\_leg.html](http://www.nydailynews.com/archives/opinions/2004/08/08/2004-08-08_bring_democracy_to_state_leg.html); Editorial, *Albany's Failures*, PRESS & SUN-BULLETIN (Binghamton), July 20, 2004, at A4; Editorial, *New York's Fake Legislature*, N.Y. TIMES, July 25, 2004, at C13; Editorial, *A Legislature in Denial*, TIMES UNION (Albany), July 25, 2004, at B4; Editorial, *New York's Shame*, BUFFALO NEWS, August 1, 2004, at H4; Editorial, *The Trouble with Albany*, NEWSDAY (New York), July 22, 2004, at A36; Editorial, *To Fix a Broken System*, POST-STANDARD (Syracuse), July 25, 2004, at C2; Jay Gallagher, Editorial, *State in a League of its Own for Dysfunctional Legislature*, POUGHKEEPSIE J., July 25, 2004, at 7A; Editorial, *Albany Emperors*, PRESS & SUN-BULLETIN (Binghamton), July 25, 2004, at 14A; Editorial, *Still Broken After All These Years*, N.Y. TIMES, Jan. 15, 2009, at A24.

3. See JEREMY M. CREELAN & LAURA M. MOULTON, BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW, THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM (2004), available at [http://brennan.3cdn.net/1f4d5e4fa546eaa9cd\\_fxm6iyde5.pdf](http://brennan.3cdn.net/1f4d5e4fa546eaa9cd_fxm6iyde5.pdf) [hereinafter 2004 REPORT]; LAWRENCE NORDEN, DAVID E. POZEN & BETHANY L. FOSTER, BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW, UNFINISHED BUSINESS: NEW YORK STATE LEGISLATIVE REFORM 2006 UPDATE (2006), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_37893.pdf](http://www.brennancenter.org/page/-/d/download_file_37893.pdf) [hereinafter 2006 REPORT]; ANDREW STENGEL, LAWRENCE NORDEN & LAURA SEAGO, BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW, STILL BROKEN: NEW YORK STATE LEGISLATIVE REFORM 2008 UPDATE (2009), available at <http://www.brennancenter.org/page/-/publications/Still.Broken.pdf> [hereinafter 2008 REPORT]. At the crux of all three of these reports is the problem of dominant leadership that stifles public and rank-and-file legislator participation in the lawmaking process.

4. 2004 REPORT, *supra* note 3.

to the legislative process.<sup>5</sup> On at least some measures of legislative legitimacy, matters have gotten worse.<sup>6</sup>

Ironically, the Senate coup—by most accounts a cynical power grab by Senators eager for attention and a distraction from their legal troubles—did bear some fruit. Drawing on the work of a bipartisan rules reform committee formed by the Senate Majority in January, the Senate changed its operating rules in July to impose term limits on chamber leadership, create procedures for members to force bills to the floor, and provide for greater public access to legislative records.<sup>7</sup> Except for a new rule mandating increased transparency, the effect of which is as-yet unknown, these changes may have little impact on the due process claims made in this Article. And while other more meaningful changes are being considered in the Senate, the chamber's practices, as of this writing, bear little resemblance to functional lawmaking. Similarly, the Assembly has not made any meaningful attempt to reform itself beyond a few minor rules changes enacted in the wake of the Brennan Center's 2004 report. While these changes included eliminating empty-seat voting in the full chamber, requiring open and regular meetings of the Rules Committee, and mandating oversight hearings, other elements of the dysfunctional legislative process—like the absence of requirements for committee reports or mark-ups and the Speaker's control over which bills move to the floor—remained in place.<sup>8</sup>

In short, the lawmaking practices of the New York State Legislature presently and historically violate what law professor and former-Chief Judge of the Oregon State Supreme Court Hans Linde calls "legislative due process"—the constitutional obligation of the legislature to enact laws through a legitimate legislative process.<sup>9</sup> Linde draws this

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5. 2006 REPORT, *supra* note 3; 2008 REPORT, *supra* note 3.

6. For example, the 2008 budget process was one of the most secretive in decades, turning back the clock on recent moves toward transparency. See Danny Hakim, *Albany's Big 3 is Cut to One as Silver Flexes Might*, N.Y. TIMES, Mar. 30, 2009, at A1.

7. See, e.g., *G.O.P. Regains Control of New York State Senate*, N.Y. TIMES, June 9, 2009, at A1. (discussing new term limits on leadership).

8. 2006 REPORT, *supra* note 3, at 3.

9. See generally Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

doctrine from the due process clause of the Federal Constitution—which is reiterated, almost verbatim, in the New York State Constitution—under which he argues that government may not regulate the conduct of its citizens or tax or spend their monies without what he calls “a legitimate law-making process.”<sup>10</sup> Behind this doctrinal claim is a clear recognition of an often forgotten but foundational principle of the state and Federal Constitutions—process is as important as product.<sup>11</sup> The intent of both the United States and New York Constitutions is to simultaneously protect the broad representation of multiple interests while assuring that no single interest can easily get its way.<sup>12</sup> The goal, as Justice Louis Brandeis wrote, is “not to promote efficiency, but to preclude the exercise of arbitrary power.”<sup>13</sup>

As Linde does not explicitly define governmental legitimacy beyond stating that it is derived from constitutional principles, one aim of this Article is to elucidate this definition. We explore the lawmaking process in New York State with an eye to its legitimacy, using the United States and New York State Constitutions, and perhaps more importantly, the values that have informed them throughout national and state history, as our standards of measurement.<sup>14</sup> Our focus is systemic, not on individual pieces of legislation. We do not argue that the validity of every law depends upon some set procedure, but rather that the shortfalls of New York’s lawmaking processes delegitimizes all of its products. Our claim is that in the context of a legislature as dysfunctional as New York’s, every bill enacted violates legislative due process. There is a legitimate argument to be made that such violations are justiciable,<sup>15</sup> but whether and how the courts could or should address this problem is another matter entirely. The

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10. *Id.* at 239.

11. ERIC LANE & MICHAEL ORESKES, *THE GENIUS OF AMERICA: HOW THE CONSTITUTION SAVED THE COUNTRY AND WHY IT CAN AGAIN* 77 (2007).

12. *Id.* at 53.

13. *Meyers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

14. See generally LANE & ORESKES, *supra* note 11.

15. In Linde’s estimation, “to deny an injured party relief from an improperly made law means either that courts will tolerate violations of due process of law, or else that every breach of the prescribed process does not fall short of due process in the constitutional sense.” Linde, *supra* note 9, at 245.

separation of powers concerns raised by judicial review of legislative procedures warrant such prudence that we can recommend only modest judicial remedies that leave the fundamental workings of the Legislature in the hands of that body. The best approach to solving this problem is undoubtedly through the political and legislative processes. Ultimately, it is up to the public to hold the Legislature accountable for infringing on their right to democratic representation.

We begin by examining the lawmaking process in New York and contrasting it with the characteristics of a legitimate lawmaking process. In this context, we define and apply Linde's theory of due process of lawmaking to New York. We then consider the conditions under which litigation might be brought under this doctrine in New York, and conclude with a discussion of the limitations of this approach and an exploration of the political approach to restoring legitimacy to the legislative process.

## II. The Characteristics of a Legitimate Law Making Process

Legislative due process demands a legitimate law making process. It is our first task, then, to define the characteristics of governmental legitimacy.<sup>16</sup> The three legitimizing characteristics of democratic government are 1) representativeness, 2) accessibility, and 3) deliberativeness.<sup>17</sup>

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16. It is important to note that legitimacy is not synonymous with rationality. While it is not unreasonable to expect legislators to base their policy decisions on "knowledge of present conditions; the identification of a preferred future, or a goal; and a belief that the proposed action will contribute to achieving the desired goal," this model of rationality is not a realistic standard for legislative legitimacy. *Id.* at 223-24. The courts have repeatedly held that laws are constitutional so long as "any set of facts which can reasonably be conceived would sustain it." *Palladio, Inc. v. Diamond*, 321 F. Supp. 630, 633 (S.D.N.Y. 1970). In other words, although a legislature's failure to document the extent to which it has investigated a problem that a bill attempts to address and develop the best possible solution to that problem may be symptomatic of a greater lack of deliberativeness, the apparent lack of rationality in the lawmaking process alone is an insufficient basis for invalidating a law. While Linde notes that in large part, many state legislatures and Congress live up to a higher standard of rationality, it is not within the court's purview to ask if a law achieves its stated goal, only whether the goal is legitimate. *Id.* at 212.

17. See generally ABNER J. MIKVA & ERIC LANE, *THE LEGISLATIVE PROCESS* (3d ed. 2009).

Representativeness is defined as access to the franchise, ballot access for candidates, and the obligation of legislators to represent constituent interests.<sup>18</sup> Accessibility has two defining characteristics: first, “the right of the people to petition their legislators for the redress of problems,” and second, “the right of the people to know what their legislators are doing (and not doing) in the conduct of public business.”<sup>19</sup> Finally, deliberativeness describes processes that “slow legislative decisionmaking and distance it from the passions and immediacy of the prevailing desires of individual legislators and of various constituencies.”<sup>20</sup>

These characteristics are rooted in the United States Constitution and its derivative state constitutions, and have been underscored as these documents have evolved to their present state. As the Framers of the Constitution surveyed the United States in 1787, eleven years after independence, one thing became abundantly clear: America was imploding, leaving a nation described later by John Quincy Adams as “groaning under the intolerable burden of . . . accumulated evils.”<sup>21</sup> As the historian Gordon Wood wrote, the Framers saw in America, “mistrust, the breakdown of authority, the increase of debt, the depravity of manners, and the decline of virtue.”<sup>22</sup>

The problem was that Americans had proven not to be as virtuous as hoped for by Thomas Paine and other leaders of the revolution. Their conduct, like people everywhere, was dominated by their own self-interest. As George Washington wrote to John Jay, “we have probably had too good an opinion of human nature in forming our confederation. . . . We must take human nature as we find it. Perfection falls not to the share of mortals.”<sup>23</sup> Alexander Hamilton put it more bluntly, “men love power. . . . Give all the power to the many, they will oppress the few. Give all power to the few, they will oppress

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18. *Id.*

19. *Id.* at 595.

20. *Id.* at 541.

21. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 393 (1998).

22. *Id.* at 476.

23. Letter from George Washington to John Jay (Aug. 15, 1786) *available at* <http://gwpapers.virginia.edu/documents/constitution/1784/jay2.html>.

the many.”<sup>24</sup>

The problem for the Framers was to protect American freedom from American vice. The solution was first representation, what Madison considered the “pivot” of the new system.<sup>25</sup> Through representation the nation’s multiple interests (originally as defined by the Framers and later expanded by amendments to include, for example, women and other racial and language minorities) could be heard.<sup>26</sup> From this perspective, the Framers defined freedom as the ability to advocate for one’s interests to members of the legislature—though not necessarily to have those interests realized.<sup>27</sup> Through the separation of political power among two legislative houses and among the separate branches of government, the Framers intended to make certain that no particular interest could dominate another and that Americans would suffer neither executive nor legislative tyranny of the majority. Of this latter form of tyranny, Madison wrote, “there is no maxim in my opinion which is more liable to be misapplied and which therefore more needs elucidation than the current one that interest of the majority is the political standard of right and wrong.”<sup>28</sup> In short, a reliance on public virtue was to be replaced by a “policy of supplying by opposite and rival interests, the defect of better motives.”<sup>29</sup> Success would require compromise and consensus, reached through slow deliberation. From these principles flowed a common form of elective government, characterized by representatives elected from districts of roughly equal population to a bicameral legislature,<sup>30</sup> the ability of any legislator to introduce a bill, the requirement that all bills must be passed by both houses of the legislature and signed by the governor before becoming law, and a system of checks and balances that

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24. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 131-35 (1987).

25. See LANE & ORESKES, *supra* note 11, at 56.

26. *Id.* at 123.

27. *Id.* at 124.

28. Letter from James Madison to James Monroe (Oct. 5, 1786). See also LANE & ORESKES, *supra* note 11, at 52.

29. THE FEDERALIST NO. 51 (James Madison).

30. This is true of the Federal Government and all state governments except Nebraska, which has a unicameral legislature. See, e.g., NEB. CONST. art. III, § 1.



includes executive veto power and courts with the ability to interpret the constitutionality of statutes. New York's state government has all of these structural characteristics, and on paper, it looks like a model of democratic government. In practice, the situation in New York is very different.

### III. The New York State Legislature at Work

In Congress and in most state legislatures, legislators and their staff study an issue before crafting and introducing legislation that is then subjected to the rigors of a committee process that includes public hearings, debate, and a public reading for amendments called a "mark-up." In most American legislatures, all bills reported to the floor are typically accompanied by committee reports that provide background on the issue addressed by the bill and show the committee's work on the legislation and, where appropriate, fiscal analysis prepared by a qualified state employee. Once legislation reaches the floor, it is allowed to age for a time period sufficient to allow members to review the legislation, and then it is subject to debate during which rank-and-file members substantively discuss and, if appropriate, amend the legislation. Once a bill passes both houses, most legislatures subject it to a conference committee to reconcile differences in each chamber's version before sending it to the governor.<sup>31</sup>

In New York, almost none of these things occur. This is largely attributable to New York's history of a leadership-dominated legislative process, which undercuts normal legislative procedures from the outset.<sup>32</sup> A hollow committee process ensures that legislation with which the leadership does not agree will never gain momentum through early exploration; instead, leadership shapes and solicits support for legislation in closed-door party conferences.<sup>33</sup> Legislators introduce an extraordinary volume of bills, many of which are ill-considered,

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31. This is not to say that there are not many exceptions to this general format. Congress and other state legislatures do occasionally stray from these typical procedures, but these instances remain the exception. In New York, deviation from the standard of legislative legitimacy is the rule.

32. 2004 REPORT, *supra* note 3, at 14.

33. *Id.* at 25, 43.

redundant, or both.<sup>34</sup> Which bills comprise the fraction of introduced legislation that receives a committee vote is left largely up to chamber leadership.<sup>35</sup> Committees, for their part, rarely substantively deliberate on bills and never read them for amendments, acting instead as a rubber stamp for those bills that have the support of chamber leadership and a bottleneck for those that do not.<sup>36</sup> Closed-door majority-party conferences run by the leadership of each chamber replace committee deliberation; in these conferences, the fate of legislation is sealed outside of the public eye.<sup>37</sup> By the time a bill reaches the floor of the full chamber for a vote, its passage is a foregone conclusion, and as a result, rank-and-file members have little interest in debating or even reading the legislation on which they must vote. Members are further shut out of the process through the abuse of messages of necessity, a constitutional provision allowing the Governor to circumvent the regular aging and debate of bills for emergency legislation. In practice, this provision has historically been used to circumvent regular review of non-emergency legislation that might not withstand even the limited deliberation that occurs during the course of New York's regular legislative process.<sup>38</sup> Bills that are not guaranteed to pass almost never make it to the floor.

Dysfunction begins at the very first step of New York's lawmaking process. In 2008, the New York State Legislature broke a record by introducing more than 18,000 bills.<sup>39</sup> Just 1,634, or 9%, passed both chambers.<sup>40</sup> By way of comparison, members of the United States Congress introduced fewer than 11,000 bills and resolutions in the same year.<sup>41</sup> In other state legislatures, the next-highest bill introduction rate was in New Jersey, with only one-third the number of bills introduced than in New York.<sup>42</sup> Citing the likelihood that legislators introduce such a massive amount of legislation for the political benefits of

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34. *Id.* at 43, 51-52.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 48, 71 n.185.

39. Jenny Lee-Adrian, *Most Bills Don't Become a Law in NY*, POUGHKEEPSIE J., Sept. 26, 2008, at A1.

40. *Id.* See also 2008 REPORT, *supra* note 3, at 25.

41. 2008 REPORT, *supra* note 3, at 24.

42. *Id.*

staking a claim on an issue rather than out of a sincere effort to change the law, the Brennan Center's 2004 report suggested that disproportionate resources were being devoted to legislation that was never meant to see the light of day.<sup>43</sup> In this context, however, this statistic is less interesting as an example of New York's rampant government inefficiency than it is as an indicator of the fact that bill introduction is the only point at which rank-and-file legislators are given the power to substantively weigh in on many issues. As we will show throughout this section, utterly hollow committees, reliance on closed-door party conferences for the conduct of legislative business, the inability of members to move bills to the floor over the wishes of leadership, and floor votes that serve only to codify predetermined legislative outcomes, all strip rank-and-file members of their ability to fully participate in lawmaking, and ultimately, to represent their constituents.

Once bills are introduced and referred to committee, matters do not improve. In Congress and in most state legislatures, committees are the engine of deliberation, the place where bills are considered, debated, and remade. In New York, committees go largely unused.<sup>44</sup> Committees rarely hold hearings to gather information on the legislation under their consideration; of the 152 pieces of major legislation enacted into law between 1997 and 2001, only one bill was the subject of a hearing devoted specifically to its consideration.<sup>45</sup> While matters have improved somewhat in recent years, hearings continue to be broad and issue-based, and not focused on the specifics of the legislation at hand.<sup>46</sup> Neither chamber of the New York State Legislature requires committees to read bills for amendments, and legislators attest that reading bills aloud before holding a committee vote—let alone discussing them in detail—is not common practice.<sup>47</sup> Only one “mark-up” in which committee members read through a bill line-by-line and

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43. 2004 REPORT, *supra* note 3, at 38.

44. 2008 REPORT, *supra* note 3, at 24-25.

45. 2004 REPORT, *supra* note 3, at 7.

46. *See, e.g.*, Posting of Laura Seago to ReformNY: The Brennan Center Blog on New York, Progress on Committee Hearings?, <http://reformny.blogspot.com/2009/04/progress-on-committee-hearings.html> (Apr. 27, 2009, 18:16 EST).

47. *See* 2004 REPORT, *supra* note 3, at 9-10; 2006 REPORT, *supra* note 3, at 11-12; 2008 REPORT, *supra* note 3, at 5-6.

suggested changes to its sponsor has occurred in recent memory.<sup>48</sup> The absence of background work on the issue addressed by a bill provides little fodder for debate, and as a result, dissent in committees is exceptionally rare; in 2006 and 2007, more than 80% of committee votes on major legislation were unanimous.<sup>49</sup> Committee reports, which are required by the Senate rules to accompany all legislation reported to the floor, reflect the anemic nature of the committee process, showing little more than a voting record.<sup>50</sup> The Assembly does not require committees to report on matters referred to them at all.<sup>51</sup> Similarly, the Assembly rules set no requirements for fiscal analyses to be attached to bills with budgetary impact,<sup>52</sup> and although the Senate rules do require fiscal analyses, the Senate Finance Committee, which is required by the chamber's rules to maintain a file of "all bills requiring fiscal notes and the notes appertaining thereto," does not have fiscal notes on file for many recent bills with clear fiscal impact.<sup>53</sup>

While bills reported to the floor by committees typically receive no more consideration than an up-or-down vote, many legitimate bills that do not have the blessing of chamber leadership are not even subject to this cursory consideration.<sup>54</sup> In the Assembly, the Ways and Means and Codes Committees have the authority to request bills outside of their jurisdiction and to then sit on them indefinitely, earning them the informal designation as the place "where bills go to die."<sup>55</sup> Assembly members only have the ability to force bills out of committee at the end of the second year of a legislative cycle,<sup>56</sup> and until

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48. The only mark-up that has ever occurred to anyone's knowledge was arranged by freshman Senator Daniel Squadron in April of 2009 in response to concerns that committees were not adequately deliberative. Daniel L. Squadron, Senator Squadron Adopts Brennan Center Recommendations for Robust Committee Meeting, New York State Senate, <http://www.nysenate.gov/print/20528> (last visited Mar. 29, 2010). Senator Squadron's markup procedure largely followed the Brennan Center's proposed model. *Id.*

49. 2008 REPORT, *supra* note 3, at 10.

50. *Id.* at 11.

51. *Id.* at 17.

52. *Id.*

53. *Id.* at 18.

54. *Id.* at 6.

55. *Id.* at 14.

56. 2008 N.Y. Assem. Rule IV § 5(b).

recently, Senators did not have this power at all.<sup>57</sup>

Once bills are reported out of committee, they go to the floor calendar. According to written procedure, bills are to age for three days and then, once they reach the “third reading calendar,” they receive a vote.<sup>58</sup> In practice, bills can face one of two wildly divergent fates based on the wishes of chamber leadership. If a bill has leadership support, the Speaker or the Majority Leader can ask the Governor to issue a “message of necessity,” a constitutional procedure intended for emergency measures that circumvents the normal three-day aging of bills and truncates debate.<sup>59</sup> Tenuous relations between the Governor and the Legislature over the past several years have reduced the frequency of the abuse of messages of necessity, but in 2000, more than a third of the legislation passed that was included in the Brennan Center’s sample, was sped through at least one chamber using this method.<sup>60</sup> Some of the worst examples of rushed legislation occurred at the end of the legislative session; in 2005, 2006, and 2007, both houses passed more than 30% of all major legislation during the final three days of session,<sup>61</sup> and in 2009, the Assembly passed 202 bills, or 16% of all passed legislation, during the *final thirteen hours of session*.<sup>62</sup> With less than four minutes allotted to each bill, we can speculate with reasonable certainty that no debate occurred.

The leadership typically only sends bills to the floor if they are guaranteed to pass; before the summer of 2009, not a single bill was voted down on the floor of either chamber in over a decade.<sup>63</sup> During a dispute over a bill that was apparently on

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57. This was changed first by the January 2009 rules that allowed for motions to discharge and then by the July 2009 changes that established the “motion for committee consideration” by which a sponsor may compel a committee to place a bill on its agenda and a “petition for consideration,” which, if signed by 3/5 of members elected to the chamber, allows a bill to circumvent the committee process entirely. As of this writing, these rules have yet to be put to use. 2009 N.Y. Sen. R. VII § 3(e); *id.* XI § 3.

58. *Id.* VIII § 1.

59. *Id.*

60. 2004 REPORT, *supra* note 3, at 29.

61. 2008 REPORT, *supra* note 3, at 21.

62. Press Release, Assembly Speaker Sheldon Silver, Legislative Material in the Assembly on Monday, June 22 (June 22, 2009), available at <http://assembly.state.ny.us/Press/20090622h/>.

63. 2008 REPORT, *supra* note 3, at 15. Since the summer 2009 coup in

the active list without a calendar number, as required by chamber rules, one frustrated Senator quipped, “[i]t’s like professional wrestling, we give the number ahead of time because we know it’s going to pass?”<sup>64</sup> With the outcome of legislation a foregone conclusion, many legislators do not even bother to dissent. In 2006, over 96% of major legislation in both chambers was passed with no substantive debate,<sup>65</sup> and over 86% of major legislation passed both houses with no floor discussion at all.<sup>66</sup> In 2007, only 11.7% of major bills received any “no” votes in the Senate, and only 31.7% of those bills received any “no” votes in the Assembly.<sup>67</sup> In most cases, these bills only received one or two dissenting votes.<sup>68</sup> In 2007, for example, less than 2% of major bills were opposed by at least one tenth of the Senate membership.<sup>69</sup>

If a bill is opposed by chamber leadership or it does not have adequate support to pass, it is unlikely that it will receive a floor vote at all. Legislative leaders determine the “active list” of bills that receive floor consideration on the next legislative day.<sup>70</sup> In the Assembly, there is no provision allowing rank-and-file legislators to move bills to the active list over the wishes of the rules committee, which is chaired by the Assembly Speaker. Until recently, the Senate imposed a similar barrier on bills coming to the floor.<sup>71</sup>

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the New York State Senate, six bills have failed before the full chamber. E-mail from Andrew Stengel, Senior Adviser for Government Reform, New York State Senate Majority, to Laura Seago, Research Associate, Brennan Center for Justice (Dec. 3, 2009, 11:59 EST) (on file with the Brennan Center).

64. N.Y. S. Debate on S.B. 5755, May 7, 2007, at 2514, lines 13-17.

65. For the purposes of Brennan Center studies, we define “substantive debate” as any floor debate that includes questioning or back-and-forth dialog on the substance of the bill (as opposed to speeches describing an individual’s intent to vote for or against the bill in general terms). *See, e.g.*, 2006 REPORT, *supra* note 3, at 46.

66. 2008 REPORT, *supra* note 3, at 19.

67. *Id.* at 15.

68. *Id.*

69. *Id.*

70. N.Y. Sen. R. VIII § 6.

71. Rules reforms passed in July of 2009 allow members to move or petition for a bill to be placed on the third reading calendar, after which it must receive a vote. As of this writing, these rules have not yet taken effect due to restrictions on the date after which such a motion is allowed. Press Release, N.Y. State Senator David J. Valesky, Historic Senate Rules Reform, Sponsored by Senator Valesky, Passes Senate (July 16, 2009), *available at* <http://www.nysenate.gov/press-release/historic-senate-rules-reform->

To help them decide which bills should go to the floor and which should be permanently detained, chamber leadership replaces the normal machinations of the legislative process with secret party conferences where the chamber's leader polls individual legislators and negotiates compromises, all outside of the public eye.<sup>72</sup> In effect, and sometimes in actual practice, this process subverts the deliberative value of the committee process. In 2008, for example, the Assembly majority deemed a proposal to establish congestion pricing "so important that the [Democratic] conference substituted for a committee meeting."<sup>73</sup> Following the closed-door conference, Speaker Sheldon Silver unilaterally decided to keep the legislation from coming to the floor for a vote.<sup>74</sup> Majority party members argued that all members had the opportunity to voice their opinions by expressing them to the speaker individually or at the party conference,<sup>75</sup> but any such activity occurred outside the formal legislative process and away from the public eye. Even when a majority of the chamber as a whole supports legislation on a particular issue, a vote may not occur because either the majority party conference or the leader decides to hold a bill back for political reasons.<sup>76</sup>

After an appellate court challenged the right of legislatures to conduct public business in secret caucuses in 1981, the New York State Legislature changed the state's Open Meetings Law to exempt political caucuses regardless of the subject matter of the discussion, including discussion of public business.<sup>77</sup> Although this runs counter to the legislation's purpose clause,<sup>78</sup>

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sponsored-senator-valesky-passes-senate.

72. 2004 REPORT, *supra* note 3, at 43; *see also* MIKVA & LANE, *supra* note 17, at 533.

73. Azi Paybarah, *Congestion Drip: Is Sheldon Silver the Man to Blame*, N.Y. OBSERVER, Apr. 8, 2008, available at <http://www.observer.com/2008/congestion-drip-sheldon-silver-man-blame?page=0%2C0>.

74. *Id.*

75. *Id.*

76. *Id.*

77. MIKVA & LANE, *supra* note 17, at 533-35.

78. The legislative declaration reads:

It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of

this legislation enables lawmakers to shroud virtually all public business in secrecy. While rank-and-file members of both parties may, as some Assembly members asserted in 2008, have the opportunity to privately express their views to chamber leadership and may also rigorously debate bills behind closed doors, members are stripped of the opportunity to cast a public vote on even those matters whose consideration dominates a legislative session.<sup>79</sup> The public is then unable to ascertain their elected representatives' stances on these and other issues of importance.

This obfuscation of legislative business extends beyond party conferences. Unlike many other states, the New York State Legislature does not, as of this writing, provide meeting minutes, hearing and debate transcripts, committee voting records, or fiscal analyses to the public in an easily accessible online format.<sup>80</sup> The limited resources that allow a member of the public to determine where a legislator stands on a bill are available through public records requests that often take weeks or months to process.<sup>81</sup> Other materials critical to public understanding of where a bill stands, such as written committee meeting minutes, earlier versions of amended bills, or substantive reports setting forth a committee's work on a bill, do not exist at all.<sup>82</sup> In addition to restricting the public's access to the legislative process, the absence of substantive documents showing the work of the legislature—likely resulting from the fact that little work worthy of documenting actually occurs—poses a challenge to courts tasked with

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and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

N.Y. PUB. OFF. LAW § 100 (McKinney 2008).

79. See MIKVA & LANE, *supra* note 17, at 533-35.

80. New Senate rules passed in July of 2009 indicate that this should change in at least one chamber, but the Senate has not yet digitized these records, and the Assembly has made no similar commitment. See 2009 N.Y. Sen. R. XIV § (1)(a).

81. This claim is based on the Brennan Center's extensive experience in filing requests for legislative records under the State's Freedom of Information Law. See 2004 REPORT, *supra* note 3, at 77; 2006 REPORT, *supra* note 3, at 45; 2008 REPORT, *supra* note 3, at 32.

82. See 2004 REPORT, *supra* note 3, at 9, 11; 2006 REPORT, *supra* note 3, at 10; 2008 REPORT, *supra* note 3, at 11.



assessing legislative intent, as we discuss later in this Article.

#### IV. New York and Governmental Legitimacy

The previous section showed that New York's legislative process is undoubtedly dysfunctional. The task of this section is to show that it is also illegitimate. As stated above, the three legitimizing characteristics of government are representativeness, accessibility, and deliberativeness. New York fails on all three counts.

##### A. *Representativeness*

There are two key aspects of representativeness. The first, "representativeness of the electorate," concerns universal suffrage and is largely irrelevant to the present discussion.<sup>83</sup> The second, "representative democracy"—the ability to elect officials to fairly represent their constituents—can be further divided into the qualifications for office, elections to legislative office, and representative obligations of legislators.<sup>84</sup> While representativeness vis-à-vis elections to legislative office faces serious threats from restrictive ballot access rules, a legislator-controlled redistricting process, and retrograde campaign finance laws in New York, these issues are less germane to the present discussion than the legislators' representative obligations. We focus, then, on the extent to which elected legislators in New York are able to represent their constituents' interests.

The diminution of the role of rank-and-file legislators functions to undermine representativeness in several ways. First, by conducting debates and votes in private and failing to hold hearings or other forums where the public can weigh in on legislation, the legislature denies the public an important opportunity to determine where their elected representatives stand on an issue, in order to effectively advocate for their policy preferences. This, of course, cannot be fully separated from the principle of accessibility, which we discuss below. Second, in denying members the opportunity to cast formal

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83. MIKVA & LANE, *supra* note 17, at 465.

84. *Id.*

votes on matters before the legislature by replacing formal processes with party conferences, legislators on both sides of the aisle are stripped of the most basic representative duty of casting votes on behalf of their constituents.

B. *Accessibility*

Accessibility includes “the right of the people to petition the legislators for the redress of problems” and “the right of the people to know what their legislators are doing (and not doing) in the conduct of public business.”<sup>85</sup> New York violates both rights. As discussed above, the shroud of secrecy over legislative proceedings makes it nearly impossible for citizens to effectively petition their legislators for the redress of problems. While New Yorkers have the right to petition their legislature, the efficacy of this process is undermined by the fact that average citizens have no way of knowing what legislative business their legislators are considering in closed-door meetings and, on some occasions, may never have the benefit of a recorded vote or statement reflecting their legislators’ stances on some issues.

Those documents that are available to the public are often not accessible until it is too late for their use as effective advocacy tools, and their lack of substance obscures the public’s view of the legislative process. Even if committee reports are, in their paltry details, an accurate reflection of “what their legislators are doing” in New York’s hollow committees, the fact that these committees have been replaced by secret meetings subject to neither the State’s Open Meetings Law nor its Freedom of Information Law means that the substance of what legislators are doing—or not doing—in the passage of laws remains hidden from view. There are no meeting minutes or transcripts of any part of the legislative process other than floor debates, at which point, as discussed above, legislative outcomes are preordained.

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85. *Id.* at 595.

### C. *Deliberativeness*

The characteristic of lawmaking in which the New York State Legislature's failure to conform to legislative due process is most clear is almost certainly deliberativeness, or "those steps of the legislative process that slow legislative decision-making and distance it from the passions and immediacy of the prevailing desires of individual legislators and of various constituencies."<sup>86</sup> In other words, deliberativeness is legislative shorthand for the due diligence that the legislature must perform in order to pass laws that achieve their stated goals. In Congress and most legislatures, deliberativeness is achieved through committee hearings and debate, an amendment or "mark-up" process, and substantive floor debate.

In New York, bills with the support of chamber leadership glide through both chambers, slowed by nothing more than rubber-stamp votes of approval by a committee and by the full chamber. Committees rarely hold hearings and never "mark-up" legislation, and floor debate, when it occurs at all, is virtually always perfunctory.<sup>87</sup> The use of the word "slow" in the definition of deliberativeness included above should be, by itself, cause for concern in a state where bills are routinely rushed through final passage in less than five minutes and where, in some years, over a third of major legislation skips normal aging and debate.<sup>88</sup>

### V. Remedies

In *Due Process of Lawmaking*, Professor Linde avoids suggesting a specific remedy, stating in general terms that a remedy is required.<sup>89</sup> Of course, he is correct. A claim without a remedy nonsuits a case. Linde does suggest that any remedy that a court pursues should use the legislature's own operating rules as the primary standard.<sup>90</sup> Unfortunately, this would not solve the problem at the heart of New York's legislative

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86. *Id.* at 677.

87. *See* 2004 REPORT, *supra* note 3, at 45-47.

88. *See, e.g., id.* at 16.

89. Linde, *supra* note 9.

90. *Id.*

dysfunction. In New York, the legislature typically does follow the letter of its own operating rules. The problem is that both chambers' inadequately robust rules are permissive of the legislature's ongoing dysfunction and the inaction of its rank-and-file members. With this in mind, we explore the prospects and pitfalls of a judicial remedy to the problem of New York's legislative dysfunction.

Asking a court to remedy New York's dysfunctional legislative process or to strike down legislation enacted through this constitutionally-flawed process also asks a court to open a Pandora's box of possible separation of power and judicial competency evils.<sup>91</sup> Courts addressing challenges to New York's lawmaking processes have—rightfully, in our view—avoided such danger. This general rule has been long established in New York jurisprudence:

Within the Constitution the legislature is supreme, and when a law confessedly within the power of the legislature to make, comes down to the people, authenticated by the presiding officers of the respective houses, approved by the governor and certified and declared by the secretary of State to be the law of the State, no citizen, I think, in a private controversy, can call upon the courts to go behind the record thus made up and impeach the validity of the law, by showing that in its enactment some form or proceeding had not been properly followed or adopted by the legislature, the supreme law maker.<sup>92</sup>

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91. See generally Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Review*, 111 YALE L.J. 1707 (2002).

92. *People v. Devlin*, 33 N.Y. 269, 283-84 (1865) (Campbell, J., concurring). See also *Packer Collegiate Inst. v. Univ. of N.Y.*, 76 N.Y.S.2d 499, 504 (App. Div. 1948) (stating “[t]hat the legislature may have enacted the statute in question without legislative hearing or recorded debates we regard as of no consequence. The statute on its face bears the mark of a legitimate purpose, viz.: to legislate for the health, safety and general welfare of children”); *Palladio, Inc. v. Diamond*, 321 F. Supp. 630, 632-33 (S.D.N.Y. 1970) (where the Plaintiff argued that the legislature did not conduct hearings on a law that prohibited the sale or importation of certain wild animal products; however, even assuming that Plaintiff's contention was

Convincing the courts to reverse course on this approach is not, and should not be, an easy task. Perhaps the best news is that neither New York nor federal courts have ever ruled, at least directly, against addressing such a question. A recent New York case, however, *Urban Justice Center v. Pataki*, makes abundantly clear the judicial resistance any such challenge will meet.<sup>93</sup>

Despite these high barriers and the dangers of such litigation, at the end of this section we suggest a somewhat circuitous path that a court attracted to the possibility of remedying New York's complete legislative dysfunction and consequential constitutional harms might be able to follow, prospectively if it chooses, without intruding too far into legislative territory.

Two New York Court of Appeals cases, *King v. Cuomo*,<sup>94</sup> and *Campaign for Fiscal Equity v. Marino*,<sup>95</sup> provide guidance. Both are cases in which the Court of Appeals narrowed the meaning of the term "internal" to allow it to opine against legislative practices that it considered undemocratic.<sup>96</sup> *Skelos v. Paterson*<sup>97</sup> also provides some hope. Here, after weeks of very public and criticized legislative inaction, infighting, and failure to renew critical legislation before the close of the fiscal year, the New York State Court of Appeals determined, on what could be fairly considered thin law, that the Governor's appointment of a Lieutenant Governor was constitutionally

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correct, the Court held that "there is no constitutional requirement that the legislature conduct hearings and build a record when it passes a law"); *Heimbach v. State*, 452 N.E.2d 1264 (N.Y. 1983) (where plaintiffs commenced an action seeking a declaratory judgment that the roll call vote taken for a proposition was not correctly registered by the Clerk of the Senate and therefore not validly enacted, the court held that § 40 of the Legislative Law provides the presiding officer's certificate showing the date and requisite votes for the passage of a bill is conclusive evidence that the bill was validly enacted and the court found this to "[preclude] judicial review of the propriety of the subject roll call vote to effect legislative action," and did not, out of "respect for the basic polity of separation of powers and the proper exercise of judicial restraint . . . intrude into the wholly internal affairs of the legislature").

93. 828 N.Y.S.2d 12 (App. Div. 2006).

94. 613 N.E.2d 950 (N.Y. 1993).

95. 661 N.E.2d 1372 (N.Y. 1995).

96. See *Cuomo*, 613 N.E.2d 950; *Marino*, 661 N.E.2d 1372.

97. 915 N.E.2d 1141 (N.Y. 2009).

legitimate.<sup>98</sup> The message we gather from that decision is that egregious facts matter. As the Supreme Court of the United States noted only last year with respect to a matter that seemed to have no easy remedy:

It is true that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong. But it is also true that extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is especially true when due process is violated.<sup>99</sup>

While all of these cases provide guidance for a potential judicial remedy, any attempt at mapping such a strategy must begin with an exploration of *Urban Justice Center*, an appellate case demonstrating the many obstacles that will be encountered in planning a successful challenge.

A. *Urban Justice Center v. Pataki*

In 2005, The Urban Justice Center, a nonprofit organization, along with Democratic Senator Liz Krueger and Republican Assemblyman Thomas J. Kirwin, each a member of their chamber's minority party, brought a broad declaratory judgment action under the Equal Protection and Freedom of Speech provisions of both the United States and New York Constitutions,<sup>100</sup> challenging the lawfulness of practices "used by the majority party in each chamber to deny minority party members meaningful participation in the legislative process."<sup>101</sup> Most significant among these practices, particularly for a discussion of legislative due process, was the use of secret, unrecorded majority party conferences in each house for

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98. *Id.* at 1146.

99. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009).

100. *Urban Justice Center v. Pataki*, 828 N.Y.S.2d 12, 14 (App. Div. 2006). The plaintiffs also argued that the challenged practices violated certain New York statutes. *Id.*

101. *Id.*

conducting legislative debate and decision making.<sup>102</sup> As discussed earlier, it is these inaccessible conferences and the atrophied committee system that form the basic element of the due process violation.

Urban Justice Center alleged that these practices “operate to exclude it and its clients from participating in the legislative process and fulfilling its mission” of advocating for indigents.<sup>103</sup> The legislator-plaintiffs argued that these anti-minority party practices diminished their capacity, as members of the minority in each house, to participate in the legislative process.<sup>104</sup>

The legislator-plaintiffs also made several resource claims. They claimed that the majority leaders of each house denied minority party members equal access to various resources for their own legislative efforts (e.g., staff and postage) and for their districts (e.g., earmarked funds).<sup>105</sup>

The court did not reach the merits of these claims, deciding either on the basis of standing or prudence that none were judicially cognizable.<sup>106</sup> The equal protection approach provided cover for the court, allowing it to view the entire matter as an attempt by minority party members to seek judicial reinforcements for battles they could not win politically. In its decision, the court wrote that “the challenges to the holding of majority political party conferences are nothing less than an assault upon our party system of government, in which all the parties, not only the majority, try to coordinate political and legislative strategy, with greater or lesser effectiveness.”<sup>107</sup> By focusing on differential treatment between minority and majority party members, plaintiffs denied the court the broader and more accurate vision presented by the Brennan Center, that:

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102. *Id.*

103. *Id.* at 15.

104. *Id.* at 14.

105. *Id.* at 18. Incidental to this case, but not to this Article, is the fact that leadership domination of the process (and membership acquiescence to this state of affairs) leads to discriminatory practices.

106. *Id.* at 15.

107. *Id.* at 20.

most legislators [regardless of party] are effectively shut out of the legislative process, particularly at the most significant stage, when the leadership determines which bills should be passed and in what form. As a result, New Yorkers' voices are not fully heard, and bills are not tested to ensure that they reflect the public's views.<sup>108</sup>

B. *Standing*

Standing in New York, as elsewhere in the country, requires a plaintiff to allege a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."<sup>109</sup> On this basis, the Urban Justice Center's allegations of diminished opportunities to participate in the political process as a result of majority party domination of each house, without an additional injury, was doomed from the start. The court concluded that Urban Justice Center's stated injury was "too speculative to constitute the type of an injury-in-fact necessary to confer standing."<sup>110</sup> The court went on to explain that:

Urban Justice Center has failed to explain how defendants' conduct has prevented it from advocating in the Legislature, with the legislative leaders, or with the legislative members of the majority party, or show that the majority party in either chamber is less favorably disposed toward its mission than the minority party.<sup>111</sup>

Additionally, even if the Urban Justice Center had provided adequate evidence of the indubitable truth that the then-Republican majority in the Senate was "less favorably

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108. 2004 REPORT, *supra* note 3, at 42.

109. *Allen v. Wright*, 468 U.S. 737, 751 (1984). *See also* *MFY Legal Servs. v. Dudley*, 67 N.Y.2d 706, 708 (1986).

110. *Urban*, 828 N.Y.S.2d at 15.

111. *Id.*



disposed” to Urban Justice Center’s mission than the democratic majority in the Assembly, such a complaint still most likely would not have satisfied standing requirements; later in its decision the court suggested that procedural claims such as those offered by Urban Justice Center are not justiciable.<sup>112</sup>

The legislator-plaintiffs’ process claims are more immediate and specific. Minority party members are unquestionably treated unequally, even in the context of New York’s lawmaking processes that marginalize almost all rank-and-file legislators. Here, however, the court focused on the redressability of the claims, not on their solidity.<sup>113</sup> Citing the United States Supreme Court decision in *Raines v. Byrd*,<sup>114</sup> the court determined that the legislator-plaintiffs’ process claims were “a type of institutional injury (the diminution of legislative powers), which does not provide standing.”<sup>115</sup> The reference to *Raines* is important. As we discuss below, it basically precludes a judicial challenge to the offending legislative processes by an individual legislator unless there is an actual concrete harm to a legislator’s power, such as that found in *Silver v Pataki*.<sup>116</sup> In that case, the court determined that a member of the Assembly did have standing to challenge a gubernatorial line-item veto of non-appropriation bills which the member had supported, writing that, “[a]s a Member of the Assembly who voted with the majority in favor of the budget legislation, plaintiff undoubtedly has suffered an injury in fact with respect to the alleged unconstitutional nullification of his vote sufficient to confer standing.”<sup>117</sup>

In *Raines*, a number of members of Congress who had voted against the 1997 Line-Item Veto Act<sup>118</sup> brought suit challenging the statute’s constitutionality.<sup>119</sup> Their alleged injuries were various increases in executive power, which they

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112. *See id.* at 18-24.

113. *Id.* at 15-17.

114. 521 U.S. 811 (1997).

115. *Urban*, 828 N.Y.S.2d at 16 (internal quotation marks omitted).

116. 96 N.Y.2d 532 (2001).

117. *Id.* at 533.

118. Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (codified at 2 U.S.C.A. § 691 (West Supp. 1994)).

119. 521 U.S. at 814.

argued unconstitutionally altered the balance of power between the legislative and executive branches of government.<sup>120</sup> The Court determined that these claims were too abstract, but the focus of the decision was on a conjoined standing point, the justiciability of the substantive constitutional claim:

We have also stressed that the alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered “an invasion of a legally protected interest which is . . . concrete and particularized,” and that the dispute is “traditionally thought to be capable of resolution through the judicial process.”<sup>121</sup>

It is this same doctrinal reasoning that informs *Silver v. Pataki*, in which the New York Court of Appeals wrote, “[a] plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest.”<sup>122</sup>

### C. *Political Issue Doctrine and Separation of Powers*

After the court determined that the legislator-plaintiffs did not have standing to challenge the process claims, it was left to consider the resource claims. The court judged (somewhat questionably in our view) that the legislator-plaintiffs did have standing to pursue those claims. But this pursuit was short-lived, given that the court immediately dismissed these claims as not judicially cognizable under New York’s separation of powers doctrine:

The first three causes of action, contesting the unequal provision of office space, equipment, staff, and printing and mailing expenses, essentially challenge the Legislature’s allocation of institutional resources to its own members, a classic example of internal administrative

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120. *Id.* at 816.

121. *Id.* at 819 (internal citation omitted).

122. *Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001).

prerogatives that are properly left to the Legislature to make, in furtherance of the duties particular to that body, without interference from the other two branches of government.<sup>123</sup>

To make sure that other process challenges were discouraged, the court folded the process claims, which it had dismissed for lack of standing, into its separation of power jurisprudence, suggesting that even if there were standing in the form of a concrete injury to the legislator-plaintiffs, the claims would not have been cognizable.<sup>124</sup>

As a general matter, it is hard to quarrel with this reasoning. There is something constitutionally and democratically offensive about a court, unelected or elected, entering the lawmaking process and directing the legislature to follow certain procedures. But despite this aversion to constitutional intrusion, the New York courts have not always stayed their hands. *King v. Cuomo*<sup>125</sup> and *Campaign for Fiscal Equity v. Marino*,<sup>126</sup> two cases exploring the Presentment Clause of Article IV, §7<sup>127</sup> are prime examples of such forays into the legislative process in which deference to legislative determinations on the meaning of their own constitutionally established procedures would have been entirely consistent with state precedent and a reasonable interpretation of the constitution. In fact, although the Court of Appeals deemed the legislative practices in question unconstitutional in both cases, the intermediary appellate courts determined that the issues were not legally cognizable and left constitutionality to legislative discretion.<sup>128</sup>

In *King*, a plaintiff argued that legislation recalled from the Governor by a joint resolution of the Legislature and then returned to the Legislature by the Governor should be deemed enacted because the recall procedure was unconstitutional, and thus the bill had aged beyond ten days so that it had become

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123. *Urban Justice Ctr. v. Pataki*, 828 N.Y.S.2d 12, 28 (App. Div. 2006).

124. *See id.* at 17-20.

125. 81 N.Y.2d 247 (1993).

126. 87 N.Y.2d 235 (1995).

127. N.Y. CONST. art. IV, § 7.

128. *See Campaign for Fiscal Equity, Inc. v. Marino*, 625 N.Y.S.2d 331 (App. Div. 1995); *King v. Cuomo*, 584 N.Y.S.2d 207 (App. Div. 1992).

law “in like manner as if he had signed it.”<sup>129</sup> The court agreed that the practice was unconstitutional for two reasons. First, it was not enumerated in the Constitution, and second, it undermined the “integrity of the law making processes as well as the underlying rationale for the demarcation of authority and power in this process.”<sup>130</sup> Very relevant to any proposed due process jurisprudence was the court’s second rationale: to ensure “that the central law-making function remains reliable, consistent and exposed to civic scrutiny and involvement.”<sup>131</sup> Another important piece of this decision for future litigation is the court’s willingness to apply it prospectively only: “Prospective application of a new constitutional rule is not uncommon where it would have a “broad, unsettling effect.”<sup>132</sup>

In *Campaign for Fiscal Equity*, the constitutional provision is the same but the question is different. Here, the Majority Leader of the Senate, the house in which the legislation in question was first passed, refused to present it to the Governor after it was passed by the Assembly.<sup>133</sup> The question asked by plaintiffs, beneficiaries of the legislation, was whether this failure to present was consistent with the New York Constitution’s Presentment Clause.<sup>134</sup> The Court of Appeals answered no, writing that “[t]o hold otherwise would be to sanction a practice where one house or one or two persons, as leaders of the Legislature, could nullify the express vote and the will of the People’s representatives.”<sup>135</sup> This is exactly the condition that leads to our legislative due process claim.

*Urban Justice*, the many cases cited therein, *King*, and *Campaign for Fiscal Equity* must frame any overall procedural challenge to New York’s dysfunctional legislative process. From *Urban Justice*, we know that it would be extremely difficult for legislators to bring such a claim in their elected capacity because of the legitimate standing and separation of power questions that would ensue. We also know that a broad

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129. 81 N.Y.2d at 250, 252.

130. *Id.* at 255.

131. *Id.*

132. *Id.* at 256.

133. *Campaign for Fiscal Equity, Inc. v. Marino*, 87 N.Y.2d 235, 237 (1995).

134. *Id.*

135. *Id.* at 238-39.

categorical challenge to New York's legislative processes by any plaintiff would likely fail for the same reasons. Most likely, courts would determine that such claims are within the legislative domain and outside of their reach. But from *King* and *Campaign for Fiscal Equity* we learn that the Court of Appeals, with the proper plaintiffs and claims, has been willing to vindicate the broad rights of New Yorkers to a representative, accessible, and deliberative democratic government. How else can we read the court's expressed concerns about the "civic scrutiny and involvement"<sup>136</sup> (*King*) and "express vote and the will of the People's representatives"<sup>137</sup> (*Campaign for Fiscal Equity*)? What is needed to fruitfully channel the court's constitutional idealism is both a solid judicial platform from which the court can view the extraordinary damage resulting from New York's profound legislative dysfunction and a reasonable remedy that ameliorates the injury without overstepping the boundaries implied by the separation of powers doctrine.

Given the limitations discussed above, two approaches would seem to fit the bill. The first, more modest approach, follows from the everyday problem experienced by the New York Court of Appeals of how to read unclear statutes adopted through a legislative process that never leaves a record of its intent. Our proposal is that the court should adopt a canon of construction that all statutes be interpreted narrowly unless actual legislative history indicates to the contrary. The second, more radical proposal emanates from the fact that all legislative deliberation currently occurs in closed and unrecorded majority-party political conferences. Here, our proposal is that the court should declare unconstitutional the provision of the Open Meetings law that allows for the discussion of public business in the privacy of legislative political conferences.

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136. *King v. Cuomo*, 81 N.Y.2d 247, 247 (1993).

137. *Campaign for Fiscal Equity, Inc. v. Marino*, 625 N.Y.S.2d 331 (App. Div. 1995).

D. *Unclear Statutes to be Read Narrowly*

Our first suggestion is for the court to read each statute extremely narrowly unless its legislative history evidences an intent that it be read broadly. Every case of statutory interpretation involves the question of whether a statute should read more broadly, covering more individuals, groups, or actions; or more narrowly. The court should continuously remind legislators and the public in its decisions that such an outcome could be avoided if the legislature would establish a legislative record documenting meaningful legislative procedures. By defaulting to a narrow mode of interpretation, the court signals to the Legislature that if it wants the court to interpret ambiguities in its statutes, it must document its intent—something the Legislature can only do through a robust process.

Each year, statutory interpretation cases form the bulk of the New York State Court of Appeals' calendar.<sup>138</sup> These cases all ask the court to determine the applicability of a particular statute to a particular set of facts that have either been agreed to by the parties or resolved by the lower courts. Usually the statute is unclear, meaning that the relevant text does not provide a clear answer to the question at hand. Litigation over the meaning of a clear statute is far less likely, given that it is proscribed by the plain meaning rule, which for the most part obligates the court to apply clear text as written.<sup>139</sup> The court has affirmed that “[w]hen . . . a statute is clear and unambiguous, courts are obligated to construe the statute so as to give effect to the plain meaning of the words.”<sup>140</sup> As former-Chief Judge Judith Kaye wrote, “[u]nless a statute in some way contravenes the state or federal constitution, we are obliged to follow it—and of course we do.”<sup>141</sup>

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138. See generally New York Court of Appeals, Court of Appeals Calendar, <http://www.nycourts.gov/courts/appeals/calpro/calendar.pl?calendar=default> (last visited Apr. 5, 2010).

139. See generally ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS (1997).

140. *Cole v. Mandell Food Stores, Inc.*, 710 N.E.2d 244, 246 (N.Y. 1999).

141. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 26 (1995).

When a statute is unclear, on the other hand, courts must find meaning beyond its text. Legislative history is a critical resource for courts tasked with determining legislative intent. Despite a generation of academic debate over the probative value of such history, it remains the touchstone of both federal and state court interpretive efforts.<sup>142</sup> The New York courts have followed suit. As the New York Court of Appeals opined regarding finding the meaning of an unclear statute, “[o]ur preeminent responsibility in that endeavor is to search for and effectuate the Legislature’s purpose. In this respect, legislative history and the events associated with and occasioning the passage of the particular statute are valuable guiding lights.”<sup>143</sup> Legislative history normally consists of the formally documented steps of the legislative process. As Judge Patricia Wald has written about Congress, “legislative history is the authoritative product of the institutional work of the Congress. It records the manner in which Congress enacts its legislation, and it represents the way Congress communicates with the country at large.”<sup>144</sup> In Congress and most state legislatures, the legislative entities that generate most of this documentation are committees.<sup>145</sup> Committees are the working arms of most legislative bodies, and their products—committee reports and transcripts of committee debates and hearings—are the means by which legislatures inform most of their membership and the public on the purpose, meaning, and background of legislation. Transcripts of floor debates similarly can provide guidance.

Omitted from any serious discussion of probative legislative history are executive signing statements. These written statements, which usually accompany bills signed into law, contain the reasons the executive is signing the bill and often include the administration’s reading of particular provisions of the bill. Such signing statements are normally not considered probative of legislative meaning. They are post-facto statements of the executive that have not received

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142. See generally MIKVA & LANE, *supra* note 139.

143. *Fumarelli v. Marsam Dev., Inc.*, 703 N.E.2d 251 (N.Y. 1988).

144. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306-307 (1990).

145. See generally MIKVA & LANE, *supra* note 139.

legislative consideration.<sup>146</sup> For this reason, the court logically confines its exploration of legislative intent to documents produced by the Legislature itself.

In New York, the typical documents that comprise legislative history do not exist. As the Brennan Center has reported, committees are moribund and debate on the floor is almost nonexistent.<sup>147</sup> As former-Chief Judge Kaye has noted in her discussions of New York lawmaking, “[i]n New York . . . legislative history is relatively sparse.”<sup>148</sup> Often, the only record of intent accompanying a bill is a bill jacket created by the executive. After a bill is presented to the Governor, it is common practice for “the Counsel to the Governor to gather comments on the bill from executive agencies and groups affected by the legislation.”<sup>149</sup> With the bill, the comments are placed in a file, known as the bill jacket:

In New York this bill jacket becomes the central repository of a bill’s history. Sometimes a bill jacket will contain a letter or memorandum from a legislator or legislatively generated documents such as introductory memoranda. Basically though, almost all materials contained in bill jackets are executively generated post passage documents.<sup>150</sup>

The dearth of legislative history originating from the legislature forces the New York courts to rely on these bill jackets for interpretation. The *Fumarelli* decision is a typical example: “The Bill Jacket materials include two memoranda presented for the Governor’s consideration, when he approved the bill to become law, that are also useful to the interpretive work of the courts.”<sup>151</sup> Of the two memos to which the court

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146. MIKVA & LANE, *supra* note 139, at 40 (“While the [executive] has the power to veto a bill and the legislature has the power to override the veto the legislature has no power to veto or override the executive’s signing message which can contain any statement the executive chooses to include.”).

147. 2004 REPORT, *supra* note 3, at 19-20.

148. Kaye, *supra* note 141, at 30.

149. Eric Lane, *How to Read a Statute in New York: A Response to Judge Kaye and Some More*, 28 HOFSTRA L. REV. 85, 113 (1999).

150. *Id.* at 113-14.

151. *Fumarelli v. Marsam Dev. Inc.*, 703 N.E.2d 251, 254 (N.Y. 1988).



refers, one was submitted by the Office of the Attorney General and the other by the Office of the Secretary of State.<sup>152</sup> After examining two years of Court of Appeals decisions, one study of New York statutory interpretation concluded, “few made reference (and none exclusively) to what is apparently pre-passage legislatively generated legislative history.”<sup>153</sup>

This reliance on executive-legislative history is problematic and another example of how legislative dysfunction in New York negatively affects the public. It shifts the power to define legislative meaning or purpose from the legislature to the executive branch of government. But from the judicial perspective this is a necessary measure to protect the integrity of the judiciary. The lack of probative legislative history forces two choices upon the New York courts. The court can either become a political body, debating and deciding what the law ought to be in each dispute, or create a façade of following the law by deferring to an outside source that has the trappings of legislative legitimacy. The Court of Appeals has understandably chosen the second course. As former-Chief Judge Kaye has observed: “Indeed, on our court we especially strive for consensus in statutory interpretation cases as a matter of policy.”<sup>154</sup>

Our proposed approach—narrowly interpreting statutes unless legislative intent dictates otherwise—would allow the court to signal its preference for legislative history generated by the Legislature itself and may, over time, force the Legislature to begin producing documentary legislative history. The intended outcome of this approach is to pressure the legislature to better document its decision-making through public processes, particularly at the committee level. As a robust legislative process, particularly at the committee level, is necessary to produce substantive and guiding legislative history documents, this approach could lead to the reform of the legislative process itself. While it is true that many unclear statutes are the result of unforeseen or unforeseeable circumstances, or compromises to leave certain phrases unclear, a rich committee record can, and often does, provide

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152. *Id.*

153. Lane, *supra* note 149, at 116.

154. Kaye, *supra* note 141, at 23.

clues to the enacting legislature's intent or purpose.<sup>155</sup> The court can then use such clues to determine the meaning of the statutory provision in the context of the particular case in question. We predict that the adoption of a doctrine of narrow interpretation will motivate all participants in the legislative process—both inside and outside the Legislature—to make greater efforts to avoid a cookie-cutter approach to lawmaking in the interest of establishing a record of legislative intent, thereby forcing greater public consideration of legislation. In other words, once the court's doctrine of narrow interpretation becomes clear, it will be in the best interest of lobbyists and others advocating for the passage of a bill to ensure that *their* intent is documented in the legislative record and is available to a court that might be called upon to interpret a statute.

#### E. *Opening Closed Political Conferences*

As the Brennan Center reports evidence, the fundamental problem with New York's legislative process is the domination by majority leadership.<sup>156</sup> Such domination requires both committees and chamber consideration to be moribund, but leaders need some forum for communicating with members. This is the purpose of the closed, unrecorded, political conferences, most importantly those held by the majority party, which are typically led by the chamber leader. It is in these conferences—and only in these conferences—that bills are presented, discussed in earnest, and voted on. Without a majority vote of the majority party, no bill goes to the floor for final consideration. Conversely, virtually every bill that goes to the floor is passed.<sup>157</sup> The conferences' privacy is to cover the fact that the discussions concern the politics of bills and not their substance. What else would explain the reasoning behind blocking public access to public business?<sup>158</sup>

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155. See MIKVA & LANE, *supra* note 139, at 27-29.

156. See *generally* 2004 REPORT, *supra* note 3; 2006 REPORT, *supra* note 3; 2008 REPORT, *supra* note 3.

157. Since the June 2009 coup weakened Democrats' control of the chamber, six bills have failed in the Senate. E-mail from Andrew Stengel, Senior Adviser for Government Reform, New York State Senate Majority, to Laura Seago, Research Associate, Brennan Center for Justice (Dec. 3, 2009, 11:59 EST) (on file with the Brennan Center).

158. For a general discussion of secrecy in government, see Eric Lane,

As noted above, this closed process is protected by statute. In 1985, after an appellate court determined that certain political caucuses in which the legislative business of a locality was conducted violated the state's open meeting law,<sup>159</sup> the New York Legislature enacted an amendment to the law to protect the privacy of its political conferences without regard to "the subject matter under discussion, including discussions of public business."<sup>160</sup> About this provision, the New York Commission on Government Integrity wrote, "[i]n our judgment, the public is entitled to make an informed decision about the quality of its representatives, and cannot do so if the significant deliberations of those representatives are held behind closed doors."<sup>161</sup>

The use of party conferences as the *exclusive* venue for meaningful legislative discussion and voting removes any excuse for their appropriateness. A plaintiff injured by a statute adopted in this fashion could challenge the due process constitutionality of the statute, tapping into the democratic rationales for both *King* and *Campaign for Fiscal Equity*. Additionally, both the plaintiff and the court could address the matter without treading into exclusively legislative territory. Such a ruling might force the legislature into a more open deliberative process.

Neither of these approaches is intended as a substitute for a political remedy. Even if the courts are willing to pursue either proposed judicial remedy—a far less likely prospect for the second approach than the first—there is no guarantee that either would serve as an adequate incentive for reform to a Legislature as entrenched in a pattern of inaction as New York's. The Legislature may choose to ignore a court applying our first remedy, and could reveal little meaningful deliberation even if it did open party conferences in response to a mandate from a court applying the second. Ultimately, the

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Frederick A.O. Schwarz & Emily Berman, *Too Big a Canon in the President's Arsenal: Another Look at United States v. Nixon*, GEO. MASON L. REV. (forthcoming).

159. *Sciolino v. Ryan*, 440 N.Y.S.2d 795 (App. Div. 1981).

160. N.Y. PUB. OFF. LAW § 108 (McKinney 2008).

161. GOVERNMENT ETHICS REFORM FOR THE 1990S: THE COLLECTIVE REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY 328 (Bruce A. Green ed., 1991). For a full discussion of the case, changes, and criticisms, see MIKVA & LANE, *supra* note 17.

only force to which the Legislature can be guaranteed to respond is political.

## VI. The Political Process

Given the liabilities of a judicial remedy, a political remedy is no doubt the most prudent in moving the Legislature toward procedural functionality. The Brennan Center's experience has also demonstrated that over time, such an approach can be fruitful.

The Brennan Center's 2004 report provided editorial boards, good government advocates, and reform-minded legislators with a clear and simple thesis: New York's Legislature is the most dysfunctional in the nation, and it must reform itself.<sup>162</sup> In 2005, the Brennan Center laid out twenty-two concrete recommendations for procedural reform, and the groundswell of support for these reforms compelled both chambers to make modest changes to their rules—to great fanfare.<sup>163</sup> The Center's 2006 and 2008 reports confirmed the suspicion that these minor changes did little to solve the real problems plaguing New York's legislative process, and they each renewed the call to adopt its full slate of recommended procedural reforms.<sup>164</sup>

The low murmur begun by the Brennan Center's efforts was amplified as the Senate Democrats seized upon reform as an issue on which they could distinguish themselves from the chamber's Republican majority. The Democrats adopted the rhetoric of this reform agenda in their successful effort to reclaim the chamber majority in 2008.<sup>165</sup> Once in office, Democratic Majority Leader Malcolm Smith introduced modest changes to the rules, primarily focused on reducing restrictions on discharging bills out of committee, and formed the

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162. *See generally* 2004 REPORT, *supra* note 3.

163. *See* Press Release, Office of Senate Majority Leader Joseph L. Bruno, Senate Passes Rules Changes and Reforms (Jan. 24, 2005) (on file with author); Press Release, New York State Assembly, Silver and Nesbitt Announce Bipartisan Agreement Reforming Assembly Rules (Jan. 6, 2005), *available at* <http://assembly.state.ny.us/Press/20050106/>.

164. 2006 REPORT, *supra* note 3; 2008 REPORT, *supra* note 3.

165. *See* Nicholas Confessore & Danny Hakim, *Capturing Senate, Democrats are Poised to Control Albany*, N.Y. TIMES, Nov. 4, 2008, at P15.

Temporary Committee on Rules and Administration Reform to review that chamber's operations and make more sweeping proposals for reform.<sup>166</sup> The chamber's initial report in April 2009 included some preliminary suggestions primarily focused on transparency and the promise that the committee would develop clear guidelines for committee reforms by the year's end.<sup>167</sup> In their June 2009 coup attempt, Senate Republicans attempted to pass new rules that included many of these suggestions alongside additional reforms.<sup>168</sup>

An important victory came in July 2009 when, after weeks of infighting over control of the chamber during which each party struggled to position itself as the voice of government integrity and reform, the full Senate passed a rules resolution in a post-coup overnight session.<sup>169</sup> This resolution adopted a significant number of the Brennan Center's recommendations, some of which were originally codified in the Republicans' June rules proposals.<sup>170</sup> These reforms appear to end leadership control over moving bills to the floor, allow committee members to petition for committee hearings, and pledge that all legislative materials will be made publicly available on the internet.<sup>171</sup> The resolution passed with the new rules also promised that the Temporary Committee on Rules and Administration Reform would revisit the issue of committees later in the year to make further reforms.<sup>172</sup> As of this writing, this last promise has not been fulfilled.

The fact that these reforms only came about as the result of a particularly brutal and drawn-out political battle that

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166. See Malcolm A. Smith's Biography – New York State Senate, <http://www.nysenate.gov/senator/malcolm-smith/bio> (last visited Feb. 24, 2010).

167. See generally DAVID J. VALESKY & JOHN J. BONACIC, N.Y. STATE SENATE, DRAFT REPORT OF THE TEMPORARY COMMITTEE ON RULES AND ADMINISTRATION REFORM (2009), available at [http://www.nysenate.gov/files/pdfs/RulesReformx1a\\_0.pdf](http://www.nysenate.gov/files/pdfs/RulesReformx1a_0.pdf).

168. Danny Hakim & Jeremy W. Peters, *Albany G.O.P. Wrests Control of the Senate*, N.Y. TIMES, June 9, 2009, at A1.

169. Posting of Andrew Stengel to New York State Senate Blog, Senate Passes Historic Rules Resolution Sponsored by Smith/Valesky, <http://www.nysenate.gov/blogs/2009/jul/16/senate-passes-historic-rules-resolution-sponsored-smithvalesky> (July 16, 2009).

170. S. Res. 2844, 2009 Leg. (N.Y. 2009).

171. See *id.*

172. *Id.*

never had reform as its primary goal may actually hold promise for future prospects for reform efforts driven by the Legislature itself. The July 2009 coup was the result of the Legislature's own dysfunction, specifically the opacity of the budget process and the dissatisfaction of the new minority party with the limited privileges granted to its members in the leadership-dominated chamber. Continued legislative dysfunction will no doubt breed similar dissatisfaction which will, in all likelihood, lead to similar skirmishes in the future. It is possible that these moments of chaos offer the most hope for reform advocates; anyone seeking to quell a rising tide of anger amongst rank-and-file members or to establish the majority party's credibility would do well to adopt reforms that make the legislative chamber and the lawmaking process more open, accountable, and deliberative.

It is our hope that the Senate's July reforms have put into motion a larger movement in the direction of legislative legitimacy in New York. The dust generated by the June 2009 coup continues to settle, and the chamber's leadership must ensure that last year's reforms will be allowed to take effect. Its new rules must be put to use by members and advocates; while these rules reforms enable a robust lawmaking process, they alone do not constitute it. The Senate must also be held accountable for its promise to enact further reforms with respect to the committee process. And the Assembly, now by far the less procedurally robust chamber, must be pressured to follow suit. The pressure necessary to make these reforms a reality must come from within the Legislature, from advocates, and from the public at large. Voter discontent—another form of chaos that catalyzes change—may also serve to push the legislature toward reform in the future.

## VII. Conclusion

On all three metrics—representativeness, accessibility, and deliberativeness—New York fails the legislative legitimacy test. New York's Legislature, with its leader-dominated structure that subverts the committee process and obscures public business from view, remains the most dysfunctional in the nation. It follows, then, that legislative due process, which dictates "that government is not to take life, liberty, or property

under color of laws that were not made according to a legitimate law-making process"<sup>173</sup> is also violated in New York.

Our aversion to a strong judicial remedy is not born out of doubt that New York's situation is adequately dire to justify a dramatic intervention. We counsel judicial prudence out of a desire to avoid inadvertently undermining one fundamental principle of American government, the separation of powers, in the process of upholding another, legislative legitimacy. The first judicial remedy that we do endorse—narrowly interpreting all statutes not accompanied by legislative history—is also derived from respect for government institutions and the separation of powers. In the absence of legislative history generated from the Legislature itself, the court is forced to tread into the murky territory of over-deference to the executive when interpreting unclear statutes. Narrow interpretations prevent the court from overstepping its bounds and underscore the necessity of legislative history, bolstering the integrity of the court. Our second proposed remedy—a due process claim brought by an individual injured by a statute deliberated only in a closed-door party conference—also has, at its core, the intent of preserving the integrity of state government, and does so without threatening encroachment by the court on the wholly internal affairs of the Legislature.

While the judicial remedies we propose have value in their own right, New York's especially obstinate Legislature may need more than the gentle nudge offered by these solutions to move toward reform. The political process is no doubt a stronger tool in any effort to imbue New York's lawmaking process with legitimacy because it relies on the relationships, procedures, and incentives that are native to the Legislature itself. We have already seen some progress on this front.

The month long halt of Senate activity in June 2009 and the Legislature's failure to pass a deficit reduction plan sufficient to close the state's budget gap a few months later highlighted the fact that New York state government is in crisis. While the legislature has a host of substantive problems to address, they can only be adequately treated through a legitimate process. The court would be more than justified in

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173. Linde, *supra* note 9, at 239.

taking prudent and limited action to attempt to pressure the Legislature to remedy itself. Action from the public and the Legislature itself is more than justified—it is long overdue.