



**Report by the Committee on State Affairs of
The Association of the Bar of the City of New York**

Supporting Legislative Rules Reform

“The Fundamentals”

May 2007

EXECUTIVE SUMMARY

For the last century the New York Legislature has grappled with the issue of rules reform. Unfortunately, “[t]he only thing that ever changes in Albany are the faces. The system stays intact.”¹ The problem is, the system of state governance is controlled by three people (the Governor, the Senate Majority Leader and Assembly Speaker), “each getting a piece of the pie, and that’s it.”²

As a result, the Legislature is dominated by its two leaders and stripped of its ability to be a truly representative body. The negative effects are many, from the failure to enact or craft good public policy to a lack of accountability and transparency. Recently though, a wave of public discontent and newly found energy have created an opportunity to reform the system.

The Committee on State Affairs of the Association of the Bar of the City of New York (“Committee”) has recognized this opportunity and developed a package - “The Fundamentals” - of rules reform proposals that should be adopted by the Legislature, at the beginning of its next session in January of 2008. Specifically, the proposals address three fundamental areas that comprise the cornerstone of any meaningful reform and the foundation for future progress. They are, 1) Resource Allocation, 2) Committees and, 3) Member Items.

Under the current system, the leaders of the Assembly and Senate exercise complete control over the distribution (or not) of resources among their membership. In effect, silencing members – and by extension the public-at-large who they represent – from voicing any discontent with the current system. As such, the Committee recommends the following changes: 1) equal funding (i.e., “base amount”) for all members regardless of party affiliation or seniority, and 2) authorizing committee chairmen to hire their own professional staff.³

By providing a “voice” to individual members and committee chairmen, the Legislature’s committees can fulfill their proper role as the crucible in which good public policy is formed. To that end, the Committee recommends that: 1) all bills reported to the legislative floor be accompanied by a comprehensive committee report; 2) before bills are reported out of committee they are openly considered with an opportunity for amendment; 3) three or more members of a committee may petition for a hearing on a bill or for an agency oversight hearing and, 4) three or more members of a committee may petition for a vote on a bill pending before it.⁴

Compounding the inertia of the current committee structure are two other legislative mechanisms - the discharge motion and the conference committee. Instead of fostering progress and resolution of legislative issues, they have been transformed into procedural impediments.

¹ Azi Paybarah, *News Flash: Albany Never Changes, Spitzers come and go, but Seminerios are forever*, *The New York Observer*, April 8, 2007 (quoting Assemblyman Anthony Seminerio (D-Queens), *see generally* <http://nyobserver.com>).

² Id.

³ *See infra* pp. 11-12.

⁴ *See infra* pp. 12-14.

To restore their intended use and effectiveness, the Committee proposes that: 1) any member may petition for the discharge of a bill from committee without the sponsor's prior approval; 2) discharge motions shall be allowed 20 days after a bill has been referred to a committee and five days before the end of the session; 3) there shall be no limit on the number of discharge motions within a legislative session and, 4) when bills addressing the same subject have been passed by both chambers, a conference committee shall be convened at the request of the prime sponsor from each chamber or the Speaker and Majority Leader.⁵

Finally, member items are a set of appropriations singled out by members and the leaders for local pet projects. Not unlike congressional "earmarks," the funds are outside of the normal budgetary process and are used by the leadership to cement their control over the rank-and-file membership. To bring accountability and transparency to the system, the Committee proposes that all member items: 1) be disclosed in budget bills; 2) include the name of the sponsor, recipient of the funds and amount of funding; 3) be disclosed on the Legislature's website; and, 4) be directed to public non-profit entities only.⁶

At the dawn of the 21st century New York State faces some of the most complex issues it has ever had to face before. To meet these challenges the Legislature must be able to deliberate and thoroughly consider the options and implications of its actions. These "Fundamentals" are an integral part of strengthening the Legislature and making it more representative and deliberative so that it can solve the issues such as, health care, education, security and the environment.

⁵ See *infra* pp. 14-15.

⁶ See *infra* pp. 15-17.

INTRODUCTION

For many in academia, government, the media and the public, the phrase “three men in a room” symbolizes all that is wrong with state government and the culture of Albany. It crystallizes the simple truth that the Governor, Assembly Speaker (“Speaker”) and Senate Majority Leader (“Majority Leader”) “largely control the state government.”⁷ Consolidating so much power among three individuals seriously undermines the fundamental principles of democracy and the purpose of representative government.

Many of New York State’s problems in achieving a truly representative government can be traced to the “dysfunctional legislature”⁸ and the rules that allow two individuals to control the entire legislative branch of government. Specifically, the strength of the Speaker and Majority Leader has been characterized as a “stranglehold” on New York lawmaking, with members having “little more than cheerleading rights.”⁹ The long-term deleterious effects of this system have even led the Legislature to admit that it must seek ways to “increase accountability and help rebuild public confidence in New York State government.”¹⁰

The negative effects of the current system are many and far-reaching, from the failure to craft good public policy to chronic delays in the passage of an annual budget. This system of governance and policymaking has had and continues to have a harmful effect upon legislation and public policy that puts the issue of “Rules Reform” squarely within the jurisdiction of the Committee on State Affairs (“Committee”) – i.e., legislative and public policy issues facing New York State together with enriching public debate and improving public governance.

As practitioners and representatives of a wide variety of members of the public before the courts and administrative agencies of the state, the Association of the Bar of the City of New York (“City Bar”) and its members have a vital interest in ensuring that government functions properly – upholding the fundamental cornerstones of separation of power and checks and balances – in order to keep that power functioning efficiently. In addition to their role as practitioners, members of the City Bar are individual citizens with a right to be heard on the important issues facing policymakers - such as, healthcare, education, taxation, security and mass transit.

⁷ Danny Hakim, *Albany Expected to Join Rush To Move '08 Primary to February*, NY Times, March 6, 2007, at B4.

⁸ In July 2004, the Brennan Center for Justice at New York University School of Law issued a report that called the New York State Legislature the most “dysfunctional” in the nation. (Jeremy M. Creelan & Laura M. Moulton, Brennan Center for Justice at New York University School of Law, *The New York State Legislative Process: An Evaluation and Blueprint for Reform*, at 3, (July 21, 2004)) available at http://www.brennancenter.org/dynamic/subpages/albanyreform_finalreport.pdf.

⁹ Interim Report of the Special Committee on State Governance of the Association of the Bar of the City of New York, *Suggestions re: Changes in the Rules of the Two Houses of the State Legislature*, at 1 (December 18, 2000) [hereinafter *ABCNY Special Committee Report*]; citing *Shining the Light on Albany*, NY Times, Nov. 30, 2000, at A 34.

¹⁰ St. Sen. Joseph L. Bruno, Maj. Leader, St. Sen. Dale M. Volker, Co-chairman & St. Sen. Frank Padavan, Co-chairman, New York State Senate Task Force on Government Reform, *Open, Accountable, Responsive Report on 2005 Senate Rules Changes*, (January 6, 2005) [hereinafter *State Senate Task Force on Gov’t Reform*].

To that end, the Committee has developed a package of reform proposals (“the Fundamentals”) centering on three specific areas:

- Resource Allocation,
- Committees, and
- Member Items.

These recommendations form a foundation upon which the larger macro issues of health care, education and the budget (to name a few) may be addressed and solved. Moreover, these “Fundamentals” are an initial step in reforming the legislative process and a basis for further refining the efficiency and productivity of public policy making and debate in New York State.

BACKGROUND

THE PROBLEM

For the last 100 years the New York Legislature has struggled with the issue of rules reform. By the dawn of this century the media had begun characterizing the legislative leadership’s control over New York lawmaking as a “stranglehold,” with members having “little more than cheerleading rights.”¹¹ In effect, stifling legislators’ voices and discouraging active participation – fueling public skepticism and legislation that was all too often, unsound or poorly worded.¹²

In 1918, State Senator George F. Thompson observed that, “[s]ix years of experience have taught me that in every case the reason for the failures of good legislation in the public interest and the passage of ineffective and abortive legislation can be traced directly to the rules.”¹³ In announcing his candidacy for President pro tem, of the Senate, he appealed for support on the platform of *reforming the senate rules* (emphasis added).¹⁴

Senator Thompson understood that “[p]arliamentary law is the code of rules and ethics for working together in groups.”¹⁵ It is the “means of translating beliefs and ideas into effective group action. It is logic and common sense crystallized into law, and is as much a part of the body of law as is civil or criminal procedure.”¹⁶ Parliamentary procedure facilitates the transaction of business within a legislature. It ensures that all members have equal rights, privileges and objectives; protects the rights of the minority; and, provides for a full and free discussion of every proposition presented for discussion.¹⁷

¹¹ *Shine the Light on Albany*, NY Times, November 30, 2000, at A 34.

¹² *ABCNY Special Committee Report*, supra note 9, at 1.

¹³ *Thompson Asks Aid for Senate Reform*, NY Times, December 23, 1918, at 5.

¹⁴ *Id.*

¹⁵ Alice Sturgis, *The Standard Code of Parliamentary Procedure*, at 2 (4th ed. 2001).

¹⁶ *Id.*

¹⁷ *Id.* at 7.

In July of 2004, the Brennan Center for Justice at New York University School of Law issued a report comparing the New York Legislature with those in the other 49 states and Congress. In short, the Brennan Center concluded that the New York Legislature was – “the most dysfunctional in the nation.”¹⁸ The report struck a nerve and by November 83 business, civic, good government, labor, religious and watchdog organizations, from around the state, coalesced to form the Albany Reform Coalition (“ARC”).¹⁹

With the issue of reform foremost in the voters’ minds, the Republican Senate majority created a Task Force on Government Reform to review the operation of state government, identify ways to improve the efficiency and quality of government services, increase accountability and help rebuild public confidence in New York State government.²⁰

The Task Force found that, “twenty years of late state budgets [were] the most obvious symptom of the need to improve the operation of state government.”²¹ It went on to examine the Senate’s proposed rule changes for January of 2005 and concluded that they were “designed to make the Senate’s operation more efficient, reduce gridlock and logjams, and empower committee chairs and rank-and-file members.”²²

¹⁸ Creelan & Moulton, *supra* note 8, at 3.

¹⁹ The Coalition included the: Amherst Chamber of Commerce, Buffalo Niagara Partnership, Business and Professional Women/NY State, Business Council of Westchester, Center for an Urban Future, Center for Constitutional Rights, Center for Governmental Research, Chautauga County Chamber of Commerce, Children’s Aid Society, Citizen Action of New York, Citizens Budget Commission, Citizens of New York for Legislative Reform, Citizens Union of the City of New York City Project, Common Cause/NY, Community Service Society of New York, Democracy for the Mohawk-Hudson Region, Democracy for New York City, Democracy Matters, Demos: A Network for Ideas and Action, Digital Rochester, Drug Policy Alliance, Edmund U. McMahon, Jr., Manhattan Institute for Policy Research, Environmental Advocates of New York, Exodus Transitional Advocates of New York, Fifth Avenue Committee, Finger Lakes Democracy for America, Greater Binghamton Chamber of Commerce, Greater Syracuse Chamber of Commerce, Greater Upscale Law Project, Inc., Headquarters Staff Union, HELP USA, Hudson Riverkeeper, Human Services Council of New York City, Hunger Action network of New York State, Interfaith Alliance of Rochester, Jews for Racial & Economic Justice, League of Women Voters of Bronxville, League of Women Voters of Buffalo/Niagara, League of Women Voters of New York City, League of Women Voters of New York State, League of Women Voters of Utica/Rome, League of Women Voters of Westchester, Long Island Alliance for Retired Americans, Make the Road By Walking, Manufacturers of New York, Metropolitan Council Housing and Redevelopment Authority, Monroe County Independence Party, National Council of Jewish Women – NY Section, National Federation of Independent Business – New York, National Nonpartisan Voter Education Campaign, Natural Resources Defense Council, New Democratic Majority, New Leadership Democratic Club, New York ACORN, New York Civil Liberties Union, New York Lawyers for the Public Interest, New York League of Conservation Voters, New York Public Interest Research Group, New York State Business & Professional Women’s Club, Inc., New York State Coalition Against Sexual Assault New York State Tenants and Neighbors Coalition, New York State Senior Action Council, Inc., Niagara USA Chamber, Nonprofit Coordinating Committee of New York, Inc., Onondaga Citizens League, Onondaga County Conservative Party, Otsego Chamber of Commerce, Plainville Farms, Inc., Printing and Imaging Association of New York State, Inc., Professional Staff Congress, Richmond Hill Quality of Life Commission, Rochester Downtown Development Corporation, Rockland County Business Association, Safe Horizon, Schuyler Center for Analysis and Advocacy, Urban Justice Center, Welfare Rights Initiative and Women’s City Club of New York.

²⁰ *State Senate Task Force on Gov’t. Reform*, *supra* note 10, at 1.

²¹ *Id.* at 3.

²² *Id.* at 2.

Also hearing the public's outcry, the Assembly sought to change the way it did business. In general, the "Stringer Resolution"²³ sought equal funding and allocation of resources - including office space - among members, an end to the practice of empty-seat voting and an increase in the role of committees, including the use of conference committees to resolve differences in legislation between the two chambers.

Many of the reforms centered on the functioning (or not) of committees – in both the Senate and Assembly – particularly the failure to issue reports and hold hearings on major pieces of legislation. For example, the Senate Task Force noted that, “[e]ach year, ***thousands of pieces of legislation are considered and passed into law by the Senate***”(emphasis added).²⁴ Interestingly though, the Task Force admitted that, “[i]n addition to regularly scheduled committee meetings to discuss, examine and act on legislation, ***Senate Standing Committees routinely conduct public hearings on legislation and proposals dozens of times throughout the year***” (emphasis added).²⁵

The Brennan Center found that, “[i]n the Senate, out of the 152 pieces of major legislation that were ultimately passed into law from 1997 through 2001 for which complete data were available, only one bill was the subject of a hearing devoted specifically to its consideration (*i.e.*, 0.7%).”²⁶ “[I]n the Assembly, out of the 202 pieces of major legislation that were ultimately passed into law from 1997 through 2001 for which complete data were available, only one bill was the subject of a committee hearing (*i.e.*, 0.5%).”²⁷ There were only nine instances where hearings were held on the general topic of a bill.²⁸

In light of these facts and the pressure exerted by the ARC²⁹ the Senate and Assembly changed their rules for the legislative session beginning in January 2005. The leaders in Albany were quick to hail their achievements as, “the most significant changes that have been made in half a century.”³⁰ Senate Majority Leader Joseph L. Bruno remarked that, “[i]t’s important to point out that *these reforms are the first step, not the last*, in our overall government reform effort (emphasis added).”³¹

Notwithstanding the leaders’ assertions that both chambers would become more open and deliberative, it was observed that the “changes [were] unlikely to fundamentally change the extreme power the leaders of each house [would] wield over their members.” Specifically, the leaders retained “control over everything from committee assignments to

²³ The proposed rule changes became known as the “Stringer Resolution,” named for its sponsor, Assemblyman Scott Stringer (67th AD - Manhattan). Many of the Stringer reforms mirrored those contained in the Brennan Center report, *see also supra* note 8. In November of 2005 Assemblyman Stringer was elected as the Borough President of Manhattan. Some political pundits have speculated that part of the reason why Stringer won the election was his push for rules reform in the Assembly.

²⁴ *State Senate Task Force on Gov’t. Reform*, *supra* note 10, at 7.

²⁵ *Id.* at 8.

²⁶ Creelan & Moulton, *supra* note 8, at 7.

²⁷ *Id.* at 8.

²⁸ *Id.*

²⁹ On January 6, 2005, ARC organized a “New Year – New Rules Rally” in which hundreds of people from around the state descended upon Albany to demand legislative rules reform.

³⁰ Michael Cooper, *In Radical Shift for Assembly, To Vote, They Must Show Up*, *NY Times*, January 7, 2005, at B7 (quoting Assembly Speaker Sheldon Silver).

³¹ *Id.*

office space and parking spots, and were still able to largely control which measures [would be] allowed to pass their houses.”³²

In the aftermath of these changes the Legislature passed its first on-time budget in 20 years. Despite the optimism that this legislative feat created the underlying function of the Legislature remains unchanged. The 2005 rules changes did nothing to change “the power relationship within the chamber[s] or [limit the] leadership’s iron-clad control over legislation and the ability of members to get bills to the chamber floor for debate and vote.”³³

Members of the Legislature admit that the function of “passing laws” is still something at which they are least successful.³⁴ Whether the problem lies in the electoral process or rules reform, there is agreement that “[r]eform in Albany requires a credible, independent and active Legislature.”³⁵

The Legislature and its leaders admit that reform is an ongoing issue that must be addressed. This is supported by a recent poll that found 47% of respondents citing legislative dysfunction and the Brennan Center reforms as their top priority.³⁶ As such, legislative rules reform is an important and relevant issue that requires the attention of the effected parties – albeit individual citizens, members of the Legislature, the Governor, or legal practitioners and scholars.

APPLICABILITY – “Relevance”

Rules reform is not an end in and of itself. Rather, it is the crucial *first step* in enabling the Legislature to become a deliberative and policy making body that is capable of addressing and solving important policy issues facing New York State, that are “more complex than ever.”³⁷ Rules reform is only one piece of a greater reform agenda that the public and newly elected Governor seek to achieve.

Following-up on the ARC “New Year - New Rules Rally,” approximately 90 groups – including good government, civic, business and activists - from across New

³² Cooper, *supra* note 30, at B7.

³³ Lawrence Norden, David E. Pozen & Bethany Foster, Brennan Center for Justice at New York University School of Law, *Unfinished Business: New York State Legislative Reform 2006 Update*, at 4 (October 11, 2006), available at http://www.brennancenter.org/dynamic/subpages/download_file_37893.pdf.

³⁴ Assemblyman Richard L. Brodsky, *The Legislature You Don’t Know*, NY Times, March 4, 2007, City Section, at 11. Specifically Assemblyman Brodsky asserts that a successful legislature will do three things well: pass laws; provide ordinary people access to power and enable them to influence decisions. He goes on to argue that the problem is “genuine institutional failure” and that the Legislature has not reformed the electoral process – citing instances of law-breaking and special interests that are “too powerful.”

³⁵ *Id.*

³⁶ The poll was conducted by the Daily Gotham - a local political blog focusing on issues related to New York City and New York State. Specifically, the question posed to readers was, “What’s your top New York political issue for 2007.” The poll was launched on February 27, 2007 and closed on April 3, 2007. The total number of respondents was 150 and was not adjusted for a margin of error – as it was not a scientific random poll. Coming in second was Election Reform with 14% or 21 out of a possible 150 votes, available at http://dailygotham.com/blog/bouldin/daily_gotham_reader_poll_results.

³⁷ *State Senate Task Force on Gov’t. Reform*, *supra* note 10, at 4.

York formed the Reform NY coalition.³⁸ The Reform NY agenda includes not only rules reform but also, redistricting, budget, ethics and campaign finance/election reform proposals. On May 3, 2005 and thereafter on May 6, 2006 and April 23, 2007, the Reform NY coalition staged a “Reform Day” event in Albany to heighten public awareness of these issues.

While each of the reform proposals seeks a different goal, they share one common element – each requires legislative action³⁹ before they can be achieved. The Governor has recently sought to overhaul New York’s campaign laws. He “ha[s] made campaign finance reform one of the top priorities of his administration and ha[s] [been] negotiat[ing] the issue with legislative leaders for [the past few] months.”⁴⁰ Predictably, “[h]is failure to sway the Legislature on campaign finance could be viewed as his latest lesson in the intractable way of doing business in Albany.”⁴¹

Reform proposals are not the only policy casualties of the “dysfunctional legislature.” A flawed legislative process too often means inaction on important issues,

³⁸ The Reform NY coalition has included: Acorn, Amherst Chamber of Commerce, Association of the Bar of the City of New York, Brennan Center for Justice, Business and Professional Women/NY State, Business Council of Westchester, Capital Region Professionals for Spitzer/Democracy for the Hudson-Mohawk Region, CBGNY, Center for an Urban Future, Center for Constitutional Rights, Center for Governmental Research, Centerstate, Citizen Action, Citizens Budget Commission, Citizens of New York for Legislative Reform, Citizens Union, Common Cause/NY, community Service Society of New York, Democracy for America, Democracy for Hudson-Mohawk Region, Democracy for New York City, Democracy Matters, Demos, Empire Justice Center/Western NY Law Center, Exodus Transitional Community, Inc., Fifth Avenue Committee, Greater Syracuse Chamber Commerce, Headquarters Staff Union, HELP USA, Hudson Riverkeeper, Human Services Council of New York City, Inc., Hunger Action, Interfaith Alliance of Rochester, Interfaith IMPACT of New York State, KECLG, League of Women Voters of New York City, League of Women Voters of New York State, League of Women Voters of Bronxville, League of Women Voters of the Syracuse Metro Area, League of Women Voters of Utica/Rome, League of Women Voters of Westchester, Make the Road by Walking; Se Hace Camino al Andar, Metropolitan Council Housing and Redevelopment Authority (Metro HRA), Mohawk Valley Community College, Monroe County Independence Party, National Council of Jewish Women – NY Section, National Federation of Independent Business, National Federation of Independent Business – New York, National Nonpartisan Voter Education Campaign, Natural Resources Defense Council, New Democratic Majority, New Leadership Democratic Club, New York Civic, New York Lawyers for the Public Interest, New York League of Conservation Voters, New York State Business & Professional Women’s Club Inc., New York State Coalition Against Sexual Assault, New York State Tenants and Neighbors Coalition, New York Statewide Senior Action Council, Niagara USA Chamber of Commerce, Nonprofit Coordinating Committee of New York, Inc., New York Civil Liberties Union, New York Public Interest Research Group, Onondaga Citizens League, Otsego County Chamber of Commerce, Otsego County Democratic Committee, Plainville Farms, Printing and Imaging Association of New York State, Professional Staff Congress, Richmond Hill Quality of Life Commission, Rochester Business Alliance, Rochester Downtown Development Corporation, Rockland Business Association, Rome Area Chamber of Commerce, Safe Horizon, Save New York, Inc., SCAA, Sierra Cub/Atlantic Chapter, The Great Binghamton Chamber of Commerce, The Manufacturers Association of Central New York, The Voice: A monthly publication of the Chautauqua County Chamber of Commerce, Urban Justice Center, VOXPAX, Welfare Rights Initiative, Westchester County Association, Western New York Law Center, Women’s City Club of New York.

³⁹ Specifically, the Reform NY coalition sought: a hearing before the Legislature voted on the Governor’s bill to create a Commission on Public Integrity; amendments to the current campaign finance laws and a system of voluntary public financing for political campaigns; a statute adopting a single statewide voting machine; and, the creation of an independent redistricting commission.

⁴⁰ Danny Hakim, *Spitzer’s Campaign Reforms Stall as G.O.P. Senators Resist*, NY Times, April 24, 2007, at B2.

⁴¹ Id.

or the enactment of policies that are bad for New York. One issue is wetlands protection, which has languished in the Senate for the past few years. In 2005, 49 of 62 senators supported a measure to address the problem; yet, it was precluded from reaching the floor for debate and a vote.⁴² While inaction plagues wetlands protection, change (i.e., action) to New York's health care system, via the Berger Commission, has created other problems.

Specifically, in 2005 the Legislature decided to address the issue of New York's health care capacity and resource problem. The Legislature enacted Chapter 63 (Part K) of the Laws of 2005, which created the Commission on Health Care Facilities in the 21st Century ("Berger Commission" – named for the Chairman Stephen Berger). On November 28, 2006 the Berger Commission issued its final recommendations, including the closure of nine hospitals and seven nursing homes, along with the restructuring of approximately 50 other health care facilities, throughout the state.⁴³

As a result of the Berger Commission's findings and recommendations, no less than seven lawsuits have been filed seeking to enjoin and/or invalidate the commission and/or its recommendations.⁴⁴ Indeed, the State Affairs Committee and the Health Law

⁴² Norden, Pozen & Foster, *supra* note 33, at 18. The Brennan Center report outlines an entire "Case Study" on the issue of wetlands protection and the struggles of St. Senator Carl Marcellino (Syosset) and Assemblyman Thomas DiNapoli (Great Neck) to amend New York's wetlands preservation laws. The reason given for inaction being the Senate Majority Leader's refusal to place the bill on the "Active List."

⁴³ New York Lawyers for the Public Interest, *Commission on Health Care Facilities in the 21 Century: How Not to Change Health Care in New York*, available at http://www.nympi.org/pub/Berger_Media_Fact_Sheet.pdf.

⁴⁴ The suits include: St. Joseph Hospital of Cheektowaga; New York and Catholic Health System, Inc., (Plaintiffs) v. Antonia C. Novello, as New York State Health Commissioner; New York State Commission on Healthcare Facilities on the 21st Century, and George E. Pataki, as Governor of the State of New York, and the State of New York, (Defendants)., Index No. 11568/06, Supreme Court County of Erie (seeking injunctive relief under 42 U.S.C. §1983 to prevent implementation of the Berger Commission's recommendations as to the closing of St. Joseph Hospital); William E. Scheuerman, Individually and as President of United University Professions; United University Professions, and Dr. Umeshandra Patil, (Plaintiffs) v. State of New York; Eliot Spitzer, as Governor of the State of New York; Department of Health of the State of New York; Dr. Richard Daines, Individually and as Commissioner of Department of Health of the State of New York; Maryanne Gridley, Individually and as Executive Director of the Dormitory Authority of the State of New York; Commission on Health Care Facilities in the Twenty-First Century, and Stephen Berger, as Chair of the Commission on Health Care in the Twenty-First Century, (Defendants) and State University of New York; John R. Ryan, as Chancellor of the State University of New York; The Board of Trustees of the State University of New York; Thomas F. Egan, as Chairman of the Board of Trustees of the State University of New York; the State University of New York Health Science Center at Syracuse; Dr. David Smith, as President of the SUNY Health Science Center at Syracuse, and Crouse Hospital Inc., d/b/a Crouse Hospital, (Permissive Party Defendants)., Index No. 2474/07, Supreme Court County of Albany; The Albert Lindley Lee Memorial Hospital, (Plaintiff) v. The Commissioner of the New York State Department of Health; the New York State Department of Health; Eliot Spitzer, as Governor of the State of New York, and the State of New York, (Defendants)., Index No. 07-0509, Supreme Court County of Oswego (challenging the constitutionality of the legislation that created the Berger Commission as well as the execution of its purported legislative mandate); Danny Donohue, Individually and as President of the Civil Service Employees Association, Inc., Local 1000; AFSCME, AFL-CIO; Civil Service Employees Association, Inc., Local 1000; AFSCME, AFL-CIO; Helen Czerwinski; David Quimby; Ralph Sorrentino, and Barbara L. Taylor, (Plaintiffs) v. Richard F. Daines, as Commissioner of the New York State Department of Health; New York State Department of Health; Eliot Spitzer, as Governor of the State of New York, and State of New York, (Defendants)., Supreme Court County of Albany (Article 78 petition seeking to vacate and annul Defendants' actions involving the implementation of the Berger Commission recommendations); Mary McKinney and Mechler Hall

Committee of the Association of the Bar of the City of New York intend to file an Amicus Curiae brief on behalf of plaintiffs in McKinney, et al. v. Commissioner, et al..⁴⁵ Of particular note with respect to rules reform is the fact that the legislature never attempted to address the underlying policy issue of health care capacity and resources, prior to enabling and creating the Berger Commission in 2005.⁴⁶ Moreover, the Legislature never held any hearings with respect to the enabling legislation itself.⁴⁷ Note that, health care spending in New York State affects billions of dollars a year.

Indeed, the triggering provision of the enabling legislation required the Governor or the Legislature to specifically negate the recommendations of the Berger Commission, in order to prevent them from taking effect on December 31, 2006.⁴⁸ This is especially important as to the issue of rules reform because State Senator Jeffrey D. Klein and Assemblyman Peter M. Rivera have submitted affidavits complaining that they and their colleagues were never afforded an opportunity to vote on the Berger Commission recommendations.⁴⁹

Community Services, Inc., (Plaintiffs) v. The Commissioner of the New York State Department of Health; the New York State Department of Health and the State of New York, (Defendants), Index No. 6034/07, Supreme Court County of the Bronx (Order to Show Cause for temporary restraining order [TRO] enjoining Defendants from implementing the recommendations of the Berger Commission); Community Hospital at Dobbs Ferry, and St. John's Riverside Hospital, (Plaintiffs) v. Antonia C. Novello, as Commissioner of the New York State Department of Health; the New York State Commission on Healthcare Facilities in the 21st Century; Stephen Berger, as Commissioner of the New York State Commission on Healthcare Facilities in the 21st Century; George E. Pataki, as Governor of the State of New York, and the State of New York, (Defendants), Index No. 24650/06, Supreme Court County of Westchester (seeking to annul the actions of the Berger Commission pursuant to Article I, Section 6 of the New York State Constitution; the Fifth and Fourteenth Amendment of the U.S. Constitution; §107 of the Public Officers Law [POL]; Article I, Section 7 of the New York State Constitution; the New York State Administrative Procedure Act: Article III, Section 16 of the New York State Constitution and 42 U.S.C. §1983 & §1988); Cabrini Medical Center, (Plaintiff) v. Antonia C. Novello, as Commissioner of the New York State Department of Health; the New York State Commission on Healthcare Facilities in the 21st Century; Stephen Berger, as Commissioner of the New York State Commission on Healthcare Facilities in the 21st Century; George E. Pataki, as Governor of the State of New York, and the State of New York, (Defendants), Index No. 9015-06, Supreme Court County of Albany (seeking to annul the recommendations/actions of the Berger Commission pursuant to Public Officers Law [POL] §107; Article I, Section 6 of the New York State Constitution; the Fifth and Fourteenth Amendments of the U.S. Constitution; Article I, Section 7 of the New York State Constitution; the State Administrative Procedure Act; Article I, Section 10 of the U.S. Constitution; Article III, Section 1 of the New York State Constitution; Article IV, Section 7 and Article III, Sections 12, 13 and 14 of the New York State Constitution; Article III, Section 16 of the New York State Constitution and 42 U.S.C. §1983 and §1988).

⁴⁵ The caption is: Mary McKinney and Melcher Hall Community Services, Inc., (Plaintiffs-Appellants) v. The Commissioner of the New York State Department of Health; the New York State Department of Health and the State of New York, (Defendants-Respondents), No. CV01-1647-JO, Supreme Court of the State of New York, Appellate Division: First Department. The motion for leave to file the Amicus Curiae brief and all papers must be filed by May 11, 2007.

⁴⁶ Interviews with State Senator Eric Schneiderman and State Senator Jeffrey D. Klein, April 18, 2007 and April 19, 2007, respectively.

⁴⁷ Id.

⁴⁸ See generally, Chapter 63 (Part K) of the Laws of 2005.

⁴⁹ In McKinney, et al. v. Commissioner, et al., *supra* note 44, Senator Klein and Assemblyman Rivera submitted affidavits stating that: "No bill or resolution was voted upon in the Senate or the Assembly regarding the recommendations of the Berger Commission between December 1 and December 31, 2006. Legislators had no opportunity to accept or reject the findings of the Berger Commission before they became law." (Klein Aff. ¶6); "In the present case, both houses had no opportunity to accept or reject the findings of the Berger Commission, as no bill or resolution was adopted by December 31st." (Rivera Aff. ¶5).

Notwithstanding the outcome of the pending litigation, the point is clear – the legislative process in Albany is broken and in need of serious reform. As such, the following recommendations are put forth as a “fundamental” package upon which to build serious, credible and real reform for the Legislature and the way that Albany does business.

PROPOSED RULE CHANGES (“The Fundamentals”) – A Solution⁵⁰

The Committee has divided its “solution” into three equally important and fundamental areas that must be addressed, in order, to create real reform and sow the seeds for future change and progress. These areas are: Resource Allocation, Committees and Member Items.

RESOURCE ALLOCATION

The intractability of the problem is clear; it is not so much the goal(s) (i.e., solution(s)) as it is where and how to begin. Any solution should begin with the issue of whether or not the Legislature (i.e., the individual members) is capable of effectuating change.

In short, do members (and more importantly, the people they represent) really have a voice when they arrive in Albany? Certainly members are allowed to vote on specific pieces of legislation, but do they really have the freedom to speak their minds and therefore, express the will of their constituents (i.e., the public’s voice)? Under the current system the answers would be a resounding - No.

The current rules give the Speaker and Majority Leader complete control over each member’s funding for staff and office operations. As such, the leaders exercise a latent ability to control individual members’ freedom to disagree with their wishes. In effect, “members are discouraged from challenging their leader’s approach to specific legislation or to procedural rules.”⁵¹ Therefore, the members are prevented from advocating for any changes to procedural rules that could lessen the authority of the chambers’ leader – lest they are punished for their disloyalty.⁵²

In 2000, Assemblyman Michael Bragman (D-Cicero) sought to unseat the Speaker. As a result he was stripped of his leadership post, “including the perks and an extra \$34,500 a year that [went] with the position.”⁵³ Other supporters were stripped of their committee chairmanships. In a floor speech Assemblyman Bragman asserted that, “[m]any, many more [supporters] would have come forward if they had not feared reprisals.”⁵⁴

⁵⁰ It should be noted that these proposed changes are meant to be a whole package. They should not be adopted piecemeal as was the case with the Brennan Center reforms of 2004, for example.

⁵¹ Creelan & Moulton, *supra* note 8, at xiv.

⁵² *Id.*

⁵³ Tom Robbins, *Rebellion of the Hollow Men*, *The Village Voice*, May31-June 6, 2000, available at <http://www.villagevoice.com/news/0022.robbins.15258.5.html>.

⁵⁴ *Id.*

An empirical analysis of the distribution of funds and their expenditure by individual members has found that the most senior (i.e., presumably most loyal) members are given the bulk of the resources in each chamber.⁵⁵ Therefore, the rules should be changed to reflect those of the U.S. Congress – which allocates resources for office and staff equally among its members, regardless of party affiliation or seniority. To remedy the muzzling effect of the current rules, the following changes are offered.

- 1) **All members shall receive equal funding (i.e., “base amount”) for the operating costs and staff of their individual offices, regardless of the member’s party affiliation or seniority. Any additional resources provided for “extra” responsibilities shall be considerably less than the base amount and allocated using objective criteria, unrelated to party affiliation.**⁵⁶
- 2) **Each committee shall be authorized to hire its own professional staff. Adequate funding for professional staff, facilities and equipment shall be provided to each committee, and shall be allocated on a proportional majority-minority split.**⁵⁷

By allocating resources - for constituent services, staff and committee operations - equally and creating an environment free from fear of reprisal and protecting the status quo, members can address their primary duties of enacting laws and making public policy. The crucible for this function lies in the Legislature’s committee structure.

COMMITTEES⁵⁸

A properly functioning legislature must have a healthy and active committee structure so that legislation is properly reviewed, revised and crafted in an efficient manner prior to enactment. Through hearings committees solicit public input, balance competing interests, debate the merits and draft thoughtful legislation. As noted above, New York’s legislative committees rarely hold hearings on any piece of legislation before it is enacted into law.

The core problem these proposals seek to address is the concentration of absolute power in the hands of two individuals. It is not the intent of these recommendations to eliminate or reduce legislative leadership. Indeed, informed and active committees support a strong leadership model, through which the legislature can effectively provide a

⁵⁵ Norden, Pozen & Foster, *supra* note 33, at 30.

⁵⁶ *Id.* at 34.

⁵⁷ *ABCNY Special Committee Report*, *supra* note 9, at 4. Together these two rule changes are meant to create an intramural system of resource allocation similar to that used by Congress.

⁵⁸ For context, compare the number of committees in the New York Legislature with those of the U.S. Congress (whose jurisdiction is vastly larger than the State’s). The Assembly has 41 Committees, 23 Subcommittees, 14 Legislative Commissions and 15 Task Forces, available at <http://assembly.state.ny.us/comm/>. The State Senate has 31 Committees – available at <http://public.leginfo.state.ny.us/statdoc/scomlist.html>. The U.S. House of Representatives has 20 standing Committees, 3 Joint Committees, 1 Permanent Select Committee and 1 Select Committee – available at <http://www.house.gov/house/CommitteeWWW.shtml>. The U.S. Senate has 20 Standing Committees, 4 Joint Committees and 4 Special and/or Select Committees – available at http://www.senate.gov/pagelayout/committees/d_three_sections_with_teasers/committees_home.htm.

meaningful check on executive power, and through which a legislative body may be effectively administered. Moreover, as any observer of the United States Congress can attest, the strengthening of a committee system need not, and does not, make the leadership toothless - quite the opposite.⁵⁹

In effective legislatures, public committee meetings and hearings are the locus of the real policy debate. The special requirements of bicameral state legislatures necessitate special rules to meet their specialized needs; including a majority for a forum and delegating their duties largely to committees.⁶⁰ As such, committee reports constitute a very important guide to the purposes and meaning of legislation, for legislative, judicial and public use. In effective legislatures, committees also serve to counterbalance the power of the legislative leadership, and to offer a policy counterbalance to the political considerations that are often accorded undue weight in last-minute leadership decisions.⁶¹

The fact is New York's legislative committees are essentially moribund holding vehicles for legislation prior to a leadership determination of whether it should be considered.⁶² Of "the 308 major laws passed from 1997 through 2001, the median number of days between a bill's introduction and its passage was 10 in the Assembly and 35 in the Senate."⁶³ In the Assembly 40.3% (124 of 308 bills) were passed within five days or fewer of their introduction – in the Senate, 85 laws (27.6%) were passed within five days or fewer.⁶⁴

To increase debate and to provide the public with an understanding of the purpose and basis for its laws, the following changes should be adopted.

- 1) **All bills reported to the legislative floor must be accompanied by a public committee report that contains, at a minimum; purposes of the bill, change in previous law, estimated cost of the bill, if any, proposed source of revenue to cover such cost, section by section analysis, procedural history, committee or subcommittee votes, and any members' views of the bill.**⁶⁵
- 2) **Before being reported out of the committee, all bills must be openly presented and considered with an opportunity for amendment.**
- 3) **If three or more members of a committee petition for a hearing on a bill or an agency oversight hearing, such consideration or hearing shall take place unless the petition is rejected by a majority vote of the committee.**

⁵⁹ *ABCNY Special Committee Report, supra* note 9, at 4.

⁶⁰ Sturgis, *supra* note 15, at 4.

⁶¹ *ABCNY Special Committee Report, supra* note 9, at 3.

⁶² *Id.*

⁶³ Creelan & Moulton, *supra* note 8, at 5.

⁶⁴ *Id.*

⁶⁵ It should be noted that under the current rules, a "memo" is attached to a bill when it is introduced. In usually no more than a few paragraphs, the sponsor summarizes the provisions and purpose of the bill. *See also* Creelan & Moulton, *supra* note 8, at 11.

- 4) **If three or more members of a committee petition for a vote on a bill, the chair shall schedule such vote as soon as practicable in the current legislative session and in any event no later than ten days before the end of the session.**

Discharge motions

In order to prevent a bill from simply languishing in committee, legislatures require committees to report all bills referred to them for consideration.⁶⁶ In New York it is more difficult than anywhere else in the country for a bill to be discharged from committee. Committee chairmen are granted the authority to determine whether a bill will be voted on by a committee and generally will not allow such a vote without certainty that it will receive unanimous support, creating an insurmountable barrier to any bill that does not have the chairperson's support and, as such, the support of the Speaker or Majority Leader.⁶⁷

As such, the following changes are recommended to break the leadership's "hammerlock" of control over important and broadly supported legislation.

- 1) **Any elected member of the chamber shall be allowed to make a motion to discharge a bill from a committee and the sponsor's agreement shall not be required.**
- 2) **Motions to discharge shall be allowed at any time after 20 days has passed since the bill was referred to the committee and until five (5) days before the end of the legislative session.**
- 3) **There shall be no limit on the number of motions to discharge within a legislative session.**

Conference Committees

Conference committees are routinely and widely used by the U.S. Congress and state legislatures to reconcile differences between bills passed by the two houses of a legislature to produce a single law that can be passed by both.⁶⁸ The Legislature in New York does not have any established automatic mechanism for conference committees. Thus, the only existing mechanism to resolve differences between the two chambers' bills is a closed-door negotiation between the Speaker and Majority Leader.⁶⁹

As such, the people – through their representatives - are effectively prevented from having any voice or input into the final version of any law that is presented to the Governor for signing.

⁶⁶ Creelan & Moulton, *supra* note 8, at 14. Indeed, at least 21 out of 99 legislative chambers have such a requirement and approximately half of all legislative chambers impose a deadline for committee action.

⁶⁷ *Id.*

⁶⁸ *Id.* at 35.

⁶⁹ *Id.*

To solve this problem the following proposal is recommended.

When bills addressing the same subject have been passed by both chambers, a conference committee shall be convened at the request of the prime sponsor from each chamber or the Speaker and Majority Leader. Such committee shall convene for a “mark up” session within two weeks of such a request to reconcile the differences in the two chambers’ bills before final passage. These sessions shall be open to the public and shall be transcribed.⁷⁰

MEMBER ITEMS

By silencing members through their absolute control over resources and thwarting their ability to move legislation - either through committee or to the floor – the Speaker and Majority Leader ensure the continuation of their “stranglehold” over the system through “member items.” In short, member items are a set of appropriations specifically delineated by members and the leaders for local pet projects.

Just as office space, supplies, parking spots and other perks are handed out by the leaders to rank-and-file members, to curry favor or ensure compliance with their wishes – “member items” are distributed to members based on their loyalty and/or seniority in the Legislature.

In 2006 the Legislature set aside \$200 million for individual projects known as “member items.” This money was divided between the Assembly, Senate and Governor, with the Legislature splitting \$170 million and the Governor controlling the remaining \$30 million.⁷¹ Aside from being outside of the normal budgetary process and public review, these funds help facilitate the continuing culture of Albany.

“In state budgets, the legislature has authorized New York to direct public authorities to borrow hundreds of millions of dollars to pay for discretionary grants to be selected at a later date.”⁷² From 1997 to 2004, the Governor, Majority Leader and Speaker controlled “more than \$1 billion from discretionary grant programs, which have been called New York’s ‘secret government.’”⁷³

⁷⁰ Creelan & Moulton, *supra* note 8, at xiii; this rule was part of the “Stringer Resolution” in January 2005.

⁷¹ Danny Hakim & Margot Williams, *Assembly Lists Recipients of Funds for Pet Projects*, NY Times, November 28, 2006, at B1, available at <http://www.nytimes.com/2006/11/28/nyregion/28pork.html?ex=1322370000&en=30d1f1e72d32706f&ei=50888partner=rssnyt&emc=rss>.

⁷² Michelle Breidenbach & Mike McAndrew, *Play Ball or Else - Disagreeing with the Governor or the Legislative Leaders Can Prove Costly*, The Post-Standard, October 19, 2004, available at, <http://www.syracuse.com/news/nyslshfunds/poststandard/story9.html>.

⁷³ *Id.*

“The loose rules and lack of accountability in the grant programs allows the three leaders to reward allies and punish rivals.”⁷⁴ “[E]very member is petrified. If they don’t play ball, they’re not going to get any funds.”⁷⁵ If they do play ball, Democratic Assembly members and Republican senators win access to money, which they use to announce grants during election season.⁷⁶

It is axiomatic that members of the Legislature must deliver for their constituents - in order to justify their presence and return every two years. Indeed, many projects are worthy expenditures and warrant special attention. However, the Committee is troubled by the lack of transparency and accountability for these funds.

Of particular concern is the leaders’ influence in the expenditure of these funds. An analysis reveals that member items, from fiscal year ’04 through fiscal year ’07, totaled \$537,490,128. During this period, the Speaker alone requested \$30,396,200 and another \$11,091,500 was requested or appropriated in conjunction with other members. The number is staggering and the temptation for abuse is clear.

Late last year, a New York state senator was indicted for allegedly using \$400,000 in member item money – appropriated for charities in his district – for personal expenses and luxuries for himself and his family.⁷⁷ When he announced the charges, Michael J. Garcia, the United States attorney for Manhattan, noted that the “indictment pointed out the risk of corruption inherent in the Legislature’s practice of setting aside a pot of money for member items, the pet projects of individual lawmakers in their districts.”⁷⁸

Whether they are called “member items” or “earmarks,” this system of dispensing public funds is corroding the legislative branch of government. Earlier this year a Congressman on the powerful House Appropriations Committee gave up his seat as a result of being linked to “three inquiries to accusations that committee members accepted bribes in exchange for earmarking federal money to certain projects.”⁷⁹

In 2007, \$170 million of pet projects were divvied up between the Assembly and Senate.⁸⁰ The Attorney General has set up new procedures for vetting these projects, yet there are no details identifying the sponsor of the particular spending item in the budget or what the item is being used for, even though each is identified by party and as coming from either the Senate or Assembly.⁸¹

⁷⁴ Breidenbach & McAndrew, *supra* note 72.

⁷⁵ *Id.*, quoting Assemblyman Michael Bragman (D-Cicero).

⁷⁶ Breidenbach & McAndrew, *supra* note 72.

⁷⁷ Anemona Hartocollis, *N.Y. State Senator Is Charged With Stealing More Than \$400,000*, *NY Times*, December 14, 2006, available at <http://travel.nytimes.com/2006/12/14/nyregion/14senator.html>.

⁷⁸ *Id.*

⁷⁹ Neil A. Lewis, *2nd House Republican Yields Committee Post*, *NY Times*, April 21, 2007, at A12. Indeed, the lobbying scandals that plagued Congress in 2005 and 2006 were often times directly linked to the system of “earmarking” legislation – i.e., tacking pork barrel projects for special state or local projects onto federal legislation. According to the Congressional Research Service, pork barrel spending rose from \$29.11 billion in 1994 to \$52.69 billion in 2004, during that same time the number of projects rose from 4,155 to 14,211.

⁸⁰ Danny Hakim, *A Budget That Covers All the Bases*, *NY Times*, April 9, 2007, at B1.

⁸¹ *Id.*

The \$170 million figure has been widely reported; yet, an analysis by the Manhattan Institute’s Empire Center - of the four major budget bills for 2007-08 - has “turned up only \$101 million in individual appropriations listed under various subtotals for the ‘community Projects 007’ account, which traditionally is the funding source for legislative member items.”⁸² As usual, “there was no opportunity for public scrutiny of the member item list in advance of the budget vote.”⁸³

Recently for the first time, the state Assembly has issued an official list of 2007-08 ‘Legislative Initiatives’ – a.k.a. member items – in a regular budget cycle.⁸⁴ The list discloses the names of sponsors, a brief description of the purpose of each grant and the name of the project director for the agency receiving the money.⁸⁵

What remains unclear is whether all the grants were itemized. The Empire Center was only able to identify 2,412 items out of roughly 5,800 obvious member items in the four major budget bills – the Assembly list consisted of “3,791 pages, with each paged representing a separate item for both Majority (Democrat) and Minority (Republican) members.”⁸⁶

As these projects and allocations are granted for legitimate and deserving purposes, the Committee believes that they should be subjected to the light of the overall legislative process. As such the following rule change is proposed.

All Member Items must be:

- a) Disclosed in budget bills and include the:**
 - i. name of the sponsor,**
 - ii. recipient of the funds and**
 - iii. amount of funding.**
- b) Disclosed on the chamber’s website.**
- c) Directed to public, non-profit entities only.⁸⁷**

One of the most ubiquitous policy goals of Rules Reform is “increasing accountability and restoring public confidence in New York State government.”⁸⁸ By adopting this rule and the others contained in this package, the Committee believes that the goals of a functioning and accountable legislature will be furthered. Moreover, the Legislature will go a long way towards restoring the public’s confidence in its political and government institutions.

⁸² E.J. McMahon, Matt Smith & Kathryn McCall, Empire Center for New York State Policy, *Albany Oink*, '07-08 Edition, April 10, 2007, available at <http://www.empirecenter.org/2007/04/Oink07.cfm>.

⁸³ Id.

⁸⁴ Empire Center for New York State Policy, *Assembly Issues Official Pork List*, April 17, 2007, available at <http://www.empirecenter.org/2007/04/AssemblyPorkList0708.cfm>.

⁸⁵ Id.

⁸⁶ Id., *see also supra* note 82.

⁸⁷ Senate Minority Reform Package, January 2007. Part of a Reform Package offered by the Senate Minority in January of 2007, prior to the adoption of the current rules for this legislative session.

⁸⁸ *State Senate Task Force on Gov’t. Reform*, *supra* note 10, at 1.

CONCLUSION

The New York Legislature long ago abandoned the ethical framework of parliamentary law in favor of a culture of omnipotent legislative leaders to whom other elected members are subservient. Such a culture is insidious and fundamentally undemocratic. Until the legislative culture changes, the people of the state of New York cannot hope for a legislature that truly represents their interests.

The continued use of “three men in a room” as the preferred approach for policymaking in New York will only prolong and imperil the state’s ability to address the vital issues that loom over the horizon of the dawning 21st century. “This is a rare reform moment – a once-a-generation opportunity to renew government and politics in New York.”⁸⁹ The adoption of these “Fundamentals” will allow the Legislature to function more efficiently and address the pressing public policy issues before it.

Ultimately the goal is to move the Legislature towards a more representative, deliberative and accessible body whose members are accountable for their actions and who are able to perform their duties in an efficient manner. The Committee believes that these fundamental changes to the legislative rules will make the Legislature, stronger, more effective, and more democratic. We urge the Legislature’s leaders and the members of the Assembly and Senate to consider and ultimately adopt these changes in January of 2008 - at the beginning of its next session.

⁸⁹ Michael Waldman, *Executive Director, Brennan Center for Justice at NYU School of Law*, Preface, Norden, Pozen & Foster, *supra* note 33.