



Here's a Minion sent down to a Corporate Town,  
In hopes to be newly Elected;  
By his prodigal Show you may easily know  
To the Court he is truly affected.

He's a Knave by the hand, who has pow'r to command  
All the Votes in the Corporation;  
Shoves a Sum in his pocket, the Devil cries take it,  
Tis all for the good of the Nation.

The Wife standing by, looks a little awry,  
At the Candidate's way of addressing;  
But a Priest stepping in, avers brib:ry no Sin,  
Since money's a family blessing.

Say if boys, ye sad Rogues, here are french wooden brogues  
To reward your vile treacherous Knav'ry;  
For such Traitors as you, are the Rascally Crew  
That betrays the whole Kingdom to Slav'ry.

## What Are You Going to Do About It?

*Ethics and Corruption Issues in the New York State Constitution*

BY BENNETT LIEBMAN  
GOVERNMENT LAWYER IN RESIDENCE

ALBANY LAW SCHOOL  
GOVERNMENT LAW CENTER

# **“What Are You Going to Do About It?”**

## **Ethics and Corruption Issues in the New York State Constitution**

*By Bennett Liebman*

*Government Lawyer in Residence  
Government Law Center  
Albany Law School*

*Edited by Andrew Ayers and Michele Monforte*

April 2017

*Cover image: “The Prevailing Candidate, or the Election carried by Bribery and the Devil,” attributed to William Hogarth, circa 1722. It depicts a candidate for office (with a devil hovering above him) slipping a purse into a voter’s pocket, while the voter’s wife, standing in the doorway, listens to a clergyman who assures her that bribery is no sin. Two boys point to the transaction, condemning it. Image courtesy of the [N.Y. Public Library](#). Explanation of the image is drawn from the Yale Library; see <http://images.library.yale.edu/walpoleweb/oneitem.asp?imageId=lwpr22449>.*

## CONTENTS

<b>I. Introduction .....</b>	<b>3</b>
<b>II. Ethics Provisions in the State Constitution .....</b>	<b>5</b>
A. Extant Ethics Provisions in the Constitution .....	5
B. Banking and Ethics .....	6
C. The Canal System and Ethics.....	11
D. Bribery and Ethics.....	15
E. Free Passes, Rebates, and Ethics .....	23
<b>III. Restrictions on the Authority of the State</b>	
<b>Legislature.....</b>	<b>26</b>
A. The Rule Against Raising Legislators' Salaries .....	27
B. Legislators' Other Jobs.....	27
C. The One-Subject Rule.....	28
D. Private and Local Bills .....	29
E. Claims Against the State .....	31
F. Explicitness of Tax Laws.....	32
<b>IV. What Can New York Do About It? .....</b>	<b>32</b>
<b>V. What Do Other States Do About It? .....</b>	<b>37</b>
A. Hortatory Provisions in State Constitutions.....	38
B. Constitutionally Created Ethics Commissions .....	39
C. Substantive Constitutional Ethics Codes.....	44
<b>VI. Conclusion.....</b>	<b>47</b>

## I. INTRODUCTION

Ethics and corruption have been perpetually perplexing issues in the governance of New York State.<sup>1</sup> The words of one of the most infamous political scoundrels, William Magear “Boss” Tweed, still echo today. Tweed said before his death, “The fact is New York politics were always dishonest – long before my time.”<sup>2</sup> The saying often attributed to Tweed, “Well, what are you going to do about it?”<sup>3</sup> is the question that has perpetually faced policymakers in New York.

Currently, many prominent reformers believe that the answer to “What are you going to do about it?” lies in amending the New York State Constitution to help resolve New York’s ethical crisis. These reform initiatives come in 2017, a year where the voters in New York will vote on whether there should be a constitutional convention.<sup>4</sup> They come after years which have seen the convictions of numerous former leaders of the State legislature, including Assembly Speaker Sheldon Silver, and Senate leaders Dean Skelos, Malcolm Smith, Pedro Espada Jr.,

---

<sup>1</sup> This paper focuses on non-judicial public officers and employees. While ethics can be defined broadly to include most every aspect of government action, the scope of this paper will be on the topics considered by the American Law Institute in its tentative draft on the “Principles of the Law, Government Ethics.” The core topics would be gifts and private benefits provided to public servants, conflicts of interest and outside activities of public servants, election-related activities of public servants, past-government employment restrictions on public servants, lobbying, and the administration and enforcement of government ethics laws. It was uncertain as to whether the lobbying would also be included as a core topic. American Law Institute, “Principles of the Law, Government Ethics, Tentative Draft No. 1” at xv (Apr. 24, 2015). See also Am. Law Institute Annual Proceedings, 2015 A.L.I. PROCEEDINGS 112 (May 19, 2015).

<sup>2</sup> Pete Hamill, “Boss Tweed: The Fellowship of the Ring,” N.Y. TIMES, Mar. 27, 2005. Tweed, per the Encyclopaedia Britannica, was an “American politician who, with his ‘Tweed ring’ cronies, systematically plundered New York City of sums estimated at between \$30,000,000 and \$200,000,000.” <https://www.britannica.com/biography/William-Magear-Tweed> (last viewed March 3, 2017).

<sup>3</sup> *Id.* It is questionable as to whether Tweed actually said these exact words.

<sup>4</sup> Article XIX, § 2 of the New York State Constitution mandates a vote by the public every twenty years on whether to hold a convention to amend and revise the Constitution.

and John Sampson. Since 2003, “at least 29 state legislators, or former legislators, and other elected state officials have been convicted of felonies, misdemeanors or violations.”<sup>5</sup> Several close confidants of Governor Andrew Cuomo were indicted on federal felony charges in 2016.”<sup>6</sup>

Political scientist Gerald Benjamin has stated, “A convention is the only vehicle New York has for achieving a more ethical and responsive government.”<sup>7</sup> *Newsday* has editorialized, “New Yorkers can take matters into their own hands by voting yes in November on the ballot question of whether to hold a constitutional convention and get ethics reform done that way.”<sup>8</sup> Assembly Minority Leader Brian Kolb declared, “If Albany won’t police itself, the public needs to do it. A Constitutional Convention is a mechanism by which meaningful change can take place.”<sup>9</sup>

Perhaps the most outspoken person on the need for a constitutional convention to address State ethics issues has been Evan Davis, the former counsel to Governor Mario Cuomo. Davis has written, “Without a constitutional convention, corruption in Albany will just continue to be a fact of life.”<sup>10</sup> Instead, a constitutional convention with a focus on ethics represents “an opportunity to bring ethics and other reforms to Albany.”<sup>11</sup> “With the Legislature unwilling to put in place a meaningful

---

<sup>5</sup> Mike McAndrew, “29 New York State Officials Convicted, 0 Ethics Reform Laws Passed in 2016,” *Syracuse.com*, May 13, 2016, [http://www.syracuse.com/state/index.ssf/2016/05/ethics\\_reform\\_in\\_albany.html](http://www.syracuse.com/state/index.ssf/2016/05/ethics_reform_in_albany.html) (viewed Feb. 25, 2017).

<sup>6</sup> Joseph Spector and Jon Campbell, “Prominent Developers, Top NY Power Brokers Charged,” *Rochester Democrat and Chronicle*, September 23, 2016. Those indicted included lobbyist Todd Howe, SUNY Polytechnic Institute President Alain Kaloyeros, and the Governor’s former deputy executive secretary, Joe Percoco.

<sup>7</sup> “Q&A: Gerald Benjamin,” *New York Law Journal* (Online) May 13, 2016.

<sup>8</sup> “Editorial; Get Down to Work for New York; Too Many Crucial Issues Demand Action,” *Newsday*, Jan. 8, 2017.

<sup>9</sup> “Kolb: Albany Ethics Reform,” *Auburn Citizen*, December 27, 2016. See also Kenneth Lovett, “Cuomo Expresses Reservations about State Constitutional Convention,” *N.Y. Daily News*, Feb. 6, 2017.

<sup>10</sup> Evan A. Davis, “A Path to Ethics Reforms,” *Albany Times Union*, Feb. 5, 2017.

<sup>11</sup> *Id.*

deterrent, it is time for the people to take charge at a constitutional convention. Ethics is as fundamental as other matters addressed in the constitution.”<sup>12</sup>

The purpose of this paper is to examine the issues involving ethics in the New York State Constitution. The paper reviews and assesses the history of New York State’s efforts to deal directly with corruption issues through the State Constitution, reviews other ethics-related sections of the New York Constitution, reviews how New York State has considered ethics in the Constitution in the last half century and how other states have treated the issues of corruption and ethics in their constitutions, and concludes with potential strategies on how best to handle future ethics issues in a State constitution.

## **II. ETHICS PROVISIONS IN THE STATE CONSTITUTION**

### **A. Extant Ethics Provisions in the Constitution**

While it has been said that “the state constitution currently says nothing about ethics in government,”<sup>13</sup> that remark is not technically accurate. Throughout much of the 19th century, the State in constitutional conventions and through the amendment process spent considerable effort in placing specific ethics language in the State Constitution. A few of these ethics provisions remain in the State Constitution.

The constitutional article on State canals<sup>14</sup> contains the admonition that canal contracts should be awarded to the lowest responsible bidder. “All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest responsible price, with adequate security for their performance as provided by law.”<sup>15</sup>

A number of the anti-bribery amendments added in the 19th century remain in the Constitution. Under article II, which

---

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> N.Y. CONST. art. XV.

<sup>15</sup> N.Y. CONST. art. XV, §3.

deals with suffrage, the legislature is required to “enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.”<sup>16</sup> That same provision also bans voting by people who have offered or accepted compensation or rewards to vote in an election.<sup>17</sup> It similarly bans voting by individuals who have wagered on the result of an election.<sup>18</sup>

The Public Officers article in the State Constitution<sup>19</sup> also contains a provision on ethics. When a county district attorney investigates or prosecutes a person for giving or attempting to give bribes to a public official or prosecutes or investigates a public official for bribe receiving, the county’s expenses are charges against the State.<sup>20</sup> Payment of these expenses “by the state shall be provided for by law.”<sup>21</sup>

These ethical constraints are the vestiges of what were regular efforts in the 19th century to incorporate ethics into the State Constitution.

## **B. Banking and Ethics**

Under early New York State laws, corporate charters for business institutions had to be approved by the legislature. There was a considerable demand for bank charters, especially beginning with the early 19th century, and “bank chartering in New York became embroiled in partisan politics from the beginning.”<sup>22</sup>

---

<sup>16</sup> N.Y. CONST. art. II, § 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> N.Y. CONST. art. XIII.

<sup>20</sup> N.Y. CONST. art. XIII, §13 (c).

<sup>21</sup> *Id.*

<sup>22</sup> Howard Bodenhorn, “Bank Chartering and Political Corruption in Antebellum New York, Free Banking as a Reform,” in CORRUPTION AND REFORM 234 (ed. Glaeser and Goldin 2006). *See also* “Problems Relating to Legislative Organization and Powers New York State,” 7 CONSTITUTIONAL CONVENTION COMMITTEE 531 (1938). Before 1838, bank charters were issued only by special acts of the Legislature, and in many instances these charters were issued for political reasons or for the personal profit of the legislators.

The earliest banks created in New York during the last decade of the 18th century were under the control of the Federalist Party. Democratic Party leader Aaron Burr believed that his party needed a bank to counter the power of the Federalist banks. He helped to form a water company to combat yellow fever in New York City—a water company that also had banking powers.

In order to obtain banking privileges for the Democrats, in the face of a Federalist majority in the legislature, Burr asked the Legislature for a charter for the Manhattan Company, “a business ostensibly formed to supply desperately needed clean drinking water in New York.”<sup>23</sup> The charter proposal included authorization for the company to raise \$2 million, and “a provision allowing any surplus capital to be used ‘in any way not inconsistent with the laws and Constitution of the United States or of the State of New York.’”<sup>24</sup> “The charter, in this form, was granted, and Aaron Burr went on to use capital to cause the Manhattan Company to function primarily as a bank.”<sup>25</sup>

While Burr’s de facto establishment of a bank may have been disingenuous, it was not manifestly illegal. In subsequent years, however, bank chartering moved on from the merely guileful to the overwhelmingly corrupt. Legislators were regularly given shares in the organizations attempting to receive bank charters. “During the early years of the last century, efforts to incorporate banks in New York were characterized by such an utter disregard of moral methods, that the period was long remembered as a black spot in the history of

---

<sup>23</sup> *In re New York*, 57 A.D. 166, 169 (2d Dep’t 1901).

<sup>24</sup> *Id.*

<sup>25</sup> *NYC C.L.A.S.H. v. City of New York*, 147 A.D.3d 97 (1st Dep’t 2017). See L. 1799, Ch. 84. The banking component of the Manhattan Company chartering statute stated, “And be it further enacted That it shall and may be lawful for the said company to employ all such surplus capital as may belong or accrue to the said company in the purchase of public or other stock, or the surplus capital might be employed in any other moneyed transactions or operations not inconsistent not with the constitution and laws of this State or of the United States for the sole benefit of the said company.” The recounting of the history of the creation of the Manhattan Company can be found in *Matter of City of New York (Clinton Avenue)*, 57 App. Div. 166 (2d Dep’t 1901).

the State.”<sup>26</sup> “Scarcely a member of the Legislature escaped downright Self corruption—and human nature never was exhibited in more disgusting features.”<sup>27</sup>

There was corruption of the legislature in the awarding of the charter of New York State Bank of Albany in 1803.<sup>28</sup> “It is quite certain that members of the 1803 legislature received N.Y.S. B. stock.”<sup>29</sup> Similar accusations were made against the chartering in 1805 of the Merchants’ Bank. It was virtually conceded that the vote of the senator who created the majority in support of the bank’s chartering was bribed by the incorporators. The senator resigned to avoid an investigation, but the bank was still able to obtain its charter.<sup>30</sup>

It grew worse in 1812 with the chartering of the Bank of America. “Federalist petitioners seeking a charter for the Bank of America of New York City hired two prominent Republican lobbyists who spread influence and cash liberally on both sides of the aisle.”<sup>31</sup> The result was that “seldom has a more unblushingly offensive proposal been made to a governing body . . . This one sought to secure its charter by collective bribery of the State of New York.”<sup>32</sup> Members of the Assembly were openly bribed. The leaders of the charter effort were charged with bribery.<sup>33</sup> Yet support for the bank incorporation only increased. “After these accusations of bribery, the truth of which was

---

<sup>26</sup> De Alva Stanwood Alexander, 1 A POLITICAL HISTORY OF THE STATE OF NEW YORK 186 (1906).

<sup>27</sup> “Elkanah Watson, Journal E,” PAPERS OF ELKANAH WATSON, quoted in Robert E. Wright, BANKING IN POLITICS IN NEW YORK 1784-1829 at 290 (PhD Dissertation, SUNY Buffalo, 1997).

<sup>28</sup> Howard Bodenhorn, “Free Banking and Bank Entry in Nineteenth-Century New York,” NBER Working Paper No. 10654 at 9 (July 2004).

<sup>29</sup> Wright, *supra* note 27.

<sup>30</sup> See Ray B. Smith, 1 HISTORY OF THE STATE OF NEW YORK, POLITICAL AND GOVERNMENTAL 259 (1922). The bribery charge “was based upon the affidavits of Messrs. German and Thorn, Democratic members of the Assembly, to the effect that Purdy had offered them large compensation for their votes if they would cast them in favor of the bill, and had told them that he had been persuaded to favor the charter at a confidential conference with the directors of the Merchants’ Bank.”

<sup>31</sup> Bodenhorn, *supra* note 28, at 10.

<sup>32</sup> Wright, *supra* note 27, at 331.

<sup>33</sup> *Id.* at 332.

widely believed, support for the bill increased, and the remaining clauses were passed by the Assembly by a vote of 58 to 39.”<sup>34</sup> Faced with the likely passage of the charter effort before the State Senate, Governor Tompkins took the unique step of proroguing, or dismissing, the legislature for a 60-day period.<sup>35</sup> It hardly stopped the bank. When the Senate returned, it passed the charter by a vote of 17-13.<sup>36</sup> The Council of Revision did not take any action to disapprove the charter.<sup>37</sup>

Finally, the State’s second Constitutional Convention amended the Constitution in a way that significantly changed the manner of creating corporations, especially bank corporations. Two thirds of the members of each branch of the Legislature would be needed for “every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, altering or renewing any body politic or corporate.”<sup>38</sup>

The ostensible purpose of the change in the Constitution was to prevent bank bribery and corruption.<sup>39</sup> “Banks could no longer gain charter by a simple majority. They could not even carry with two thirds of the members present. Two thirds of the entire number of legislators had to vote in the affirmative.”<sup>40</sup>

Despite the good intentions of the Convention in strengthening the bank-incorporation provisions, there is a

---

<sup>34</sup> *Id.* at 333. “A regular system of bribery, almost without parallel in the history of civilized governments, was established and carried on, until the final passage of the bill in the Assembly, by a vote of fifty-eight to thirty-nine.” John S. Jenkins, HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW-YORK 147 (1846).

<sup>35</sup> Wright, *supra* note 27, at 334. *See also* 1 J. Hampden Dougherty, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 120 (1915).

<sup>36</sup> Wright, *supra* note 27, at 337. *See* L. 1812, Ch. 78.

<sup>37</sup> Dougherty, *supra* note 35, at 102. This was at a time when the governor did not have veto power over legislature. Veto power was vested in the Council of Revision which was repealed by the 1821 State Constitution.

<sup>38</sup> Article VII § 9 of the New York Constitution of 1821; *see* REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821 at 687 (Albany, E and E. Hosford, 1821). The discussion of corporations and banks were not the subjects of significant debate at the Convention. *See id.* at 446.

<sup>39</sup> Wright, *supra* note 27, at 940.

<sup>40</sup> *Id.*

consensus that the changes were not at all effective. “The unintended effect of the clause was probably to increase bank corruption, however, as it was virtually impossible to charter a new bank without resorting to bribery or strict party allegiance.”<sup>41</sup>

Witness the proceedings in passing the law to incorporate the Chemical Bank, and other institutions, in 1825. “The intention of the convention was good, but the clause failed to accomplish the object intended. The only effect of the restrictive clause in the constitution has been to increase the evil, by rendering necessary a more extended system of corruption, in some form, than was before indispensable.”<sup>42</sup> “Between about 1820 and 1838, Martin Van Buren’s political regime manipulated the charter-granting process to serve its allies and advance its political agenda.”<sup>43</sup> “Party insiders received lucrative bank charters, and partisan administrators then allocated shares among themselves and other party regulars. In 1836 the distribution of shares in 12 newly chartered banks was so overtly partisan that even the partisan bank commissioners criticized them and recommended changes in allocation practices.”<sup>44</sup>

The excesses of the bank charter incorporation system eventually led the legislature to adopt a system of free banking in 1838, under which the legislature played no role in approving bank charters,<sup>45</sup> and banks would be authorized under general

---

<sup>41</sup> *Id.*

<sup>42</sup> Jabez D. Hammond, *THE HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW-YORK, FROM THE RATIFICATION OF THE FEDERAL CONSTITUTION TO DECEMBER, 1840* at 337 (1844). *See also* Dougherty, *supra* note 35, at 120-121.

<sup>43</sup> Bodenhorn, *supra* note 22, at 233.

<sup>44</sup> Bodenhorn, *supra* note 22, at 11.

<sup>45</sup> 2 Franklin Benjamin Hough, *NEW YORK CONVENTION MANUAL, PREPARED IN PURSUANCE OF CHAPTERS 194 AND 458, OF THE LAWS OF 1867*, at 158-60 (1867). “The granting of charters was soon regarded as part of the spoils belonging to the victorious party, and were dealt out as rewards for partisan services. This practice became so shameless and corrupt that it could be endured no longer, and in 1838, the Legislature sought a remedy in the general banking law.” Comptroller Millard Fillmore, *ANNUAL REPORT* (1848).

law.<sup>46</sup> “New York’s free banking act stripped the legislature of its chartering prerogative, depoliticized incorporation, and made it a purely administrative function.”<sup>47</sup> In the ensuing Constitutional Convention of 1846, the essentials of the 1838 system were placed in the constitution.

As Charles Lincoln has stated:

“The Convention, without changing the banking system, put enough of it into the constitution to place it beyond the effect of legislative fluctuation, and to insure its continuance. The committee on banking and currency presented a report... including the following propositions:— Prohibiting the legislature from granting any special bank charters, and requiring banks to be incorporated under general laws.”<sup>48</sup>

The constitutional efforts to remove corruption from the bank-chartering process in 1821 were not successful. The constitutional amendment only served to exacerbate the ethical problems.

### C. The Canal System and Ethics

By the 1840’s, the state’s canal system—including the Erie Canal—faced significant competition from the development of railroads throughout the state.<sup>49</sup> The media and the legislature paid considerable attention to the expenditures and

---

<sup>46</sup> L. 1838, Ch. 260. The law was held constitutional in *Warner & Ray v. Beers*, 23 Wend 103 (Court for the Correction of Errors of N.Y. 1840).

<sup>47</sup> Bodenhorn, *supra* note 22, at 12.

<sup>48</sup> Charles Z. Lincoln, 2 *THE CONSTITUTIONAL HISTORY OF NEW YORK* 195 (1906). See article VIII of the Constitution of the State of New York adopted in 1846, in particular article VIII, §4, “The Legislature shall have no power to pass any act granting any special charter for banking purposes; but corporations or associations may be formed for such purposes under general laws.”

<sup>49</sup> See Thomas J. Archdeacon, “The Erie Canal Ring, Samuel J. Tilden, and the Democratic Party.” 59 *N.Y. HISTORY* (Oct 1, 1978).

the management of the canal system.<sup>50</sup> Reviews of the canal system showed extensive corruption in the system's operation. An Assembly committee reviewing the management of the canal system found "a system of frauds and abuse of confidence such as seldom comes to life."<sup>51</sup>

In 1851, there were accusations that the State Attorney General had been offered a bribe not to test the constitutionality of an upcoming canal bill. Attorney General Levi S. Chatfield claimed that people in regular contact with prominent members of the legislature "have organized a company consisting of some twenty persons for the avowed purpose of taking the entire contract for all the work to be put under contract on the Erie Canal enlargement under the new canal bill."<sup>52</sup> An 1852 legislative investigation "revealed that the superintendents of the three divisions of the Erie Canal had divided equally among supporters of the Democratic and Whig parties the contracts authorized under the \$9 Million Act of 1851."<sup>53</sup> Canal Board Commissioner John C. Mather was impeached in 1853 by the Assembly for his conduct at the Canal Board, but he was found innocent by the State Senate.<sup>54</sup>

In order to authorize the canal board to borrow funds to provide for expansion of the canal<sup>55</sup> and to avoid corruption in

---

<sup>50</sup> The 1846 Constitutional Convention provided for the election of canal commissioners and a prohibition on the State's sale of canal property. *See* Ernest Henry Breuer, CONSTITUTIONAL DEVELOPMENTS IN NEW YORK 1777-1958 30 (1958).

<sup>51</sup> "Outrageous Corruption—The Canal Frauds—Astounding Disclosure," N.Y. HERALD, Feb. 21, 1847.

<sup>52</sup> "The Difficulty between the Attorney General and the Assembly," *N.Y. Herald* (July 12, 1851). *See also* "The Charge or Attempt to Bribe the Attorney General: From the Evening Journal," N.Y. TRIBUNE, July 12, 1851.

<sup>53</sup> Archdeacon, *supra* note 49, at 411. "In the Assembly, it was openly charged that several members of the canal board had met secretly at the house of Peter Cagger in Albany prior to the letting and agreed upon an allotment of canal contracts on the basis of political considerations and favoritism, and not to the lowest bidder." Noble E. Whitford, HISTORY OF THE CANAL SYSTEM OF THE STATE OF NEW YORK TOGETHER WITH BRIEF HISTORIES OF THE CANALS OF THE UNITED STATES AND CANADA 200-201 (1905).

<sup>54</sup> "The Hon. John C. Mather, of New York, State Senator," *The United States Democratic Review*, *New York*, 47 (Jan. 1858).

<sup>55</sup> *See* *Newell v. People ex rel. Phelps*, 7 N.Y. 9 (1852).

the awards of these contracts, the State Constitution was amended in 1854.<sup>56</sup> The language in the amendment stated “All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest price with adequate security for their performance. No extra compensation shall be made to any contractor; but if, from any unforeseen cause, the terms of any contract shall prove to be unjust and oppressive, the Canal Board may, upon the application of the contractor, cancel such contract.”<sup>57</sup>

This ethics reform did not have its intended results. “Unfortunately this measure resulted only in new schemes. By offering to do major parts of a project at a very low rate while demanding exorbitant prices for minor ones, a contractor could present an ‘unbalanced’ but winning bid.”<sup>58</sup> Charles Z. Lincoln later commented on this reform, “Under this provision numerous frauds had been perpetrated on the state by means of combination bids, under which the lowest bids would be rejected for informality, and the contract finally awarded to the highest bidder, who was in collusion with the other bidders.”<sup>59</sup>

In 1868, a legislative investigative committee found “gross and monstrous frauds” in the canal system.<sup>60</sup> The testimony according to the committee shows the grossest neglect of public duty by which the State has suffered to an incalculable

---

<sup>56</sup> See 1853 Report on the Canals of New York State by the State Engineer and Surveyor, Senate Doc. 1854 No. 60, p. 61. “In departing from the wholesome rule of awarding the work to the lowest bidder, the public officers are plunged into a wide sea of discretion, and are liable to charges of erroneous judgment, and to suspicion of favoritism.” J. Hampden Dougherty noted, “There was wisely added to the section a provision that all contracts for work or materials on any canal should be made with the person offering to ‘do or provide the same at the lowest price with adequate security for their performance.’” Dougherty, *supra* note 35, at 175.

<sup>57</sup> Article VII, §3. See Robert Alan Carter, 1 NEW YORK STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT 170-71 (2d ed. 2001); *People ex rel. Frost v. Fay*, 3 Lans. 398 (1871).

<sup>58</sup> Archdeacon, *supra* note 49, at 411.

<sup>59</sup> 2 Charles Z. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 357 (1906). See also Peter J. Galie, ORDERED LIBERTY 15 (1996).

<sup>60</sup> Archdeacon, *supra* note 49, at 410-411.

extent.”<sup>61</sup> A canal commissioner named Robert Dorn was impeached.<sup>62</sup>

In March of 1875, Governor Tilden issued “a special message to the Legislature, showing that for the five years ending September 30, 1874, millions had been wasted because of unnecessary repairs and corrupt contracts. Upon ten of these fraudulent contracts the State, it appeared, had paid more than a million and a half, while the proposals at contract prices called for less than half a million.”<sup>63</sup>

Governor Tilden followed the message with an investigating commission which issued 12 reports on the canals substantiating the Governor’s charges. Indictments included former Assemblyman George D. Lord for bribery, one of the “Board of Canal Appraisers for a conspiracy to cheat the State . . . an ex-canal commissioner . . . two ex-superintendents of canals and of one division engineer; also in the suspension and final removal of the auditor of the Canal Department for unlawfully trafficking in canal certificates.”<sup>64</sup>

In short, the effort to stem corruption in contracting in the canals system through placing an ethics provision in the State constitution failed. The bidding requirements were constantly violated and evaded by the canal overseers for more than two decades. Only massive investigative action undertaken against the canal commissioners by the executive put a halt to corruption.

---

<sup>61</sup> “Albany: The Report of the Assembly Special Committee on Canal Frauds,” N.Y. TRIBUNE, Feb. 28, 1868. Dorn was acquitted of the charges.

<sup>62</sup> Archdeacon, *supra* note 49, at 412. JOURNAL OF THE COURT FOR THE TRIAL OF IMPEACHMENTS IN THE CASE OF THE HON. ROBERT C. DORN, A CANAL COMMISSIONER OF THE STATE OF NEW YORK (1868).

<sup>63</sup> Dealva Stanwood Alexander, 3 POLITICAL HISTORY OF THE STATE OF NEW YORK 1861-1882 at 321-22 (1906). See 6 State of New York, MESSAGES FROM THE GOVERNORS COMPRISING EXECUTIVE COMMUNICATIONS TO THE LEGISLATURE AND OTHER PAPERS RELATING TO LEGISLATION FROM THE ORGANIZATION OF THE FIRST COLONIAL ASSEMBLY IN 1683 TO AND INCLUDING THE YEAR 1906 at 788 (Charles Z. Lincoln ed. 1909).

<sup>64</sup> John Bigelow, 1 THE LIFE OF SAMUEL J. TILDEN at 261-62 (1895).

## D. Bribery and Ethics

It is hard to envision the massive degree of corruption that took place in the legislature in the late 1860's. The New York Times could write, "We venture to say that as a general rule for the last ten years one-fifth of the members of each House have been in the habit of taking bribes for their votes:— the fact is open and notorious to everyone who has had any personal connection with Albany legislation."<sup>65</sup>

There were the railroad wars in 1868 between Commodore Cornelius Vanderbilt, representing the New York Central, and James Fiske and Jay Gould, representing the Erie Railroad. Collectively, these two companies bribed and counter-bribed members of the legislature, turning the legislature into the "Sanhedrin of rascality."<sup>66</sup> Initially, the Vanderbilt forces through their bribes were successful in blocking legislation that was favorable to the Erie Canal. Jay Gould himself then went personally to Albany with a trunk "literally stuffed with thousand dollar bills which are to be used for some mysterious purpose in connection with legislation on the subject of the bill now before the Legislature."<sup>67</sup>

Accounts of the funds provided by Gould to the legislature vary from between \$500,000<sup>68</sup> to \$800,000.<sup>69</sup> There was a report of one individual who took \$100,000 from one side and then

---

<sup>65</sup> "Legislative Corruption—Albany Matters Which Deserve Attention," N.Y. TIMES, Apr. 8, 1867.

<sup>66</sup> John Steele Gordon, *THE SCARLET WOMAN OF WALL STREET* at 184 (1986), quoting George Templeton Strong.

<sup>67</sup> *Id.* at 186, quoting the *New York Herald* of April 15, 1868.

<sup>68</sup> Robert Fuller, *JUBILEE JIM: THE LIFE OF COLONEL JAMES FISK, JR.* at 174 (1928); Gustavus Myers, *2 HISTORY OF THE GREAT AMERICAN FORTUNES* at 308 (1911).

<sup>69</sup> Gordon, *supra* note 66, at 187. Even in years prior to 1868, there was considerable legislative spending by railroads corporations in Albany. The Committee on Official Corruption at the 1867 Constitutional Convention had noted before 1868 that "one railroad company had expended in a single year in efforts to procure favorable legislation \$20,000; another upward of \$200,000, besides \$60,000 or more during the two preceding years, and that another had distributed \$300,000 of its own stock, valued at about par, a large portion of which was believed to have been paid, ultimately, to members of the Legislature. The inference is unavoidable, that much of these and other large sums, similarly expended, must have been employed, directly or indirectly, in corrupting members of the Legislature." PROCEEDINGS OF THE 1867 CONSTITUTIONAL CONVENTION at 2279.

\$70,000 from the other.<sup>70</sup> In the end, Gould, with the deeper pockets, succeeded in passing the Erie legislation.

Peaking soon after the railroad wars came the Tweed Ring. William Magear Tweed, and his cohorts, were able for several years to take over not only New York City government but much of Albany as well. Tweed allegedly profited by \$650,000 from the Erie-Grand Central wars.<sup>71</sup> Through voter registration frauds involving the naturalization of immigrants, Tweed was able to get his candidate John Hoffman elected governor in 1868. “In twenty districts of the city Hoffman’s vote exceeded the total number of voters registered.”<sup>72</sup>

From 1869 to 1871, Tweed was immersed in controlling much of New York state government, and most everything touched by the Tweed Ring involved bribery and corruption.<sup>73</sup> “The Tweed ring at its height was an engineering marvel, strong and solid, strategically deployed to control key power points: the courts, the legislature, the treasury and the ballot box. Its frauds had a grandeur of scale and an elegance of structure: money-laundering, profit sharing and organization.”<sup>74</sup> “Plunder of the city treasury, especially in the form of jobbing contracts, was no new thing in New York, but it had never before reached such colossal dimensions.”<sup>75</sup>

While Tweed eventually went to prison (some of his associates did not), he did succeed in turning both New York City and the state legislature into a “den of thieves.”<sup>76</sup>

---

<sup>70</sup> *Id.* See also Myers, *supra* note 68, at 311.

<sup>71</sup> Edwin G. Burrows & Mike Wallace, *GOTHAM* 913 (1999).

<sup>72</sup> Gordon, *supra* note 66, at 323. “It was estimated that the vote cast in New York City was 8 per cent in excess of its entire population and that illegal votes exceeded 50,000.” Alexander B. Callow, *THE TWEED RING* at 213 (1966).

<sup>73</sup> See generally Kenneth D. Ackerman, *BOSS TWEED: THE RISE AND FALL OF THE CORRUPT POL WHO CONCEIVED THE SOUL OF MODERN NEW YORK* (2005). “In 1870, came the exposure of the Tweed frauds in New York city. Public sentiment then awoke, investigated the disease and demanded a remedy.” J. Hampden Dougherty, “The Constitutions of the State of New York,” 230 *Political Science Quarterly* IV, 2 (June 1889).

<sup>74</sup> Pete Hamill, *supra* note 2.

<sup>75</sup> James Bryce, 2 *THE AMERICAN COMMONWEALTH* at 387 (1895).

<sup>76</sup> REPORT OF THE SPECIAL COMMITTEE OF THE BOARD OF ALDERMEN APPOINTED TO INVESTIGATE THE “RING” FRAUDS 13 (1878). The committee

In this era, it was not surprising that there were efforts made to amend the Constitution to improve the laws against bribery and corruption. This was especially true since the governmental efforts to enforce and prosecute bribery offenses had been almost non-existent. The crime was “also *the one crime* most prevalent and the *one crime* most rarely prosecuted or punished.”<sup>77</sup> Nobody at the New York Constitutional Convention could even recollect a single conviction for bribery except for a single conviction in Ontario County in 1867 where the bribe receiver was given a \$1,000 fine.<sup>78</sup> Nor was there a reported decision until 1886 where a person was convicted of bribery.<sup>79</sup>

Given the dormant status of the enforcement efforts, it was not surprising that the 1867 Constitutional Convention added a new Article 13 on bribery. “Various practices and abuses of public life existing at the time of the convention of 1867 led the delegates to consider seriously various measures intended to correct these conditions.”<sup>80</sup> The Committee on Official Corruption at the 1867 convention stated that “official corruption is a crime of deep turpitude, of growing prevalence and of dangerous tendency.”<sup>81</sup> The bribe-receiving public office holder was guilty of a felony. If the bribe was rejected, the bribe-giver would be guilty of a felony; if the bribe offer was accepted, the bribe-giver, however, would not be guilty of the crime if the bribe-giver testified about the bribe. The governor was empowered to remove district attorneys who did not faithfully

---

also brought the Erie and the Grand Central Railroads into this era of corruption stating “Not only the “Tweed Ring” entered the market as a buyer and seller of Legislators, but powerful corporations (notably two great railroad companies), also engaged warmly in this degrading traffic.” *Id.* at 13.

<sup>77</sup> De Lancey Nicoll, “An Unpunished Constitutional Crime,” *NORTH AMERICAN LAW REVIEW* 21-22 (Jan 1, 1888).

<sup>78</sup> *Id.* at 28.

<sup>79</sup> *Id.* “Prosecutions under the existing bribery legislation, enacted in 1853, were few and the law appeared to be ineffective.” State of New York, *THE TEMPORARY COMMISSION ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION* at 164 (1957-1961).

<sup>80</sup> New York State Constitutional Convention Committee, Volume VIII, “Problems Relating to Executive Administration of Powers,” at 238 (1938).

<sup>81</sup> 1867 Constitutional Convention, *supra* note 69, at 2277.

prosecute a bribery case, and counties would be reimbursed by the State for the costs of bribery prosecutions and investigations involving State officials.<sup>82</sup> The constitutional proposal was part of one overall package of proposals that was decisively rejected by the people in 1869.<sup>83</sup>

With the failure of the Convention's proposal on bribery, the legislature in 1869 added its own proposal on bribery.<sup>84</sup> The penalties were basically the same as that provided in the 1867 Constitutional Convention proposals. Nonetheless, in a year that was dominated by the Tweed forces, the new bribery law gave immunity to all people who in the past and in the future offered bribes that had been accepted in whole or in part.<sup>85</sup> Also, there could be no conviction of the crime of bribery simply based on the testimony of one of the parties to the transaction.<sup>86</sup> Only with additional corroborating evidence could a person be convicted of bribery. The effect of this provision was virtually to authorize bribery in the state. "It was the golden age of bribery. The crime flourished. The paying of bribes was absolutely innocent, and the taking of bribes absolutely safe."<sup>87</sup>

This situation began to change by 1872. Governor John Hoffman<sup>88</sup> recommended legislation suggesting a 32-member constitutional commission which would recommend amendments to the State Constitution.<sup>89</sup> The legislature created

---

<sup>82</sup> George A. Glynn, Compiler. *Convention Manual for the Sixth New York State Constitutional Convention*, (1894) at 413-414. See also Dougherty, *supra* note 35, at 242.

<sup>83</sup> The overall proposal lost by a vote of 290,456 to 223,935. An amended judiciary article was narrowly approved by the voters. Glynn, *supra* note 82, at 417.

<sup>84</sup> L. 1869, Ch. 742.

<sup>85</sup> *Id.* § 2.

<sup>86</sup> *Id.* § 9.

<sup>87</sup> De Lancey Nicol, *supra* note 77, at 26.

<sup>88</sup> Hoffman, a former mayor of New York City, had basically been elected as an ally of the Tweed Ring.

<sup>89</sup> STATE OF NEW YORK: MESSAGES FROM THE GOVERNORS COMPRISING EXECUTIVE COMMUNICATIONS TO THE LEGISLATURE AND OTHER PAPERS RELATING TO LEGISLATION FROM THE ORGANIZATION OF THE FIRST COLONIAL ASSEMBLY IN 1683 TO AND INCLUDING THE YEAR 1906 392-403 (Charles Z. Lincoln ed. 1909). Hoffman wrote, "Such a commission could have all the benefit of the debate incident to a larger body through intelligent discussions in the press, and the voluntary suggestions of thoughtful

this 32-member commission which featured eight individuals from the four judicial districts.<sup>90</sup> All the members were appointed by the governor subject to confirmation by the senate.<sup>91</sup>

On the issue of bribery, the commission recommended to the legislature that the bribery provisions of the 1867 Constitutional Convention be submitted to the public for vote.<sup>92</sup> These amendments were necessitated, according to the commission, by “the simple purpose of ... purity in office.” The commission also recommended an addition, that had also been recommended in the 1867 Convention,<sup>93</sup> in the oath of office for elected officials. Besides the standard oath, elected officials would swear that they had not engaged in bribery of votes in the election at which they had attained office.<sup>94</sup> The legislature in 1873 and 1874 passed this proposal, and it was overwhelmingly approved by popular vote in 1874.”<sup>95</sup>

At the 1874 election, the people voted on twelve separate proposals that had been recommended by the 1872 Constitutional Commission. All twelve proposals were

---

citizens; and would be almost certain to agree upon amendments which would secure the popular approval.” *Id.* at 393.

<sup>90</sup> L. 1872, ch. 884.

<sup>91</sup> J. Hampden Dougherty wrote, “The commission of 1872 was an innovation in constitutional evolution in this state. The experiment of an intermediate body summoned into being to advise and to report to the legislature upon constitutional reform had never before been tried in its history.” Dougherty, *supra* note 35, at 245. Similarly, Peter J. Galie has written that the commission was “unique in New York history.” Peter J. Galie, *THE NEW YORK STATE CONSTITUTION* 39 (2011). *See also* Peter J. Galie, *ORDERED LIBERTY* 154 (1996).

<sup>92</sup> *JOURNAL OF THE CONSTITUTIONAL COMMISSION OF THE STATE OF NEW YORK* 409 (Mar. 13, 1873).

<sup>93</sup> Peter J. Galie, *Ordered Liberty*, *supra* note 91, at 130.

<sup>94</sup> 1873 *Journal*, *supra* note 92, at 472.

<sup>95</sup> *See generally* “The Vote on the Constitutional Amendments,” *N.Y. Times* (Dec. 2, 1874). The full vote on the amendment was 341,697 in favor and 178,065 opposed. All the twelve amendments recommended by the Constitutional Commission passed. The bribery amendment passed despite opposition from the Tammany Hall interests in New York City. The amendment lost in New York County as well as in the counties of Cortland, Oneida, Putnam and Schoharie. On the other hand, it carried all the other counties. In Erie County, it passed with a remarkable 96.3% of the vote.

approved. Besides the bribery article, there was a vote on amendments to article II, the Constitution's suffrage article. One of the amendments to the suffrage article contained language banning "all persons convicted of bribery or of any infamous crime" from voting.<sup>96</sup>

Despite the Constitution's efforts to suppress bribery and corruption, it can hardly be said that these efforts had much impact. Initially, the carrot and the stick approach to bribery—under which local district attorneys could be removed by the governor for failing to pursue bribery cases, but the cost of prosecutions involving State officers would be picked up the state—seemed to work.

The Albany County district attorney prosecuted State senator Loren B. Sessions, who was accused of bribing a State assemblyman in the course of the legislative voting for the United State senators in 1881.<sup>97</sup> The constitutional provision on removals of district attorneys for failure to pursue bribery investigations arguably placed added pressure on the district attorney to prosecute the senator.<sup>98</sup> The senator was quickly found innocent in the bribery trial.<sup>99</sup> In 1883, Governor Grover Cleveland removed Queens County district attorney Benjamin Downing for bribery.<sup>100</sup>

Nonetheless, in subsequent years, the practice of having the governor remove a district attorney for failure to prosecute

---

<sup>96</sup> 1873 Journal, *supra* note 92, at 458. As it exists today as Article II, § 3, "in addition to barring from voting those convicted of bribery, the section prohibits any person who engages in bribery or election wagering in connection with an election from voting in that election. Every conceivable form of bribery is detailed. Such elaborate detail is testimony to the gross and open electoral fraud characteristic of New York politics after the Civil War...Putting into the constitution a provision that reads like an election code likely reflected the frustration created by a failure of other attempts to correct the problem." Peter J. Galie, *THE NEW YORK STATE CONSTITUTION*, *supra* note 91, at 86.

<sup>97</sup> "The Situation at Albany," *N.Y. TRIBUNE*, June 29, 1881.

<sup>98</sup> "Sessions Indicted," *N.Y. HERALD*, June 29, 1881; *see also* "Senator Sessions Indicted," *BUFFALO MORNING EXPRESS*, June 29, 1881.

<sup>99</sup> "The Acquittal of Sessions," *N.Y. TRIBUNE*, Oct. 20, 1883; *see also* "Other Bribery Cases in State Legislature," *N.Y. HERALD*, May 25, 1915.

<sup>100</sup> Public Papers of Governor Cleveland, *Order of Removal of Benjamin W. Downing, District Attorney of Queens County* 140 (1883). *See also* "Mr. Downing Removed," *N.Y. TIMES*, Oct. 27, 1883.

bribery<sup>101</sup> largely stopped. The last major time that this occurred seemed to be in 1936, when Governor Herbert Lehman refused to remove Kings County district attorney William F. X. Geoghan, who had been accused by a grand jury of failing to sufficiently investigate and prosecute a bribery attempt.<sup>102</sup> Moreover, district attorneys who did prosecute bribery offenses used the penal laws rather than rely on the constitutional crime of bribery.

Thus, given their lack of practical utility, the 1874 provisions were slowly removed from the Constitution. “Little interest has been stirred by this portion of the Constitution since its adoption in 1874.”<sup>103</sup> The 1938 Constitutional Convention removed the bribery provisions of the oath of office from the Constitution. Speaking in support of repeal was Supreme Court justice Phillip McCook. Justice McCook found that the bribery section was legally useless and that the “oath is stronger without it.” He stated, “I can only say that the false swearing of oaths will not bother dishonest men. Men who bribe will not hesitate to falsify.”<sup>104</sup> McCook invoked the comments of Governor Alfred Smith who had taken the oath 22 times and believed that the bribery oath was “just foolishness.”<sup>105</sup>

The other bribery provisions in Article XIII simply became obsolete. The Legislature “has so extensively exercised its power to deal with the handling of bribery problems that the constitutional treatment of the matter has been completely overshadowed.”<sup>106</sup> In 1958, the Inter-Law School Committee on Constitutional Simplification studied the bribery provisions in the constitution and recommended that the bribery provisions

---

<sup>101</sup> “Problems Relating to Executive Administration and Powers,” VIII NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE 231 (1938).

<sup>102</sup> “The Decision on Geoghan: Governor Lehman's Decision ‘Dismissing’ Geoghan Charges,” N.Y. TIMES, Sept. 18, 1936; “Lehman Clears Geoghan,” N.Y. HERALD TRIBUNE, Sept. 18, 1936.

<sup>103</sup> *Inter-Law School Committee Report on the Problem of Simplification of the Constitution*, N.Y. Legis. Doc. No. 57 at 166 (1958).

<sup>104</sup> 1938 CONSTITUTIONAL CONVENTION PROCEEDINGS at 2430.

<sup>105</sup> *Id.* at 2429. See also “Convention Acts to End Bribery Clause in Oath,” N.Y. TIMES, Aug. 10, 1938.

<sup>106</sup> *Temporary Commission on the Revision and Simplification of the Constitution*, *supra* note 79, at 168.

not be retained.<sup>107</sup> “Generally, the Committee recommended either that the provisions be dropped in toto or that they be replaced by a simple declaration of policy.”<sup>108</sup> The provisions were obsolete and/or superfluous.<sup>109</sup>

The Inter-Law School Committee’s recommendations on bribery were endorsed by the Temporary Commission on the Revision and Simplification of the Constitution and subsequently by the legislature in two separate sessions. The proposal was placed on the ballot in 1962,<sup>110</sup> and passed by a nearly 2-1 margin.<sup>111</sup>

The anti-bribery constitutional provisions were part of the State Constitution for nearly ninety years.<sup>112</sup> Yet, while they were considered of utmost significance when they were passed, the fact is that they had no significant effect on public policies in the state. Prosecutors did not rely on the constitutional provision in their prosecution of bribery, and governors largely did not take much action against district attorneys who failed to pursue bribery allegations. In large measure, the constitutional

---

<sup>107</sup> *Inter-Law School Committee Report*, *supra* note 103, at 168. The report said of the crime of bribery, “The section has no practical significance today in the prosecution of public officials for accepting bribes.” As to the totality of the bribery provisions in Article XIII, the Committee reported, “No court has relied on the constitutional provisions in recent years, although there has been considerable litigation involving the bribery statutes.” *Id.* at 174. For a summary of the report, see Charles N. Quinn, “State Constitution Held Verbose, Trim Is Urged,” N.Y. HERALD TRIBUNE, June 2, 1958.

<sup>108</sup> Roger B. Jellinik in 1 Jack B. Weinstein et al., *ESSAYS ON THE NEW YORK CONSTITUTION*, from the Seminar in Problems in Revising the New York Constitution, VI-1, VI-5 (1966).

<sup>109</sup> *Id.* at VI-4. The *New York Times* later described these repeals as pruning “out of the Constitution sections that had become meaningless with the passing years or that had been taken care of by specific laws.” Charles Grutzner, “State Voters Reject Subsidy Plan on Low-Income Family Housing,” N.Y. TIMES, Nov. 7, 1962.

<sup>110</sup> Richard P. Hunt, “6 Proposals Face Voters Tuesday,” N.Y. TIMES, Nov. 4, 1962; “State to Vote on Articles to Trim Constitution,” N.Y. TIMES, Apr. 8, 1962.

<sup>111</sup> [https://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_Votes-Cast-Conventions-Amendments.pdf](https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf) (last viewed February 25, 2017).

<sup>112</sup> They were in effect from 1875-1963.

bribery reforms—despite the best of intentions—had no real effect on ethics or corruption in the state.

### **E. Free Passes, Rebates, and Ethics**

Much of the corruption in the state legislature in the post-Tweed era of the 19th century focused on what was known colloquially as the Black Horse Cavalry. Theodore Roosevelt in his autobiography suggested that during his years in the legislature a third of the members were corrupt.<sup>113</sup> The Black Horse Cavalry would demand payment from corporations and, after payment, vote as they wished.<sup>114</sup> They would introduce “strike” legislation the purpose of which was to harm a corporation. Subsequently, the corporation affected adversely by the legislation would buy off the introducers of the bill, sometimes in the case of a railroad company by the issuance of free passes.<sup>115</sup> These so-called “strike” bills were “introduced for the purpose of holding up the corporations, holding them up and calling them down...Good men, good citizens, honest, law-abiding men justified themselves in the directorates of these railroads and other public service corporations in spending the money of the corporation to elect senators and assemblymen who would protect them against strike bills. The whole system became a scandal and a disgrace.”<sup>116</sup>

To counter the use of “strike” legislation, the 1894 Constitutional Convention added language making it a misdemeanor for a public official to demand, accept or receive a free pass, free transportation, rebate, or reduced telephone or telegraph rates from a person or corporation. The attorney general was authorized to remove from office any public officer

---

<sup>113</sup> Theodore Roosevelt, THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 69 (1921).

<sup>114</sup> *Id.*

<sup>115</sup> 1914 CYCLOPEDIA OF AMERICAN GOVERNMENT, v.1 at 478 (Abattoirs/Finality), McLaughlin and Hart.

<sup>116</sup> Elihu Root, “The Regulation of the Public Service Commissions and the Decline of the ‘Black Horse Cavalry,’” address given on Aug. 25, 1915, in ADDRESSES ON GOVERNMENT AND CITIZENSHIP 188 (1916).

who violated the provision, and the person or corporation offering the benefit would also be guilty of a misdemeanor.<sup>117</sup>

The issue of free passes was subject to considerable debate at the Convention. Some opponents thought that it should be sufficient to have the railroad companies list the public officers who received free passes. Others thought that this was a statutory provision that did not merit a mention in the Constitution.<sup>118</sup> Delegate E.R. Brown argued against “the evils of the practice of giving railroad passes to public officers, especially to members of the legislature and judges,” pointing out that in some sections of the state passes were also given to assessors, and the rate of assessment was controlled by this means. Municipal officers were also frequently, if not usually, the recipients of such passes. He cited several states whose constitutions contained provisions against passes.<sup>119</sup> Delegate Nicoll added, “We all know that this is a great evil, petty and disgraceful as it is. What right has any man, the moment he get into a public office to accept a pass.”<sup>120</sup> He added that while it might not stop free passes, “this provision will do some good; it will have some effect, and it is our duty to incorporate it in the organic law of this State, in the hope that, while we know as practical men that it will not eradicate the evil, it will at least lessen the evil to the advantage of the body politic.”<sup>121</sup> The provision was agreed to by a vote of 96-44,<sup>122</sup> and became a part of the Constitution when the people voted in support of the work of the 1894 Convention.

Again, it can hardly be said that the anti-free pass provision had any significant effect on corruption in the State. Those legislators who introduced strike bills continued to do so

---

<sup>117</sup> CONSTITUTION OF THE STATE OF NEW YORK AS PROPOSED BY THE CONSTITUTIONAL CONVENTION SEPTEMBER 20, 1894, AT ALBANY, N.Y., AND ADOPTED BY THE PEOPLE OF THE STATE art. 13, §5 (Nov. 6, 1894).

<sup>118</sup> 4 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 480-512 (1894).

<sup>119</sup> 2 Charles Z. Lincoln, CONSTITUTIONAL HISTORY OF NEW YORK 655-656 (1906).

<sup>120</sup> *Revised Record*, *supra* note 118, at 487.

<sup>121</sup> *Id.* at 488.

<sup>122</sup> 2 JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF ALBANY, ON TUESDAY, THE EIGHTH DAY OF MAY, 1894 at 708-709 (1894).

into the second decade of the 20th century. Major corporations, such as the life insurance company and public utilities, were involved in major scandals in the early 20th century that were not prevented by the anti-free pass provisions. There was almost no enforcement of the free-pass provisions.

Moreover, the United States Supreme Court, in the 1923 case of *Kansas City Southern Railway Co. v. Van Zant*,<sup>123</sup> found that interstate rail passes were subject to federal and not to state controls. The Court stated, “The pass proceeded from the federal act; it is controlled necessarily in its incidents and consequences by the federal act to the exclusion of state laws and state policies.”<sup>124</sup> As such, the free pass ban—as it pertained to railroads—was “highly questionable to begin with.”<sup>125</sup> Even more significantly, the section had not been cited by a court since 1915.<sup>126</sup>

Given the dubious constitutionality of the free-pass provision, its obscurity, and its ineffectiveness, the repeal of the provision was suggested by both the Inter-Law School Committee and the Temporary Commission on the Revision and Simplification of the Constitution. The repeal of the free-pass provision was included by the legislature as part of its repeal of the bribery provisions, and was passed by the people in the 1962 referendum.<sup>127</sup>

\* \* \*

These efforts in the 19th century to place ethics provisions in the State Constitution were largely unsuccessful. The unintended result of the bank-chartering provision was only to increase corruption. The plunderers were able to outmaneuver the bidding protections in the canal provision. Most significantly, the anti-bribery and anti-free pass provisions soon became obsolete due to legislative and historical developments and court decisions.

---

<sup>123</sup> 260 U.S. 459 (1923).

<sup>124</sup> *Id.* at 468.

<sup>125</sup> Jellinik, *supra* note 108, at vi-i.

<sup>126</sup> *Id.*

<sup>127</sup> See *supra* note 111.

While placing substantive ethics provisions in the State Constitution has the advantage of bypassing a legislature that might be reluctant to undertake significant ethics reform, the fact is that placing ethics reform in the Constitution poses its own series of challenges. These challenges arise from the difficulty of changing constitutional provisions.

Constitutional ethics provisions are static, and they cannot be easily repaired once scheming individuals can find a way to maneuver around them. Thus, if corrupt bidders and canal administrators can evade the language of the low-bid requirements, it is very difficult to change the constitutional bidding requirements. If the circumstances of bribery and anti-free-pass provisions change due to court decisions, legislative actions, or even current events, the constitutional ethics provisions cannot change with the times. As a result, despite the best of intentions, the 19th century constitutional ethics provisions largely did not achieve the results that the reformers might have expected or desired.<sup>128</sup>

### **III. RESTRICTIONS ON THE AUTHORITY OF THE STATE LEGISLATURE**

While the provisions of the Constitution that were specifically enacted to limit corruption might not have succeeded in achieving their goals, there are a series of sections in Article III, the legislative article, which affect ethics and corruption issues. They limit the authority of the legislature, and they have in some cases limited the potential for legislative corruption.

These provisions include Article III(a) § 6, which prohibits changes in the compensation of legislators during their term; III(b) § 7, which bans certain civil appointments for legislators; III(c) § 15, which requires private and local bills to encompass one subject; III(d) § 17, which bans certain private or local bills; III(e) § 19, which bans the legislature from auditing or allowing

---

<sup>128</sup> “Constitutional reformers added numerous substantive and procedural limitations on state legislatures. Added when less was demanded of government than is the case today, these restrictions now function in ways not intended by the reformers and, in some cases, have not eliminated the evils they were intended to remedy.” Peter J. Galie and Christopher Bobst, *Constitutional “Stuff”: House Cleaning the New York Constitution—Part I*, 77 ALB. L. REV. 1385, 1393-1394 (2013-2014).

private claims against the state; and III(f) § 22, which requires tax laws to “distinctly state the tax and the object to which it is to be applied.”

While some of these restrictions have been more successful in restraining graft and corruption and in promoting transparency in legislative operations than the ethics provisions of the 19th century, the effect of many of these provisions has been muted. With the possible exception of Article III § 19, which banning the payment of private claims by the legislature, these provisions have not been of particularly great significance in promoting ethics.

### **A. The Rule Against Raising Legislators’ Salaries**

Article III § 6 provides that “neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he or she shall have been elected.” Much of this provision dates from a 1947 amendment which allowed the legislature to fix members’ salaries.<sup>129</sup> (Previously, they had been set by the Constitution.) This provision has prevented the legislature from immediately raising its collective salary during the current legislative term,<sup>130</sup> but it has not had an overall broader effect on ethics. It also has not been able to keep the issue of legislative salaries out of political and judicial scrutiny.<sup>131</sup>

### **B. Legislators’ Other Jobs**

Article III § 7 prevents legislators from receiving certain additional civil appointments. The prohibition stems in large part from the work of the 1872 Constitutional Commission<sup>132</sup> and was in large part aimed at preventing future Boss Tweeds. Tweed served simultaneously as a state senator and as the commissioner of public works in New York City.<sup>133</sup> While the

---

<sup>129</sup> Carter, NEW YORK STATE CONSTITUTION, *supra* note 57, at 25. *See also* New York Public Interest Research Group, Inc. (NYPIRG) v. Steingut, 40 N.Y.2d 250, 255-256 (1976); Dunlea v. Anderson, 66 N.Y.2d 265 (1985).

<sup>130</sup> NYPIRG v. Steingut, 40 N.Y. 2d at 259.

<sup>131</sup> Cohen v. State, 94 N.Y. 1 (1999); Maron v. Silver, 14 N.Y.3d 230 (2010).

<sup>132</sup> Carter, NEW YORK STATE CONSTITUTION, *supra* note 57, at 26.

<sup>133</sup> Galie, THE NEW YORK STATE CONSTITUTION, *supra* note 91, at 103.

definition of a “civil appointment” has been defined very broadly by the Court of Appeals,<sup>134</sup> the fact is that this provision is limited on its face to banning civil positions which have been created during the term of the current legislator or to civil positions where the emoluments have increased during the current term of the legislator.<sup>135</sup> Thus, in practice, this section bans relatively few civil appointments of legislators.

### C. The One-Subject Rule

Article III § 15 requires that local or private bills shall include no more than one subject, and that subject must be expressed in the title of the bill. This section was added by the Constitutional Convention of 1846 partially as a result of Aaron Burr’s establishment of a bank in a bill purported to supply potable water for the city of New York.<sup>136</sup> The Court of Appeals in *Burke v. Kern* stated, “This is perhaps best illustrated by the occasion for the creation of this constitutional provision, which was added as a result of the success of Aaron Burr in persuading the Legislature to grant him a charter for a water company which had hidden among its provisions a clause enabling him to found a bank.”<sup>137</sup> At the Constitutional Convention in 1846, supporters of the proposal noted a number of instances where the actual contents of legislation did not match up with the title of the legislation.<sup>138</sup> The courts have opined that the section was designed to prevent logrolling<sup>139</sup> and “to prevent the fraudulent

---

<sup>134</sup> *People v. Tremaine*, 252 NY 27 40 (1929). “The importance of the office is immaterial if the appointment is administrative or judicial in character. The prohibition is absolute and unqualified, and in analogous cases has been ruthlessly enforced.” *Id.* at 41.

<sup>135</sup> Peter Galie notes, “Only those [positions] created or the salaries of which have been increased during the term of office are off-limits.” Galie, *THE NEW YORK STATE CONSTITUTION*, *supra* note 91, at 103.

<sup>136</sup> See *supra*.

<sup>137</sup> 287 N.Y. 203, 213 (1941).

<sup>138</sup> REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 176-77 (1846).

<sup>139</sup> *People v. Chautauqua County*, 43 N.Y. 10, 22 (1870). “That purpose is, that every bill on a private or local subject, shall stand alone, and ask for legislative favor on its own merits.”

insertion of provisions upon subjects foreign to that indicated in the title.”<sup>140</sup>

The section, while it may have been intended to have a broad effect, has little present effect. “The courts have not given a strong interpretation of any of the crucial terms employed in this section.”<sup>141</sup> So long as the bill’s contents are incidental to the purpose of the bill as shown by the bill’s title, the section is not violated.<sup>142</sup> Accordingly, the single-subject section, as currently interpreted, has not placed significant limitations on legislative overreach.<sup>143</sup>

#### **D. Private and Local Bills**

Article III § 17 prevents the legislature from passing an assortment of private and local bills. Private bills constitute bills designed specifically to apply to an individual, a class of individuals or to specific corporations. Local bills apply to specific governmental units. Collectively, they tend to be described euphemistically as special bills, as contrasted to general bills which have statewide application. These bills prohibited by Article III § 17, include a host of categories from changing county seats and personal name changes to regulating the rate of interest, and granting tax exemptions, immunity, or a franchise. The section was largely added by the Constitutional Commission of 1872 and has been amended only slightly since

---

<sup>140</sup> *Economic Power & Construction Co. v. City of Buffalo*, 195 NY 286, 296 (1909). *See also* Galie, *THE NEW YORK STATE CONSTITUTION*, *supra* note 91, at 107.

<sup>141</sup> Galie, *supra* note 91. Galie also notes that the traditional presumption of constitutionality also works to protect legislation from challenges under Article III, Section 15.

<sup>142</sup> *People ex rel. Olin v. Hennessy*, 206 N.Y. 33, 39 (1912); *Bogart v. Westchester County*, 270 A.D. 274, 277 (2d Dep’t 1945). *See also* NYC C.L.A.S.H. v. City of New York, *supra* note 25 (finding that the single subject rule was not violated by a city ordinance dealing with both electronic and traditional cigarettes).

<sup>143</sup> While the section may have been added to prevent Aaron Burr from adding banking powers to the chartering of a company designed to improve the safety of New York City’s water supplies, a court might now find that the banking authority was incidental and related to the purpose of “an act for supplying the city of New York with pure and wholesome water.” *See* L. 1799, Ch. 84.

that time.<sup>144</sup> It was part of the general effort of the Commission to prevent corruption by limiting the private legislative power to help specific individuals and corporations. It was also designed to limit the number of bills passed by the legislature.

Again, this provision has had very limited practical effect. “This section has not limited the legislature as much as its framers intended because the courts have allowed the term *general law* to apply to less than all places or person in the state.”<sup>145</sup> The insignificance of Article III § 17 was recognized soon after its passage. The Association of the Bar of the City of New York in 1885 recognized, “The constitutional restrictions of 1875 in restraining the Legislature from passing special laws in a large number of enumerated cases, have not brought about the beneficial results which were anticipated from them, as even the number of laws which are annually enacted has not been materially reduced by such restrictions.”<sup>146</sup>

To get around the prohibition on special laws, the legislature crafted laws, technically general in application, which accomplished the purposes of the private laws or local laws. Soon after the constitutional amendment, “the practice of concealing under the guise of general laws legislation designed to affect private interests and to meet individual cases became general. This practice tends to destroy and has already very considerably destroyed the symmetry of the laws, and has substituted fickleness and changeableness for certainty and stability.”<sup>147</sup> The eminent lawyer Simon Sterne in an 1884 address noted that “the constitutional restriction of the legislature to pass special and local acts has not only failed to accomplish the purposes of the projectors of the reform, and produced a condition of affairs more dangerous than that which it was intended to cure, but it has also placed the general body of the law in great jeopardy by creating a strong incentive to destroy the general law to serve special interests.”<sup>148</sup>

---

<sup>144</sup> Carter, NEW YORK STATE CONSTITUTION, *supra* note 57, at 30.

<sup>145</sup> Galie, THE NEW YORK STATE CONSTITUTION, *supra* note 91, at 109.

<sup>146</sup> Association of the Bar of the City of New York, REPORT ON A PLAN FOR IMPROVING THE METHODS OF LEGISLATION OF THIS STATE 3 (1885).

<sup>147</sup> John Foord, THE LIFE & PUBLIC SERVICES OF SIMON STERNE 167 (1903).

<sup>148</sup> Simon Sterne, “The Prevention of Defective and Slipshod Legislation,” paper read before the American Bar Ass’n, at 19 (1884).

The courts have similarly expanded the notion of what constitutes a general law by expanding the concept to include legislation that applies to less than all the locations or people in the state.<sup>149</sup> Thus, bills applying to cities with a population over one million (which simply means New York City) are not local bills.<sup>150</sup> Whatever the intent of the 1872 commissioners may have been, current section 17 has not served as a meaningful limitation on legislative prerogatives.

### **E. Claims Against the State**

Article III § 19 was another product of the Constitutional Commission of 1872, and it has largely remained intact since that time.<sup>151</sup> It basically prevents the legislature from settling and resolving private claims against the State. Prior to its passage, this was “a procedure open to abuse and soon depleted the public treasury.”<sup>152</sup>

This provision has largely been successful in reducing corruption; the Court of Claims has replaced the legislature as a non-political, legally regulated, and standardized forum to hear private claims on their merits.

That is not to say that the legislature has refrained from acting on individual claims that affect the state that are not directly barred by this section. Thus, the legislature is frequently involved in authorizing exemption applications from real property taxes<sup>153</sup> and in assisting individuals with pension

---

<sup>149</sup> Galie, THE NEW YORK STATE CONSTITUTION, *supra* note 89 at 109.

<sup>150</sup> *McAneny v. Board of Estimate & Apportionment of City of New York*, 232 N.Y. 377 (1922).

<sup>151</sup> Carter, NEW YORK STATE CONSTITUTION, *supra* note 57, at 31.

<sup>152</sup> Galie, THE NEW YORK STATE CONSTITUTION, *supra* note 91, at 100. The original State case against the Tweed ring involved the allegation that the ring members, who jointly held the power to audit claims against New York City, conspired to approve fraudulent claims which benefited them personally. *See People v. Ingersoll*, 58 NY 1 (1874).

<sup>153</sup> See for instance L. 2015, §§ 253, 261, 283, 284, 294, 310, 316, 318, 319, 322, 327, 328, 346, 352, 355, 356, 357, 359, and 360.

and civil-service issues.<sup>154</sup> Nonetheless, this section has actually advanced the cause of ethics in New York State.

### **F. Explicitness of Tax Laws**

Article III, Section 22 requires tax laws “state the tax and the object to which it is to be applied.” This was largely the product of the 1846 Convention. The provision has not been a significant check on arbitrary action by the legislature. It has been held that the section only applies to actual state taxes and not to license fees, regulatory assessments, or local taxes.<sup>155</sup> Moreover, simply by stating that the tax moneys are to go to the State’s general fund would suffice to satisfy this section.<sup>156</sup> In short, this section has not at all affected State ethics.

\* \* \*

While the constitutional limitations on legislative procedures and authority have likely had a more beneficial effect on State ethics than the provisions that had been designed directly to improve ethics, their overall effect has not been especially significant. The State Constitution over the centuries has had very little effect on the overall ethical operation of the State and its elected officials.

## **IV. WHAT CAN NEW YORK DO ABOUT IT?**

Given the limited effect of New York’s constitutional attempts to improve ethics, the question becomes—returning to the alleged words of William Tweed—what New York can do about it.

The Inter-Law School Committee in 1958 did not think there was much that could be done about it. It saw little reason for any constitutional provision on corruption. The Committee

---

<sup>154</sup> See for instance L. 2015, §§ 202, 203, 305, 306, 330, 337, 338, 339, 342, 353, and 354.

<sup>155</sup> See *Exempt Firemen’s Benev. Fund v. Roome*, 93 N.Y. 313 (1883); *Berkshire Fine Spinning Associates, Inc. v. City of New York*, 5 N.Y.2d 347 (1959); *New York Ins. Ass’n, Inc. v. State*, 145 A.D. 3d 80 (3d Dep’t 2016).

<sup>156</sup> *Matter of McPherson*, 104 N.Y. 306, 318–320 (1887); *Steuben Restaurants, Inc. v. City of New York*, 202 Misc. 22 (Sup. Ct, N.Y. County, Special Term, 1952); *Matosin v. City of New York*, 203 Misc. 973 (Sup. Ct, NY County, Special Term, 1952).

wrote, “If any constitutional reference to bribery is to be retained as a solemn expression of the State’s condemnation of official corruption, a general directive that there shall be laws against bribery would adequately serve the purpose.”<sup>157</sup>

In 1966, future federal district judge Jack Weinstein—then a professor at Columbia Law School—as part of a seminar on revising the New York Constitution, edited and published a series of student essays on the Constitution.<sup>158</sup> Included among these essays was an essay on “Political Ethics as a Constitutional Issue” by Roger Jellinik.<sup>159</sup> The essay stated, “The exact degree of coverage of the subject matter [in the constitution] should depend upon the circumstances within the jurisdiction considering inclusion of such a provision. If the problem is not serious, a simple declaration of policy will probably suffice.”<sup>160</sup> The essay specifically suggested a limited role for ethics in the Constitution. It recommended that the Constitution contain language that “public officers are constructive trustees for the benefit of the people and they shall be held to the standards commonly demanded of (corporate) fiduciaries.”<sup>161</sup> The attorney general was empowered to initiate proceedings in equity to prevent such violations, and the legislature was charged with enacting laws to further the policy of this provision.<sup>162</sup>

Ethics emerged as a very minor issue at the 1967 Constitutional Convention.<sup>163</sup> Delegate Martin Walsh offered a proposition stating that public offices are public trusts and that “it shall be the duty of the legislature to adopt appropriate

---

<sup>157</sup> Inter-Law School Committee, *supra* note 103, at 175.

<sup>158</sup> Roger B. Jellinik in 1 Jack B. Weinstein et al., *ESSAYS ON THE NEW YORK CONSTITUTION*, *supra* note 108. A number of individuals who became prominent in political life in New York City and the nation participated in the seminar. These included Carter Burden, Harold Ickes, and Frank Macchiarola.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at VI-22.

<sup>161</sup> *Id.* at VI-23.

<sup>162</sup> *Id.*

<sup>163</sup> Henrik N. Dullea’s 1997 book on the 1967 Convention barely contains a mention of the word “ethics.” See Henrik N. Dullea, *CHARTER REVISION IN THE EMPIRE STATE* (1997).

legislation to effectuate such right.”<sup>164</sup> That proposition was not acted upon.

Former New York City mayor Robert Wagner offered a somewhat more comprehensive measure on ethics. He proposed a ban on legislators and State officers and employees appearing pay in relation to: (a) any case or matter against the interest of the State or (b) before most State agencies. The bill also created an independent ethics commission which would issue advisory opinions on ethical standards.<sup>165</sup> Delegate Earl Brydges, who was also the temporary president of the Senate, took exception to the proposal. He found it unnecessary since “this State has the greatest, tightest code of ethics in the nation and has had for many years.”<sup>166</sup> The Wagner proposition was defeated by voice vote at the convention.<sup>167</sup>

In the lead-up to the 1997 vote on whether to convene a constitutional convention, there was limited mention of ethics-related issues.<sup>168</sup> The report of the Association of the Bar on the 1997 Convention vote only mentioned ethics in regard to the selection of delegates and to term limits for New York City elected officials.<sup>169</sup> The volume of the *Hofstra Law and Policy Symposium* devoted to the 1997 Convention vote had no mention

---

<sup>164</sup> PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, Volume VI, Proposition No. 7 (1967).

<sup>165</sup> *Id.* at volume VIII, Proposition No. 393 (1967). *See also id.* vol. I at 93-94.

<sup>166</sup> *Id.* at volume IV at 753. Former Assemblyman Charles Cusick went even further than Senator Brydges and said the “Wagner proposal, on its face, brands ... any member of the Assembly, any member of the Senate, as second-class citizens who must be subjected to some sort of ethical code which does not apply to any other person in the state.” He further stated, “I am sick and tired of sanctimonious psalm singers.” *Id.* at 756.

<sup>167</sup> *Id.* at 758.

<sup>168</sup> Earlier in the decade, the State Commission on Government Integrity in its reports recommended no constitutional changes. It did recommend a pension forfeiture provision for public officials but only in the future for people who joined or rejoined the state retirement system. THE COLLECTED REPORTS OF THE STATE COMMISSION ON GOVERNMENT INTEGRITY, GOVERNMENT ETHICS REFORM FOR THE 1990’S at 712-13 (Bruce A. Greene ed. 1991).

<sup>169</sup> The Task Force on the New York State Constitutional Convention, “Report of the Task Force on the New York State Constitutional Convention,” 52 THE RECORD 523 (1997).

of the term “ethics.”<sup>170</sup> The term “corruption” was only mentioned in one article in reference to an 1884 constitutional amendment on debt limits.<sup>171</sup> There were few newspaper articles on the topic of ethics and the Constitutional Convention.<sup>172</sup> The most significant mention of ethics as a possible topic was in Jeffrey Stonecash’s “Elections and the Political Process,” which was an essay in the briefing book put out by the Temporary Commission on Constitutional Revision in 1994.<sup>173</sup> Stonecash wrote that three states (Texas, Hawaii, and Rhode Island) had established independent statewide ethics commissions<sup>174</sup> and that this would be “one solution”<sup>175</sup> to improve “the scrutiny of the ethics of public officials.”<sup>176</sup>

In its final report in 1995, the Temporary State Commission on Constitutional Revision did not mention ethics as part of its four-part action agenda for Albany.<sup>177</sup> The four areas the Commission suggested for necessary action were education, public safety, fiscal integrity, and state and local

---

<sup>170</sup> 1 HOFSTRA L. & POL’Y SYMP. [i], [ii] (1996).

<sup>171</sup> Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL’Y SYMP. 79, 110 (1996).

<sup>172</sup> The few articles included William J. Stern, “C’mon Governor Pataki, Lead,” *City Journal* (Oct. 1995), suggesting that Governor Pataki “should urge a yes vote and press the convention to bypass the Legislature and write his ethics and process reforms into the Constitution”; and John Caher, “Questions Often Asked on State Constitution” (Sept. 21, 1997), suggesting state ethics as a possible topic at a convention.

<sup>173</sup> Jeffrey M. Stonecash, “The New York Constitution: Elections and the Political Process,” in the Temporary Commission on Constitutional Revision, *THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK* at 147-148 (1994). The same essay appeared in “Elections and the Political Process” in *DECISION 1997 CONSTITUTIONAL CHANGE IN NEW YORK* 193 (eds. Gerald Benjamin and Henrik N. Dullea 1997).

<sup>174</sup> *Id.* at 205.

<sup>175</sup> *Id.* at 204.

<sup>176</sup> *Id.*

<sup>177</sup> *Effective Government Now for the New Century: A Report to the People, the Governor, and the Legislators of New York: The Final Report of the Temporary State Commission on Constitutional Revision*, (1995). The Commission did mention as part of its selective ideas in its final report that a constitutional change could improve legislative districting and end the political party equality requirement for elections boards.

government relations.<sup>178</sup> If action could be taken in these four crucial areas, the Commission believed that the need for a convention might be obviated.

In sum, there was little focus on ethics in the campaign leading to the vote for a 1997 Constitutional Convention, and much of what was written on ethics centered simply on the general issue of whether ethics should be part of the Convention's consideration.

In the years since the Convention vote, there has been minimal activity in the legislature on the issue of using the Constitution as a way to improve government ethics. While there have been fairly frequent legislative Constitutional amendments introduced to change the Constitution by adding initiative and referendum, recall, term limits, pension forfeitures, and redistricting requirements, the overall topic of ethics in the Constitution has been given short shrift.

The only proposal to include ethics in the constitution is one that has been introduced annually in the Assembly since 2004, initially by former Assemblyman Richard Brodsky.<sup>179</sup> Since Assemblyman Brodsky left the Assembly after 2010, it has been introduced continuously by Assemblyman Gary Pretlow. The resolution "raises the importance of ethics to a constitutional level,"<sup>180</sup> and states that "a public office is a public trust." It requires each of the three branches of government to establish an ethics code which will be administered by its own independent ethics commission. Each code of ethics shall include, but not be limited to, provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure, conflicts of interest, and lobbyist registration and restriction." The proposal

---

<sup>178</sup> See Kevin Collison, "Reform Urged in Bid to Avoid State Constitutional Convention," BUFFALO NEWS, Feb. 26, 1995.

<sup>179</sup> A. 11857 (2004) introduced by the Committee on Rules at the request of Member Brodsky.

<sup>180</sup> New York State Assembly Memorandum in Support of Legislation, A. 737 (2017).

has not changed since it was first introduced in 2004,<sup>181</sup> and it has not advanced at all in the legislature over the years.

Nonetheless, in the period leading up to the 2017 Constitution vote, the need for ethics reform has taken central stage as an argument for the Convention. Ethics issues seen as potential topics for the Constitution include stripping pensions from State officials found guilty of significant crimes, a full-time legislature, term limits for the legislature, outside income restrictions for legislators, and an independent ethics agency. Issues related to ethical concerns cited as possible Convention topics have included campaign-finance reform, redistricting procedures, various election and voter registration reforms, and the permissible use and sources of campaign funds.<sup>182</sup>

Ethics has gone from being a lounge act in 1997 to the center stage in 2017. Yet most of the 2017 suggested reforms seem to be aimed at structural and procedural concerns. They are unlike the constitutional amendments of the late 19th century on bribery and free passes which sought to establish specific penal sanctions and regulated conduct norms for government officials. Instead, the 2017 proposed changes largely focus on establishing procedures for improved governance<sup>183</sup> and in adding electoral-process reforms.<sup>184</sup> Additionally, thus far, there has been an absence of specifics in the ethics-related proposals. One needs to look to other jurisdictions to see what ethics proposals have been placed into state constitutions.

## V. WHAT DO OTHER STATES DO ABOUT IT?

---

<sup>181</sup> A. 598 in the 2005-2006 term, A. 1198 in the 2007-2008 term, A.4252 in the 2009-2010 term, A.2545 in the 2011-2012 term, A. 4144 in the 2013-2014 term and A.2619 in the 2015-2016 term.

<sup>182</sup> See generally the website of the Committee for a Constitutional Convention and its suggested issues for constitutional purview. [http://www.concon19.org/take\\_action](http://www.concon19.org/take_action) (viewed Feb. 25, 2017).

<sup>183</sup> For example, there is a focus on an independent ethics commission, and independent redistricting body, independent election boards.

<sup>184</sup> These include campaign finance reforms, broader participation in choosing officeholders, automatic registration, early voting and voting by mail. It is somewhat ironic that the constitutional provisions from the 19<sup>th</sup> century designed to prevent elections fraud now serve as an impediment to increasing voter turnout.

In reviewing how states treated ethics issues in their constitutions in 1966, Roger Jellinik noted that “all states have constitutional provisions that, in theory or in practice, serve to check the actions of government officials.”<sup>185</sup> He did not seem to believe they had a “single rubric that can adequately cover the multiplicity of situations involved.”<sup>186</sup>

Yet, broadly speaking, there appear to be three types of ethics provisions in state constitutions. These include hortatory declarations on ethics, structural and procedural changes affecting ethics, and, finally, substantive provisions governing actual ethical conduct by public officers and employees.

### A. Hortatory Provisions in State Constitutions

First is the hortatory provision, which tends to simply declare the state’s public policy on the importance of ethics in state government or the notion that public office is a public trust.<sup>187</sup> Somewhat typical of this is the Massachusetts constitutional section that states, “All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.”<sup>188</sup>

Similarly, the Florida Constitution states, “A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse.”<sup>189</sup> While cynics might view these adages as substance-free window dressing, they do act

---

<sup>185</sup> Jellinik, *supra* note 108, at VI-7.

<sup>186</sup> *Id* at VI-6.

<sup>187</sup> *Id.* at VI-7.

<sup>188</sup> MASS. CONST. Pt. 1, Art. V; similarly, see N.H. CONST. Pt. First, Art. 8.

<sup>189</sup> FLA. CONST. art. II, § 8. *See also* “That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct.” Md. Dec. of R. Art. 6; “Legislative office is a public trust, and every effort to realize personal gain through official conduct is a violation of that trust.” LA. CONST. Art. III § 9; Public officers and employees “shall carry out their duties for the benefit of the people of the state.” C.R.S.A. CONST. Art. 29, § 1(1)(b); “Public service is a public trust. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain.” 5 C.F.R., § 2635.101.

symbolically to provide clear policy direction on the importance of ethics in state government. They could provide value in inspiring people to work towards higher levels of integrity in government. In fact, while reviewing the overall state of ethics in state constitutions in the late 1950's, the Inter-Law School Committee seemed to take the position that the only benefit of a reference of bribery in the Constitution would be as a "solemn expression of the State's condemnation of official corruption."<sup>190</sup>

## **B. Constitutionally Created Ethics Commissions**

While state constitutions since the 1960's have witnessed a de-emphasis in handling bribery issues, in the years since Watergate a number of states have used their constitutions to create ethics commissions and to help establish codes of ethics.<sup>191</sup>

The Florida constitutional provision on ethics appears to be the earliest constitutional ethics provision of this kind. It was enacted in 1976 as a result of a citizen initiative. It requires the creation of an "independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees."<sup>192</sup> Also, the legislature is required to prescribe a code of ethics for employees.<sup>193</sup>

Hawaii was the first state to have an ethics commission, in 1968,<sup>194</sup> and was also early in placing state ethics

---

<sup>190</sup> The Inter-Law School Committee, *supra* note 103, at 175.

<sup>191</sup> This includes states that have established ethics commissions that cover the executive branch of government. It does not include the states that have established separate judicial ethics commissions through their constitutions. *See, e.g.*, N.Y. CONST. art VI, § 22; TEX. CONST. art. V, § 1-a; UTAH CONST. art. VIII, § 13; WASH. CONST. art. IV, § 31; WYO. CONST. art. 5, § 6. For interesting perspectives on what an ethics code can actually achieve, *see* Richard Rifkin, "Commentary: What Can Ethics Codes Accomplish?" 74 PUBLIC ADMINISTRATION REVIEW 39 (January/February 2014); Mark Davies, "Governmental Ethics Laws: Myths and Mythos," 40 N.Y.L. SCH. L. REV. 177 (1995).

<sup>192</sup> FLA. CONST. art. II, § 8(f). The commission is the Florida Commission on Ethics. *Id.* art II, § 8(i)(3).

<sup>193</sup> *Id.* at (g).

<sup>194</sup> [http://ethics.hawaii.gov/about\\_hsec/](http://ethics.hawaii.gov/about_hsec/) (last viewed Feb. 28, 2017). *See also* Wendy J. Johnson, Samuel E. Sears and Daniel J. Rice, *Oregon*

commissions in its constitution, which it did in 1978.<sup>195</sup> Its provision requires each branch of State government to establish its own code of ethics which will be administered by its own ethics commission.<sup>196</sup> The ethics commissions were to be independent. “The members of ethics commissions shall be prohibited from taking an active part in political management or in political campaigns. Ethics commissioners shall be selected in a manner which assures their independence and impartiality.”<sup>197</sup>

Hawaii’s constitution does not dictate the actual contents of the codes of ethics.<sup>198</sup> It does, however, require the codes to include “provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure and lobbyist registration and restriction.”<sup>199</sup>

The Constitution of Texas in 1991<sup>200</sup> was amended to establish an eight-member bipartisan ethics commission.<sup>201</sup> Four members are appointed by the governor from bipartisan lists supplied by the members of the house of representatives and senate “from each political party.”<sup>202</sup> Two are appointed by the speaker of the house from lists made by the members of the house from each political party, and two are appointed by the lieutenant governor from lists made by the members of the senate from each political party. The ethics commission can recommend the salaries of the legislature, subject to a public

---

*Government Ethics Law Reform*, 44 WILLAMETTE L. REV. 399, 402 (2007); Department of the Attorney General, State of Hawaii, Op. No. 15-2 (2015).

<sup>195</sup> Rebecca L. Anderson, *The Rules in the Owners’ Box: Lobbying Regulations in State Legislatures*, 40 URB. LAW. 375, 379 (2008).

<sup>196</sup> HAWAII CONST. art. 14.

<sup>197</sup> *Id.*

<sup>198</sup> Opinion No. 15-2, *supra* note 194.

<sup>199</sup> HAW. CONST. art. 14. The New York constitutional amendment introduced by Assemblymen Brodsky and Pretlow is clearly modeled on the Hawaiian Constitution.

<sup>200</sup> Mark S. DesNoyer, “In Through the Out-Door: Conflicts of Interest in Private-To-Public Service, Revolving Door Statutes, And Ethical Considerations,” 5 TEX. TECH J. TEX. ADMIN. L. 113, 119 (2004).

<sup>201</sup> TEX. CONST. art. III, § 24a.

<sup>202</sup> *Id.* at §24a.(a).

referendum, but otherwise has the powers established by the legislature.<sup>203</sup>

Rhode Island was also early in creating a constitutionally based ethics commission. The constitutional provision passed in 1986<sup>204</sup> requires the legislature to “establish an independent non-partisan ethics commission.”<sup>205</sup> The commission is to adopt a code of ethics which is to include, but is not limited to, “conflicts of interest, confidential information, use of position, contracts with government agencies and financial disclosure.”<sup>206</sup>

Rhode Island’s constitution applies not to just state executive-department officials but to “all elected and appointed officials and employees of state and local government, of boards, commissions and agencies.” There has always been some tension over how the provision applied to the legislature. The commission could not remove members of the legislature, since it lacked the “power to remove from office officials who are not subject to impeachment.”<sup>207</sup> Also, under a 2009 Rhode Island Supreme Court decision, the ethics commission was unable to enforce the ethics code against members of the legislature engaged in the legislative process.<sup>208</sup> The court found that the Rhode Island Constitution’s speech-in-debate clause gives legislators absolute immunity from the actions of the ethics commission when the legislators were engaged in “core legislative acts.”<sup>209</sup> At the general election of 2016, the legislative immunity was ended when a constitutional amendment was passed to provide the ethics commission with full jurisdiction over members of the legislature.<sup>210</sup>

---

<sup>203</sup> *Id.*

<sup>204</sup> See *In re Advisory Opinion to the Governor*, 732 A.2d 55 (R.I. 1999); *In re Advisory Opinion to Governor*, 612 A.2d 1 (R.I. 1992).

<sup>205</sup> R.I. CONST. art. III, § 8.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Irons v. R.I. Ethics Comm’n*, 973 A.2d 1124 (R.I. 2009).

<sup>209</sup> *Id.* at 1132.

<sup>210</sup> See “Rhode Island Gives Ethics Commission Oversight of Legislators,” STATES NEWS SERVICE, Nov. 15, 2016; Alex Kuffner, “Jurisdiction Over Assembly Restored; Question 2 Wins in A Landslide,” PROVIDENCE JOURNAL, Nov. 9, 2016.

Louisiana requires the legislature to “enact a code of ethics for all officials and employees of the state and its political subdivisions.”<sup>211</sup> It further provides that the code be administered by one or more boards to be established by the legislature.<sup>212</sup>

Oklahoma has a constitutionally created ethics commission which was established by an initiative petition in 1990.<sup>213</sup> The constitution requires “an annual appropriation by the Legislature sufficient to enable it to perform its duties.”<sup>214</sup> The Ethics Commission is charged with promulgating rules of conduct for State elections and “rules of ethical conduct for state officers and employees.”<sup>215</sup> These rules can be disapproved by the legislature subject to a gubernatorial veto, and the legislature is also given power to repeal or modify the ethics rules, subject again to a gubernatorial veto.<sup>216</sup>

Arkansas, strictly speaking, does not have a constitutionally created ethics body. Instead, it has an ethics commission which was established by an initiative in 1990.<sup>217</sup> Under that law, the Arkansas Ethics Commission is composed of five members with one appointment each from the governor, the lieutenant governor, the attorney general, the speaker of the House of Representatives, and the president pro tem of the Senate.<sup>218</sup> Nonetheless, the Arkansas Constitution recognizes the existence of the Arkansas Ethics Commission in three separate sections. The registration of a former member of the legislature as a lobbyist,<sup>219</sup> the regulation of gifts to public

---

<sup>211</sup> LA. CONST. art. 10, § 21.

<sup>212</sup> *Id.*

<sup>213</sup> OKLA. CONST. art. 29, § 1.

<sup>214</sup> *Id.* § 2.

<sup>215</sup> *Id.* § 3.

<sup>216</sup> *Id.*

<sup>217</sup> A.C.A. § 7-6-217.

<sup>218</sup> *Id.* Initially the chief justice of the Supreme Court selected one of the members. That was found unconstitutional as a violation of separation of the powers in *Spradlin v. Arkansas Ethics Commission*, 314 Ark. 108 (1993). The statute was amended to allow the lieutenant governor rather than the chief justice to make the appointment to the commission.

<sup>219</sup> ARK. CONST. art. 19, § 29.

officials,<sup>220</sup> and the regulation of political contributions<sup>221</sup> are all constitutionally under the jurisdiction of the Ethics Commission. Thus, in essence, the Arkansas Constitution has incorporated the Arkansas Ethics Commission by reference.

Colorado may have the most extensive of the state constitutional structures governing ethics.<sup>222</sup> Enacted pursuant to an initiative in 2006, Colorado amended its Constitution to establish an independent ethics commission.<sup>223</sup> “In many ways, the language of the Amendment creates a super-agency, a commission set apart from the legislative and executive branches of government so as to supervise the ethical conduct of both branches, and given the authority to administer, implement, and enforce the Amendment's provisions.”<sup>224</sup> The constitution further provides a guarantee of independence by adding that in no way can “legislation limit or restrict the provisions of this article or the powers herein granted.”<sup>225</sup> There are five members of the commission. One member each is appointed by the governor, the Senate, the House of Representatives, and the chief justice of the Supreme Court. The fifth member is a local government official or employee appointed by three of the other members of the commission. No more than two members can belong to the same political party. The legislature is required to “appropriate reasonable and necessary funds to cover staff and administrative expenses”<sup>226</sup> for the independent ethics commission. Unless a complaint is determined to be frivolous, the commission is required to “conduct an investigation, hold a public hearing, and render findings.”<sup>227</sup>

---

<sup>220</sup> *Id.* § 30.

<sup>221</sup> *Id.* § 28.

<sup>222</sup> COLO. CONST. art. 29. Besides establishing an ethics commission, the Colorado Constitution contains detailed language creating limitations on gifts to public officials and lobbying by former public officers.

<sup>223</sup> *Id.* §5.

<sup>224</sup> *Developmental Pathways v. Ritter*, 178 P.3d 524, 535 (Co. 2008).

<sup>225</sup> COLO. CONST. art. 29, § 9.

<sup>226</sup> *Id.* § 5(1).

<sup>227</sup> *Id.* § 5(3)(C). *See generally* *Colorado Ethics Watch v. Independent Ethics Commission*, 369 P. 3d (Colo. 2016), finding that a decision of the commission finding a complaint to be frivolous is not subject to judicial review.

Elements of these state constitutions could serve as models for constitutional reform of ethics in New York. The current ethics enforcement, training, and oversight agency, the Joint Commission on Public Ethics,<sup>228</sup> is regularly criticized for not being independent, having too many members, lacking a sufficient budget to perform its duties, and having insufficient power over the legislature.<sup>229</sup> A constitutionally created ethics commission could resolve these issues by reducing the size of the commission, guaranteeing commission independence, resolving the issues of coverage of the legislature, and guaranteeing a satisfactory budget.

### C. Substantive Constitutional Ethics Codes

Several of the states that have added ethics provisions in their constitutions have gone further than simply creating an independent organization to enforce and oversee ethics rules. These states have established enactments which are in many ways “collections of essentially statutory material.”<sup>230</sup> As such, they raise significant theoretical and practical issues over what properly belongs in state constitutions. Should it simply be fundamental principles that belong in the state constitution, or in a vital field where the legislature refuses to take significant action, do you need to place a quasi-legislative scheme into the constitution? If you place the legislative scheme in the constitution, what do you do when the enactment receives unfavorable or controversial administrative treatment,<sup>231</sup>

---

<sup>228</sup> N.Y. Exec. Law §94.

<sup>229</sup> See N.Y. Ethics Rev. Comm’n, *Review of the Joint Commission on Public Ethics and the Legislative Ethics Commission* (Nov. 1, 2015), <http://www.nyethicsreview.org/wp-content/uploads/2015/11/Ethics-Review-Commission-Final-Report.pdf> (reviewed Mar. 1, 2017) and its attached materials; Mark Davies, “New York State Whiffs on Ethics Reform,” 5 ALB. GOV’T L. REV. 710 (2012); see also “For Review, Cuomo Chooses Outside Agent Over Existing State Investigators,” GOTHAM GAZETTE, June 6, 2016; Bill Mahoney, “A Guide to What the JCOPE Review Commission Will Be Looking At,” POLITICO, Oct. 13, 2015.

<sup>230</sup> J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What’s A Constitution For?*, 56 DUKE L.J. 545, 574 (2006); cf. Gerald Benjamin, *When Does a Gambling Prohibition Not Prohibit Gambling? Or an Alternative Mad Hatter’s Riddle and How It Helps Us to Understand Constitutional Change in New York*, 75 ALB. L. REV. 739, 742 (2012).

<sup>231</sup> See, e.g., “Colo. Ethics Board Misreads the Rules,” DENVER POST, Jan. 17, 2017.

controversial or unfavorable judicial treatment, goes out of public favor, or becomes obsolete? What do you do if the persons and entities affected by the constitutional code devise a permissible way of circumventing the code?<sup>232</sup> How hard and how long will it take to amend the constitution if the constitutional code is given a construction that defeats its intended purposes?<sup>233</sup>

Arkansas bans gifts from lobbyists to its major public officeholders.<sup>234</sup> The section on gifts is extremely detailed. It was added in 2014 and was amended extensively in 2015<sup>235</sup> and even in 2017 by a new provision allowing gifts of facilities “for the purpose of conducting a meeting of a specific governmental body.”<sup>236</sup> The Arkansas Constitution has a revolving-door section preventing former legislators from becoming lobbyists until two years after their term has expired.<sup>237</sup> It also has a detailed section governing who can make political contributions to candidates for public office. Arkansas even retains a bribery ban in its Constitution.<sup>238</sup>

Florida in its Constitution requires financial disclosure statements for elected constitutional officers and for their campaigns, prevents legislators from appearing for compensation before a state agency, has a two-year ban on individuals appearing before their former agency, and adds that public officer or employees who breach the “public trust for private gain and any person or entity inducing such breach shall

---

<sup>232</sup> Since constitutional codes are stationary and hardly elusive targets, it did not take long in the 19th century for New York legislators to find a way to work around the limitations on “single subject” private and local bills as well as the ban on private and local bills containing certain subjects.

<sup>233</sup> For example, it took Rhode Island seven years to amend the Constitution to respond to the *Irons* decision. *See supra* notes 208 to 210 and accompanying text.

<sup>234</sup> ARK. CONST. art. 19, § 30. *But see* Max Brantley, “It’s Official: Amendment 94, the ‘Ethics Amendment,’ is Meaningless,” *Arkansas Times* (Mar. 19, 2015).

<sup>235</sup> 2015 Arkansas Laws Act 1280 (S.B. 967).

<sup>236</sup> 2017 Arkansas Laws Act 207 (S.B. 169).

<sup>237</sup> ARK. CONST. art. 19 § 29.

<sup>238</sup> *Id.* at art. 5, § 35.

be liable to the state for all financial benefits obtained by such actions.”<sup>239</sup>

Colorado’s detailed substantive ethics enactments in its constitution ban most gifts of slightly more than \$50 to public officials<sup>240</sup> and has a two-year bar on former statewide elected officials and legislators representing clients before other statewide elected officials or the legislature.<sup>241</sup> The gift ban is extremely detailed and complicated,<sup>242</sup> and “ripe for future interpretation.”<sup>243</sup> Colorado’s ethics commission, however, does not have much power to actually investigate complaints,<sup>244</sup> and its budget has been extremely limited.<sup>245</sup>

Perhaps it might be worthwhile to determine whether the inclusion of ethics in a state’s constitution improves the overall integrity of government conduct. While certainly subjective and a very gross measure, no state received higher than a C grade from the Center for Public Integrity.<sup>246</sup> The states with ethics provisions in their constitution had rankings all across the board. Hawaii and Rhode Island ranked fourth and fifth respectively with a grade of D+. They were followed by Colorado (13th), Florida (30th), Arkansas (32nd), Texas (39th), Oklahoma (40th), and Louisiana (41st). Both Oklahoma and Louisiana

---

<sup>239</sup> FLA. CONST. art. 2 § 8.

<sup>240</sup> COLO. CONST. art. 29, § 3. The original \$50 limit has been indexed for inflation. For questions about the reach of the gift ban, see Tim Hoover, “Gift-Ban Tweak Roils Opinions Amendment 41 Foes Say It ‘Implodes’ the Law,” *Denver Post* (Aug. 22, 2010).

<sup>241</sup> COLO. CONST. art. 29 § 4.

<sup>242</sup> Gerald E. Dahl, B. Brittany Scantland, “Amendment 41: Ethics in Government,” 39 COLO. LAWYER 29 (Dec. 2010).

<sup>243</sup> *Id.* at 38. See Hoover, *supra* note 240.

<sup>244</sup> “Audit: Colorado’s Ethics Commission Has Questionable Ethic,” COLORADO INDEPENDENT, Mar. 8, 2016.

<sup>245</sup> Joey Bunch, “Bill Would Give Ethics Panel More Powers, DENVER POST, March 9, 2016. See Colorado Office of the State Auditor, *Independent Ethics Commission, Performance Audit* (February 2016), <https://perma.cc/E4UM-6LWN>.

<sup>246</sup> Nicholas Kusnetz, “Only Three States Score Higher Than D+ in State Integrity Investigation; 11 Flunk,” (Center for Public Integrity report, Nov. 9, 2015); <https://www.publicintegrity.org/2015/11/09/18693/only-three-states-score-higher-d-state-integrity-investigation-11-flunk> (viewed Mar. 3, 2017).

received failing marks under the grading system used by the Center for Public Integrity. New York ranked 31st.<sup>247</sup>

To be sure, correlation is not causation, and it is possible that states with ethics problems are those more likely to need—and therefore enact—constitutional ethics provisions. But we can at least say that adding ethics to the state constitution is hardly a guarantee of government integrity.

## VI. CONCLUSION

Many thoughtful reformers reasonably believe that the State legislature in New York will not take meaningful steps to improve ethics training, administration, and enforcement. They believe, in the absence of legislative action, that amending the Constitution is the only way to significantly improve ethics and reduce corruption in New York. While this may be a necessary step to limit integrity problems, it is not a panacea. The history of ethics reform in New York's constitution has demonstrated that the benefits may be marginal. The 19th-century constitutional amendments aimed at ending bribery and corruption in New York were largely unproductive. Efforts across the country to introduce ethics reforms into state constitutions have also produced unremarkable effects.

The 19th-century New York examples show that adding detailed quasi-legislative codes of conduct into the Constitution was a questionable way of deterring corruption. The bribery and anti-free pass amendments to the State Constitution quickly became obsolete and lay dormant for decades before they were ultimately repealed. More general structural reforms aimed at guaranteeing an independent ethics enforcement and oversight body with a reasonable number of members,<sup>248</sup> providing that body with adequate funding, and giving it clear authority over all non-judicial State officers and employees, might be a more

---

<sup>247</sup> *USNews.com* has its own rankings for state integrity. It is not much different from the 2015 Center for Public Integrity rankings. Hawaii was 4th, Rhode Island tied for 5th, Colorado tied with seven other states for 7th, New York and Arkansas tied for 30th, Texas tied for 36th, and Oklahoma and Louisiana tied with four other states for 39th. *See* <https://perma.cc/273N-APZA>.

<sup>248</sup> The current Joint Commission on Public Ethics has 14 members, which has been considered an unwieldy number. *See* N.Y. Ethics Review Commission, *supra* note 229.

successful formula. Even then, these structural reforms will hardly be enough to end corruption in New York State. No one doubts that an improvement in ethics would be beneficial to New York State, but not even the most Panglossian of optimists should expect that adding a spoonful of ethics into New York's Constitution will bring about a renaissance of honest and principled government in the Empire State. High ideals, by themselves, will not suffice.<sup>249</sup> We will need an overall continued focus on ethics at all levels of government if we ever are to respond successfully to Boss Tweed's question, "What are you going to do about it?"

---

<sup>249</sup> Quoting the detestable banker Mr. Potter on George Bailey's father, Peter, in the film *It's a Wonderful Life*, "He was a man of high ideals, so called, but ideals without common sense can ruin this town." See [https://en.wikiquote.org/wiki/It%27s\\_a\\_Wonderful\\_Life](https://en.wikiquote.org/wiki/It%27s_a_Wonderful_Life) (viewed Mar. 4, 2017).