

September 2017

## Constitutionalizing Ethics

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### Recommended Citation

Bennett L. Gershman, *Constitutionalizing Ethics*, 38 Pace L. Rev. 40 (2017)

DOI: <https://doi.org/10.58948/2331-3528.1956>

Available at: <https://digitalcommons.pace.edu/plr/vol38/iss1/4>

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## Constitutionalizing Ethics

By Bennett Gershman\*

### I. Introduction

On November 7, 2017, as they are mandated to do every twenty years, New Yorkers will vote on the following question: “Shall there be a convention to revise the constitution and amend the same?”<sup>1</sup> The last convention was held fifty years ago: a revised constitution was presented to the voters, and its recommendations were decisively rejected.<sup>2</sup> The battle lines this year have hardened, and diverse interest groups have coalesced to support and oppose a convention.<sup>3</sup> Whether the voters will recommend a convention, elect delegates to the convention the following year, and ultimately approve a new constitution the year after that, is anybody’s guess.

New York’s present constitution—approved in 1938—is its sixth constitution.<sup>4</sup> It’s a lengthy document containing some fifty thousand words, more than six times the length of the United States Constitution. It contains twenty articles compared to the federal Constitution’s six. It has been amended two hundred times.<sup>5</sup>

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\* Professor of Law, Elisabeth Haub School of Law at Pace University. I would like to thank the Pace Law Review for organizing the symposium on the New York State Constitution and inviting me to participate. This article was adapted from the author’s remarks delivered on March 24, 2017 at *The New York State Constitution*, a symposium of PACE LAW REVIEW, held at Elisabeth Haub School of Law at Pace University.

1. *2017 Proposed Constitutional Amendments*, N.Y. STATE BD. OF ELECTIONS, <https://www.elections.ny.gov/ProposedAmendments.html> (last visited Oct. 4, 2017).

2. See Brian M. Kolb, *New York’s Last, Best Hope for Real Reform: The Case for Convening a State Constitutional Convention*, 4 ALB. GOV’T L. REV. 601, 603 (2011).

3. See Lisa W. Foderaro, *A Constitutional Convention for New York? This May Be the Year*, NY TIMES (July 5, 2017), <https://www.nytimes.com/2017/07/05/nyregion/constitutional-convention-voting-new-york.html?mcubz=1>.

4. See Jerald A. Sharum, *A Brief History of the Mechanisms of Constitutional Change in New York and the Future Prospects for the Adoption of the Initiative Power*, 70 ALB. L. REV. 1055 (2007).

5. See Kolb, *supra* note 2, at 603.

A constitution codifies the rules and values that shape a state's identity. It is in effect a blueprint or manual for the operation of government. It enumerates the powers of government and the rights of individuals. The conflict over whether to revise New York's Constitution is understandable. Most observers agree that there are many defects in the constitution—critics have called it a “broken constitution”<sup>6</sup>—which they claim has created a crisis in state government. Among the provisions that need to be amended, critics contend, are the structure of the judiciary, taxation and funding, the budgetary process, environmental conservation, administration of elections, campaign finance, legislative reapportionment, the relationship between the state and local governments, and many other issues. By the same token, reasonable arguments have been advanced by groups seeking to preserve the status quo, such as labor unions, abortion rights groups, environmentalists, and gun advocates who seek risks in a wholesale revision of the constitution rather than through the familiar process of piecemeal amendment. Oppositionists also point to the huge cost to taxpayers in the multi-year revision process.<sup>7</sup>

Nevertheless, the relentless criticism of New York's government by good government groups for its dysfunction, inefficiency, and “culture of corruption”<sup>8</sup> may be the most potent impetus for energizing voters to seek constitutional change.

The purpose of this essay is not to weigh in the wisdom or utility in revising New York's Constitution. However, in my opinion, one of the most compelling reasons to amend New York's Constitution is the need to incorporate into the fundamental charter a meaningful code of ethics, including

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6. See PETER J. GALIE, CHRISTOPHER BOPST & GERALD BENJAMIN, *NEW YORK'S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS* (2016).

7. See Matthew Hamilton, *Report: Few Pros and Many Cons to New York's Constitutional Conventions*, TIMES UNION (June 23, 2016), <http://www.timesunion.com/local/article/Report-Few-pros-many-cons-to-New-York-s-8321655.php> (noting that 1967 convention cost \$47 million, or \$336.5 million at today's cost, if adjusted for inflation).

8. See *NY Reform Coalition: Albany Ethics Reform is Inadequate, More Comprehensive Plan is Still Needed*, BRENNAN CENTER FOR JUSTICE AT N.Y.U. (March 31, 2015) [hereinafter *NY Reform Coalition*], <https://www.brennancenter.org/press-release/albany-ethics-reform-inadequate-more-comprehensive-plan-still-needed>.

procedures for its enforcement, and sanctions for violations. New York over the past fifteen years has experienced more scandals, criminal prosecutions, and convictions of lawmakers and other government officials for corruption than any state in the nation.<sup>9</sup> It is certainly arguable that the extent of New York's corruption, and the widespread cynicism and distrust of the New York government, may be attributable to the state's inability to enact meaningful and enforceable ethics laws. The public perception appears to be that New York's government is not working for them and that some officials subordinate the good of the state to their own personal gain. It is this crisis in government ethics that to me offers one of the strongest arguments for amending the constitution to bring about meaningful ethics reforms.

Indeed, as of this writing, and despite numerous so-called "sweeping ethics reforms,"<sup>10</sup> the current state of New York ethics laws is a hodgepodge of marginal, technical, and mostly insignificant rules that appear to have had only a meager impact on regulating the conduct of public and political officials. New York's ethics rules are insufficiently rigorous, and enforcement is negligible. Nevertheless, despite repeated calls for many years for meaningful ethics reform, there have been no significant changes to the core concerns of good government groups such as ending conflicts of interest, regulating lobbyists, requiring disclosure of outside income, reforming pay to play abuses, and limiting the vast amounts of unregulated money that flows into campaigns.<sup>11</sup> Tweaking and tinkering with

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9. See *infra* notes 66-70, and accompanying text.

10. See Karl J. Sleight & Joan P. Sullivan, *Ethics and Lobbying Reform in State Government (Again)*, N.Y. L.J. (Dec. 6, 2011), <http://www.newyorklawjournal.com/id=1202534430223/Ethics-and-Lobbying-Reform-in-State-Government-Again> (describing how Public Integrity Reform Act "overhauled last sweeping reform"); Karl J. Sleight & John A. Mancuso, *Ethics and the Constitution*, 12 GOV'T L. & POL'Y J. 1, 35 (2010) ("collateral damage of scandal washes over an ethics commission and the commission ends up being replaced with a new and improved commission.").

11. See *Albany Ethics Reform is Inadequate, More Comprehensive Plan is Still Needed*, BRENNAN CENTER FOR JUSTICE AT N.Y.U. (Mar. 31, 2015), <https://www.brennancenter.org/press-release/albany-ethics-reform-inadequate-more-comprehensive-plan-still-needed> (describing "reactive improvements [that] put nothing more than a dent in the problem of public corruption and obfuscate the reason our state is experiencing a crime wave of corruption."); Rachel Silberstein, *Since State of the State, Cuomo Silent on*

Potemkin-like ethics laws—laws that create a façade of serious ethics oversight—and officials engaging in false bravado to publicize these “sweeping ethics reform” bills only reinforces the public’s cynicism over New York’s broken ethics system.

Ethics rules, as discussed below, can be adopted and enforced in several ways. First, investigations can be launched into allegations of official and political misconduct and systemic issues involving fraud, waste, and mismanagement which can result in recommendations on ways to regulate certain types of unethical behavior and enhance public trust in government.<sup>12</sup> Second, legislation can be enacted to prevent certain types of unethical behavior by creating substantive rules of ethics, procedures for investigation and adjudication, and imposition of penalties for violations.<sup>13</sup> Third, criminal prosecutions can be launched when officials are found to have engaged in deviant behavior that is not only unethical, but also violates criminal laws.<sup>14</sup> Finally, amendments to the state constitution can be enacted to address ethics reforms similar to the legislative approach by adopting substantive rules and procedures for investigation, adjudication, and punishment.<sup>15</sup>

## II. Investigating Ethics – Moreland Commissions

An important catalyst for ethics reform in New York State has been the Moreland Act. Enacted in 1907 under the leadership of progressive Governor Charles Evans Hughes, later a Justice of the U.S. Supreme Court, the Moreland Act has been employed by virtually every governor to investigate problems of waste, mismanagement, and corruption at all levels of state

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*Ethics Reform*, GOTHAM GAZETTE (Mar. 17, 2017), <http://www.gothamgazette.com/state/6814-since-state-of-the-state-cuomo-silent-on-ethics-reform> (“[T]here have been various incremental ethics reform measures passed but they have proved insufficient in preventing corruption in state government.”); Michael Gormley, *Albany Criticized for Lack of Ethics Reform as Session Ends*, NEWSDAY (July 2, 2017), <http://www.newsday.com/news/region-state/albany-criticized-for-lack-of-ethics-reform-as-session-ends-1.13778749>.

12. See *supra* notes 15-36, and accompanying text.

13. See *supra* notes 37-65, and accompanying text.

14. See *supra* notes 66-72, and accompanying text.

15. See *supra* notes 73-78, and accompanying text.

government and recommend reforms.<sup>16</sup> The Act authorizes the governor under the state's executive law<sup>17</sup> to create a commission to investigate the conduct of departments and agencies and expose inefficiencies, political self-dealing, and criminal behavior. Seven commissions were established by reform Governor William Sulzer, elected in 1912, which exposed widespread corruption by his own Democratic Party and recommended electoral reforms.<sup>18</sup> The state legislature retaliated against Sulzer, and ultimately uncovered evidence that he had violated state campaign finance laws, and impeached and removed him from office.<sup>19</sup>

Dozens of Moreland Commissions were appointed thereafter by reform-minded governors. Alfred E. Smith, elected governor in 1919, established fourteen Moreland Commissions and even appointed himself a commissioner twice.<sup>20</sup> Smith's commissions investigated the state police, private industry, and public works, which revealed widespread corruption, inefficiency, and mismanagement.<sup>21</sup> Governor Smith is credited with creating child welfare, workmen's compensation, labor laws, and other state reforms.<sup>22</sup> Franklin Delano Roosevelt, elected governor in 1928, authorized a Moreland Commission to investigate the state's banking department and recommend changes in banking laws.<sup>23</sup>

But of all the many Moreland Commissions impaneled by governors to investigate public and political mismanagement and corruption, two commissions stand out. Corruption scandals in the mid-1980's produced a public outcry over rampant political abuses in state and local government, and created the perception that illegal and unethical practices were rife throughout the state. In 1987, Governor Mario Cuomo

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16. See Bruce W. Dearstyne, *A Century of Moreland*, TIMES UNION (Aug. 30, 2014, 4:49 PM), <http://www.timesunion.com/opinion/article/A-century-of-Moreland-5724049.php>; see also ERNEST HENRY BREUER, MORELAND ACT INVESTIGATIONS IN NEW YORK: 1907-1965 (1965).

17. See N.Y. EXEC. LAW §§ 6, 63(8) (McKinney 2010).

18. See Dearstyne, *supra* note 16.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. See Dearstyne, *supra* note 16.

created a Moreland Commission on Government Integrity and directed it to investigate weaknesses in existing laws and procedures connected with campaign financing, judicial selection, conflicts of interest, solicitation of government business, and the use of public and political party positions for personal enrichment.<sup>24</sup> The commission, chaired by John Feerick, Dean of Fordham University Law School, spent several years conducting public hearings and issued twenty reports, including seven reports on the state's campaign financing system.<sup>25</sup> The commission found that the current campaign finance laws were so outmoded and inadequate that they undermined public trust and integrity in government.<sup>26</sup> One of the commission's singular achievements was a blueprint to reform the campaign finance system.<sup>27</sup>

The commission made recommendations on many other political and ethical issues, including closing loopholes in the New York Ethics in Government Act, abolishing judicial elections for full-time trial courts, reforming laws on how candidates get on the ballot in state primaries, examining defects in the state's open meetings law, limiting the influence of political patronage, and strengthening the whistleblower law of the state.<sup>28</sup>

Much more controversial than the 1987 Commission was Governor Andrew Cuomo's use of the Moreland Act in 2013 to create a commission to investigate public corruption.<sup>29</sup> The commission was unprecedented. In partnership with the state attorney general, it possessed the most extensive investigative powers of any previous commission in the state's history. The commission had broad power to investigate any matter that

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24. See New York State Commission on Government Integrity, *Restoring the Public Trust: A Blueprint for Government Integrity*, 18 FORDHAM URB. L.J. 173, 174 (1990).

25. See John D. Feerick, *Reflections on Chairing the New York State Commission on Government Integrity*, 18 FORDHAM URB. L.J. 157, 160 (1990).

26. *Id.*

27. *Id.*

28. *Id.* at 160-61.

29. See N.Y. Exec. Order No. 106 (July 2, 2013); Thomas Kaplan, *Cuomo Creates Special Commission to Investigate Corrupt Elected Officials*, N.Y. TIMES (July 2, 2013), <http://www.nytimes.com/2013/07/03/nyregion/cuomo-names-panel-to-investigate-corrupt-elected-officials.html>.

involved “public peace, safety, and justice.”<sup>30</sup> Thus, if the commission’s investigation revealed violations within the attorney general’s jurisdiction, such as misuse of taxpayer money by pension padding, no-show jobs, abuse of legislative earmarks, and fraud at the secretive public authorities, the commission through its deputy attorney generals—ten of whom were sitting district attorneys—could empanel grand juries to prosecute these cases.<sup>31</sup> Given its broad mandate and prosecutorial experience, it was believed that the commission would likely uncover criminal violations and prosecute them.

However, the results from these two high-profile Moreland Commissions are disheartening. The 1987 Moreland Commission’s final report lamented that the laws of New York fall woefully short in guarding against political abuses in an alarming number of areas and that New York has not demonstrated a real commitment to government ethics reforms.<sup>32</sup> The report urged the leaders of the state to act before new scandals erupted and to ensure that government ethics attain a meaningful role in the conduct of all state officials. Virtually none of the commission’s recommendations were enacted into law.<sup>33</sup>

The 2013 Moreland Commission suffered an even more dispiriting demise. The high expectations for an aggressive investigation into public corruption, which included focusing not only on outright criminal behavior such as bribery and fraud, but also widespread unsavory but legitimate conduct such as exploiting loopholes to bundle huge campaign contributions or receive so-called “lulus,”<sup>34</sup> or extra payments in lieu of expenses, were quickly dashed. The commission was hampered by infighting, arguments, and accusations, its independence was

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30. *Id.*

31. *Id.*

32. *See* Feerick, *supra* note 25, at 161.

33. *Id.*

34. *See* Jon Campbell, *Legal or Fraud? NY Senate Defends Payment Tactic*, THE JOURNAL NEWS (May 15, 2017, 12:38 PM), <http://www.lohud.com/story/news/politics/politics-on-the-hudson/2017/05/15/legal-fraud-ny-senate-defends-payment-tactic/101711118/> (describing how eight New York state senators were paid thousands of dollars in stipends for committee positions they did not actually hold, a tactic known as “lulus,” or payments in lieu of expenses).



compromised, and its investigations undermined by pressure from the governor's office.<sup>35</sup> The governor abruptly disbanded the commission halfway through what he initially announced would be an eighteen-month life.<sup>36</sup>

### III. Legislating Ethics

Calls for ethics reform through legislation has been a constant theme in newspaper editorials and platforms of governors, legislative leaders, and others for the past seventy-five years, especially in response to the public's reaction to repeated corruption scandals and other ethical misconduct.<sup>37</sup> Dozens of bills have been introduced in Albany to address a cornucopia of ethics abuses, mostly involving conflicts of interest, campaign finance, disclosure, pay to play, lobbying abuses, and gifts. In 1954, after widespread allegations of unethical conduct by public and political officials in the harness racing industry, and in response to conclusions of the Special Legislative Committee on Integrity and Ethical Standards in Government, New York enacted the first generally applicable state ethics law in the country.<sup>38</sup> At the time, the legislation was considered a pioneering effort to address abuses by government

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35. See Susanne Craig, William K. Rashbaum & Thomas Kaplan, *Cuomo's Office Hobbled Ethics Inquiries by Moreland Commission*, N.Y. TIMES (July 23, 2014), <https://www.nytimes.com/2014/07/23/nyregion/governor-andrew-cuomo-and-the-short-life-of-the-moreland-commission.html>; Bennett L. Gershman, *Is Gov. Cuomo's Anti-Corruption Commission Going Off the Rails?*, HUFFINGTON POST (Nov. 12, 2013, 5:57 PM), [http://www.huffingtonpost.com/bennett-l-gershman/is-gov-cuomos-anticorrupt\\_b\\_4262062.html](http://www.huffingtonpost.com/bennett-l-gershman/is-gov-cuomos-anticorrupt_b_4262062.html).

36. See Jesse McKinley & Thomas Kaplan, *Capitol Corruption Panel's Demise Angers Watchdogs*, N.Y. TIMES (Mar. 31, 2014), <https://www.nytimes.com/2014/04/01/nyregion/cuomos-push-to-end-moreland-commission-draws-backlash.html>.

37. See COMM. ON ST. AFFAIRS & COMM. ON GOV'T ETHICS, N.Y.C. BAR ASS'N, REFORMING NEW YORK'S ETHICS LAWS THE RIGHT WAY 7-8 (2010) [hereinafter REFORMING NEW YORK'S ETHICS] ("It is little wonder that the New York Times editorial page described our state capital as 'a swamp of intrigue and corruption' and 2009 as 'New York's moment of shame.'"); see also Editorial, *Fed Up With Albany*, N.Y. TIMES (Oct. 28, 2009), <http://www.nytimes.com/2009/10/19/opinion/19mon1.html>.

38. See *Forti v. N.Y. State Ethics Comm'n*, 554 N.E.2d 876 (N.Y. 1990).

officials of their public office for private financial gain.<sup>39</sup> The problem of ethical standards, according to the committee's resolution, "involves a whole range of border-line behavior, questions of propriety, and the question of conflicts of interest."<sup>40</sup> It concluded that "the people are entitled to expect from their public servants a set of standards above the morals of the marketplace."<sup>41</sup>

Some revisions were made to the 1954 ethics law in subsequent years, but the law was largely ineffective in curbing conflicts of interest and influence peddling in Albany.<sup>42</sup> Indeed, following new allegations of conflict of interest abuses ten years later, the legislature created another special committee which proposed a new Code of Ethics for legislators.<sup>43</sup> The code was never adopted. Thereafter, as noted above, following a series of corruption scandals in the mid-1980's, Governor Mario Cuomo appointed another commission on government integrity, which led to the passage of the 1987 Ethics in Government Act.<sup>44</sup> The Act imposed enhanced restrictions on conflicts of interest by lawmakers, particularly in their ability to represent clients before government agencies.<sup>45</sup> The Act also established new financial disclosure requirements for state officials, created the State Ethics Commission, which had jurisdiction over the executive branch, and created the Legislative Ethics Committee, which had jurisdiction over the legislative branch.<sup>46</sup> The 1987 Act also created a Temporary Commission on Local Government Ethics which recommended significant reforms, none of which were adopted.

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39. *Id.* See Patrick J. Dellay, *Curbing Influence Peddling in Albany: The 1987 Ethics in Government Act*, 53 BROOK. L. REV. 1051 (1988).

40. See Karl J. Sleight & John A. Mancuso, *Ethics and the Constitution*, 12 N.Y. ST. B.J. 1, 35 (2010).

41. See Patricia Salkin, *New York is at the Tipping Point in Public Confidence in Government*, TIMES UNION (June 2, 2009, 10:48 AM), <http://blog.timesunion.com/salkin/ny-is-at-the-tipping-point-in-public-confidence-in-government/35/>.

42. See *Forti*, 554 N.E.2d at 876; Dellay, *supra* note 39.

43. *Id.*

44. See Ethics in Government Act, ch. 813, § 73, 1987 N.Y. Sess. Laws (McKinney).

45. *Id.*

46. *Id.*

In 2007, after twenty years without any comprehensive change in the state's ethics laws, the legislature enacted the Public Employee Ethics Reform Act ("PEERA,"<sup>47</sup> which purported to be a comprehensive modification of lobbying and ethics laws. Although enacted without public discussion or debate, the Act was hailed by Governor Elliot Spitzer as a "dramatic, significant, fundamental step forward,"<sup>48</sup> and by the New York State Assembly as containing "ground breaking and sweeping reforms to ensure the highest possible standards by government officials."<sup>49</sup> The lengthy Act, comprising forty-six sections, addressed many aspects of government ethics. But despite the hyperbole, the Act was mostly cosmetic. The Act did include a ban on honoraria, a reduction in the allowable value of gifts, prohibitions on nepotism, a ban on lawmakers appearing in taxpayer-funded advertisements, and increased penalties for violations. But critical reforms were absent. The Act did not address core concerns such as campaign finance abuses, conflicts of interest, outside income, financial disclosure, regulation of lobbyists, and lack of an independent ethics regulatory agency, including an independent bipartisan ethics commission with jurisdiction over all public officials, inclusive of both the executive and legislative branches. PEERA has been called a "complete failure."<sup>50</sup> Since its creation, numerous lawmakers were convicted of bribery, fraud, and other crimes but the Legislative Ethics Committee issued not a single finding against a sitting lawmaker.

Three years later, in response to more scandals, Governor Paterson announced: "sweeping reforms to fundamentally change the culture of Albany."<sup>51</sup> His proposal included regulations to reduce campaign contributions, require disclosure of outside income, strip the pension from any public official

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47. See N.Y. PUB. OFF. LAW, §§ 73, 73A, 74 (McKinney 2008); N.Y. CIV. SERV. LAW § 107 (McKinney 2011).

48. See REFORMING NEW YORK'S ETHICS, *supra* note 37, at 7-8.

49. *Id.*

50. See LAWRENCE NORDEN, KELLY WILLIAMS & JOHN TRAVIS, BRENNAN CENTER FOR JUSTICE AT N.Y.U., MEANINGFUL ETHICS REFORM FOR THE "NEW" ALBANY (2011).

51. See Nicholas Confessore, *Paterson Seeks Overhaul to Combat Corruption*, N.Y. TIMES (Jan. 4, 2010), <http://www.nytimes.com/2010/01/05/nyregion/05ethics.html>.

convicted of a felony, phase in public financing of campaigns, and impose term limits on all state officeholders. In response, the legislature enacted a “comprehensive” ethics reform bill requiring greater disclosure of outside income for legislators, greater oversight of lobbyists, and replacing the existing Commission on Public Integrity with the Ethics Commission, as well as creating an Ethics Designating Commission to recruit and attract qualified individuals to serve on the commission.<sup>52</sup> The new commission would have jurisdiction over both the executive and legislative branches and would take over enforcement of campaign finance laws.<sup>53</sup> Although the bill was termed the “strongest ethics reform bill in a generation,”<sup>54</sup> the governor vetoed the bill, claiming it “falls short” of his call for independent oversight of the legislature.<sup>55</sup>

The following year, the legislature enacted another “sweeping reform,” this time through the Public Integrity Reform Act of 2011 (“PIRA”).<sup>56</sup> The new reforms were hailed as “dramatic and wide-ranging.”<sup>57</sup> They included a unitary independent ethics agency with jurisdiction over both the executive and legislative branches, new disclosure requirements, and robust mandatory training for public officials and lobbyists.<sup>58</sup> A centerpiece of the new legislation was the creation of the Joint Commission on Public Ethics (“JCOPE”) with the power to investigate both the executive and legislative branches.<sup>59</sup> It was the sixth ethics regulatory agency to exist in state government over the preceding five years. According to some experts, JCOPE represented a “sea change” in the

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52. *Senate Passes Strongest Ethics Reform in a Generation*, N.Y. ST. SENATE (Jan. 20, 2010), <https://www.nysenate.gov/newsroom/press-releases/senate-passes-strongest-ethics-reform-generation>.

53. *Id.*

54. *Id.*

55. See Kenneth Lovett, *Paterson Vetoes Ethics Reform Bill He Calls “Deeply Flawed,”* N.Y. DAILY NEWS, (Feb. 2, 2010, 11:44 PM), <http://www.nydailynews.com/news/gov-paterson-vetoes-ethics-reform-bill-calls-deeply-flawed-article-1.193984>.

56. See N.Y. COMP. CODES R. & REGS. tit.19, § 938.1 (2011).

57. See Sleight, *supra* note 10 (describing the new law as “representing a sea change in the enforcement and regulation of lobbying and ethics ion the state of New York.”).

58. See N.Y. COMP. CODES R. & REGS. tit.19, § 938.1 (2011).

59. *Id.*

enforcement of state ethics laws.<sup>60</sup> According to other observers, it was a “joke,” and amounted to “little more than putting lipstick on a pig.”<sup>61</sup> Moreover, JCOPE’s so-called independence was disputed; its members are not “independent” but are appointed by the governor and the legislature. Indeed, JCOPE played no role with respect to the dozens of lawmakers who were accused and convicted of corruption since 2011—it did play a role in removing one lawmaker—Assemblyman Vito Lopez.<sup>62</sup>

Finally, in 2016, for the seventh year in a row, Governor Cuomo proposed an ethics reform package that included closing the loophole that allows limited liability corporations (“LLC’s”) to spend vast sums on elections, public campaign financing, a cap on lawmakers’ outside income, and expansion of the Freedom of Information law to cover legislators.<sup>63</sup> The new Ethics Reform Act of 2016 did not include any of these proposals. It did include broader financial disclosure requirements that some critics have derided as over-excessive, but it did not address any of the above proposals.<sup>64</sup> Although the 2017 legislative session ended without addressing any comprehensive ethics reforms, one ethics measure did get passed. It would remove pensions from state lawmakers convicted of corruption crimes.<sup>65</sup> The bill will require an amendment to the state constitution, which will go to the voters in November.

#### IV. Prosecuting Ethics

Ethics violations and criminal conduct often overlap. Conflicts of interest and influence-peddling, particularly where

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60. See Sleight, *supra* note 10.

61. See Editorial, *New Teeth for New York’s Ethics Watchmouse*, N.Y. POST (Nov. 8, 2015, 7:38 PM), <http://nypost.com/2015/11/08/new-teeth-for-new-yorks-ethics-watchmouse/>.

62. *Id.*

63. See Nick Reisman, *Cuomo: New Ethics Reform Bill is Just the Beginning*, SPECTRUM NEWS (Aug. 26, 2016, 12:00 AM), <http://spectrumlocalnews.com/nys/capital-region/politics/2016/08/25/cuomo-ethics-bill-follow-new-york-state-albany>.

64. *Id.*

65. *New York State Legislators Pass Pension Reform Bill*, DAILY MESSENGER (Jan. 30, 2017, 6:10 PM), <http://www.mpnnow.com/news/20170130/new-york-state-legislators-pass-pension-reform-bill>.

money is used by private interests to buy government favors and enrich the government official, can be prosecuted as bribery, extortion, fraud, conspiracy, and official misconduct. Indeed, in the past fifteen years over forty New York State Legislators have been accused or convicted of corruption.<sup>66</sup> The leaders of the New York State Assembly and Senate—Sheldon Silver and Dean Skelos—were convicted of federal corruption crimes for selling their influence.<sup>67</sup> So was the former Senate Majority Leader Joseph Bruno.<sup>68</sup> At least nine officials in the executive branch, including two persons close to the governor, were charged with bid-rigging and bribery in an upstate corruption scandal.<sup>69</sup> Interestingly, none of these prosecutions were instituted by local or state prosecutors—they were initiated by federal prosecutors. New York State has the highest number of criminal prosecutions for corruption-related conduct by government officials of any state in the nation.<sup>70</sup>

From a prosecutor's standpoint, good government is about the rectitude of government officials in serving their

66. *Troubled NY Politicians: A List of Arrests, Scandals, Misdeeds, and Controversies*, SYRACUSE.COM | THE POST-STANDARD (Jan. 26, 2015, 5:00 AM), [http://www.syracuse.com/news/index.ssf/2015/01/troubled\\_ny\\_politicians\\_a\\_list\\_of\\_arrests\\_scandals\\_misdeeds\\_and\\_controversies.html](http://www.syracuse.com/news/index.ssf/2015/01/troubled_ny_politicians_a_list_of_arrests_scandals_misdeeds_and_controversies.html).

67. Based on the Supreme Court's decision in *McDonnell v. United States*, both convictions were later vacated. *McDonnell v. United States*, 136 S. Ct. 2355 (2016). The government has announced it plans to retry both cases. See Benjamin Weiser, *Dean Skelos's 2015 Corruption Conviction is Overturned*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/nyregion/dean-skelos-2015-corruption-conviction-overturned.html>.

68. See Nicholas Confessore & Danny Hakim, *Bruno, Former State Leader, Guilty of Corruption*, N.Y. TIMES (Dec. 7, 2009), <http://www.nytimes.com/2009/12/08/nyregion/08bruno.html>.

69. See Vivian Yee, *Ex-Advisers to Gov. Andrew M. Cuomo Are Indicted in Federal Bribery Case*, N.Y. TIMES (Nov. 22, 2016), <https://www.nytimes.com/2016/11/22/nyregion/ex-advisers-to-gov-andrew-m-cuomo-are-indicted-in-federal-bribery-case.html>.

70. See Alan Greenblatt, *Congratulations, New York, You're #1 in Corruption*, POLITICO (May 5, 2015), <http://www.politico.com/magazine/story/2015/05/how-new-york-became-most-corrupt-state-in-america-117652>; Dan Clark, *Yes, New York Has More Corrupt Officials Than Any Other State*, POLITIFACT NEW YORK (Sept. 19, 2016, 1:38 PM), <http://www.politifact.com/new-york/statements/2016/sep/19/elaine-phillips/new-york-has-been-most-corrupt-state-decades/>; Kirstan Conley, *Study Proves NY Politicians Most Corrupt in Nation*, N.Y. POST (Nov. 9, 2015, 12:46 PM), <http://nypost.com/2015/11/09/study-proves-ny-politicians-most-corrupt-in-nation/>.

constituents. It is about the integrity of our democracy. Using the criminal law to root out corruption is one of a prosecutor's most critical functions. As prosecutors see it, convicting corrupt public officials goes to the heart of the rule of law and the preservation of the democratic process. Public corruption undermines the legitimacy of government and the confidence of the public that officials are not abusing their trust for personal gain. Making those officials who abuse their trust criminally accountable for their misconduct deters other would-be wrongdoers, which is a paramount consideration by law enforcement. Thus, as former United States Attorney Preet Bharara has stated, who was responsible for most of the prosecutions of corrupt New York lawmakers, "the cure to what ails our political system calls for hard-nosed investigations, fearless prosecutions, and savvy watchdogs."<sup>71</sup> Bharara noted that rule-makers with a self-interest in the status quo "do not often rush to change rules they themselves made."<sup>72</sup> The only viable means of ethics enforcement, therefore, may be through aggressive criminal prosecution.

#### V. Constitutionalizing Ethics

Amending the state constitution to incorporate new provisions dealing with the regulation of government ethics may be the most effective means of reform.<sup>73</sup> Several states have "constitutionalized" their code of ethics,<sup>74</sup> and while constitutional regulation of ethics is unusual and controversial, it may be one of the most effective checks on ethical misconduct by government officials. Given New York's failure to enact and enforce meaningful ethics reforms, it certainly can be much more effective than legislative regulation and enforcement. Moreover, a constitutional structure for ethics regulation would

71. See Preet Bhahara, *Fighting Corruption in America and Abroad*, 84 *FORDHAM L. REV.* 601, 606 (2015).

72. *Id.* at 607.

73. See Symposium, *Can a NYS Constitutional Convention Strengthen Government Ethics?* *ALB. LAW SCHOOL* (Mar. 25, 2016); Karl J. Sleight & John A. Mancuso, *Ethics and the Constitution*, 12 *N.Y. ST. B.J.* 35 (2010).

74. See, e.g., R.I. CONST. art. 3, §§ 7-8; FLA. CONST. art. II, § 8; HAW. CONST. art. XIV; MONT. CONST. art. XIII, § 4; OKL. CONST. art. 29; TEX. CONST. art. III, §§ 24-24a.

be a permanent fixture in state law. It would avoid the cyclical gamesmanship that has characterized New York State's history of ethics reform: government scandal, public outcry, "sweeping reforms" by the legislature, new scandals, public outcry, pronouncements that existing laws are insufficiently effective, and then more new "sweeping reforms."<sup>75</sup> Making ethics regulation a constitutional fixture would also dramatize not only the importance of ethics reform, but provide a framework for promulgating substantive ethics laws, procedures for investigation and adjudication, and the imposition of penalties for violations.

Assuming that the voters decide to convene a constitutional convention and elect delegates to the convention to revise the constitution, there is good reason to believe that one significant area that would command interest and support would be ethics reform. Given the ridicule heaped on New York State for its parade of scandals, described as a "culture of corruption,"<sup>76</sup> and the resulting public cynicism over the failure of state government to reform itself, the inclusion in a new constitution of an ethics code and a regulatory commission for its enforcement would be a dramatic step towards meaningful ethics reform and ethics enforcement.

The contours of a constitutionally-based ethics commission would need to be carefully delineated. There would undoubtedly be legal challenges that would have to be resolved by the state's highest court, the New York Court of Appeals. One important challenge would be whether a constitutionally-created ethics commission should be empowered to draft its own substantive code of ethics, procedures for investigation and adjudication, and the imposition of penalties for violations.<sup>77</sup> The drafting of substantive legal rules ordinarily is the work of the state legislature, not a commission. There will very likely be challenges from both the executive and legislative branches about the commission's power to "legislate" in the field of substantive ethics law, especially if the commission's rules and procedures infringe too aggressively on the conduct of these

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75. See Sleight, *supra* note 40, at 37.

76. See *NY Reform Coalition*, *supra* note 8.

77. See Samuel D. Zurier, *Pruning the Tree: The Supreme Court Clips the Power of the Rhode Island Ethics Commission*, 48 R.I. B.J. 5 (2000).



officials. Depending on the language used, it might be claimed that a constitutionally-created ethics commission has been granted the authority in the field of ethics to draft substantive rules of ethics and thereby accorded constitutional status equal to the status of the established three branches of government.<sup>78</sup>

Another issue would be the composition of the constitutionally-created ethics commission. Who would have the power to select its members? Would the governor or the legislature be authorized to make the selection? Moreover, who would define the procedures for the commission's investigations and prosecutions? Who would be responsible for its budget? Presumably, all fiscal power in a state lies with the legislative branch. If that is the case, then the legislature through its funding power could limit the power of the ethics commission through its control of the purse. And too, who would be responsible for defining the penalties for violations, the commission or the legislature?

These are only some of the questions that would need to be addressed if the voters decided to revise the constitution and if a regulatory ethics body was created in that revision.

## VI. Conclusion

Whether the voters decide to revise New York's Constitution has been forcefully debated. There are good reasons for and against revision. But one of the most compelling reasons for revision is to adopt in a new constitution a strong ethics law. Despite numerous ethics investigations, ethics legislation, and criminal prosecutions of corruption, New York leads the nation in the number of convictions of lawmakers for corruption. And despite the passage of numerous ethics laws and the creation of numerous ethics enforcement bodies, the state has not yet demonstrated a serious commitment to meaningful ethics reform. It may be, as this essay suggests, that the only effective route to meaningful ethics reform is through a revised constitution that incorporates strong ethics laws and a viable

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78. See *In re Advisory Opinion to the Governor (Rhode Island Ethics Commission – Separation of Powers)*, 732 A.2d 55, 97 (R.I. 1999) (Rhode Island ethics commission exceeded its powers by promulgating regulations that impinge on executive or legislative branch functions).

mechanism for enforcement.