Legislative Devolution and Public Accountability

State constitutions and their amending are the products of "the broader political, social, economic, and historical contexts of time and place" (Holland 2011, p. 2). We live in a period that has witnessed two conflicting political realities. The first is a professionalization of state legislatures (Benjamin 2003). The second is a global trend toward increasing public demand for more accountability from government, which is fundamentally defined as the transparency of government proceedings (Haque 1994, McGee and Gaventa 2010). American state electorates have not been immune to this political behavior (Alt and Lowry 2010). The legitimacy of any constitutional government rests in the sovereignty of the people. Our era is one that has made transparency a primary exemplar of that basic republican principle, prompting one scholar to call the first few years leading into this new century the "decade of openness" (Blanton 2002).

In New York State these two dichotomous political realities of legislative professionalization and public demand for transparency have reached their unhappy nadir. A set of permanent incumbents has taken control of the Statehouse over the past two decades. The incumbency rate in the New York state legislature has reached fully 90 percent (Galie and Bopst 2017, p. 3). Scholars note that most incumbents are "insulated from primary challenges as well" (Id., p. 3). Save the odd electoral upset or a particularly headline-grabbing criminal prosecution, such as the Skelos and Silver ethics cases, Albany's lawmakers and lawmaking system seem to operate outside of a genuinely deliberative constitutional process.

At the same time, there has been a growing public voice demanding change in New York State's egregious lack of accountability in its legislative process. That emergent pressure on Albany is most concretely represented by the proposal advocated by a group of leading scholars of state politics and public interest groups. They argue that New York should take advantage of its constitutional provision to hold a state constitutional convention this coming year in order to restructure the way its statehouse carries out legislative business. The New York Times reports that even Governor Andrew Cuomo tentatively supports a proposal for a constitutional convention for the sake of reform (July 5, 2017, July 6, 2017, New York Times) This is not a fringe idea. It is in the mainstream of any current reasonable conversation about how to effectively "clean up" Albany so that it no longer decides laws for one of the country's most powerful regional economies based on the final word of an entrenched cabal of legislators.

That cabal is most exemplified by the sadly accurate cliché summing up New York State government as governance ultimately by "three men in a room" (Lachman 2006). Former federal prosecutor, Preet Bharara, speaking at New York Law School in 2015, condemned Albany deal-making by these "three men in a room," namely the governor, the State Assembly speaker, and the State Senate majority leader, "who work in secret and without accountability to decide most vital issues. For decades, state government has been controlled by the three leaders. When they emerge from their closed door meetings, issues are usually settled, with no schedule or record of public debate. (January 23, 2015, New York Times)". The perks of office, such as funds for member items, which each chamber majority leader is able to dispense to legislative careerists who fall into line with their votes, only enhance this control (Lachman 2006, p. 34).

These three officials ultimately manage New York state government. They instruct legislative careerists in the Statehouse how to vote, they have hollowed out the committee process, and they have placed ethics to the side as not only the Skelos and Silver cases made clear in their "pay to play" schemes brought to light of day, but also the "criminal convictions of 29 sitting or former elected state officials between 2003 and 2016" (Galie and Bopst 2017, p. 2). Transparency seems very distant indeed when looking into the workings of how three men in a room have hijacked any semblance of a meaningful legislative process.

This paper aims to restore that republican virtue by advocating for the simultaneous implementation of just two basic reforms: a unicameral legislature (Benjamin 1997) and the concurrent revitalization of the committee system (Brennan Center 2004). We will summarize the central points in the extant literature already justifying these two reforms in detail, and then proceed to a detailed rendering of how their implementation can be worked out practically in an amended state constitution. While the two points themselves are not new, their coupling as the most salient reform agenda items are, as is a more specific description of how that coupling might actually work.

Why a Unicameral Legislature?

While there have been many proposals for the "broken" New York state legislature (Id. 2004, p. vii), we conclude that these two changes will be the most effectively transformational towards devolving power back to elected legislators away from three all-powerful men in a secluded room. There is an argument to be made for simplicity of

both message and content when available. These two reforms, if married, can achieve just that chance of actual success.

If the New York State legislature becomes unicameral there will be an upset of the bipartisan deal that has historically allowed for a permanent Democratic Assembly since 1975 and Republican Senate since 1965 (Sun and Lynch 2008, p. 224). Even a Democratic majority in the Senate as of 2017 has not uprooted historic Republic control of the body, because a group of Democrats has allied itself with Senate Republicans. It is this accepted division of legislative power by a class of incumbent careerists seeking only to retain their seats that facilitates government by private handshake between the majority party leader of each chamber (Lachman 2006). A unicameral legislature would throw off the yoke of a lack of competition for state legislative seats.

Imagine instead an actual competitive electoral process offered by genuinely partisan campaign battles seeking to capture a majority of seats in a single legislative chamber. This reform would likely diminish at least the guarantee of a fully professionalized legislature with de facto lifetime tenures in government. Rather, it would provide increased public accountability through the basic republican feature of procedural democracy.

In reference to talks between the leaders of the Assembly and Senate and the governor, Gerald Benjamin, perhaps the most expert scholar on New York state politics, recently remarked “I don’t like a three-way negotiation…Two-way is simpler and it’s easier to come to outcomes” (July 5, 2017, New York Times). Underlying Benjamin’s comment is not just a message attempting to devolve the complexity of what he has labelled the “triadic” relationship between the State’s Chief Executive and two chambers

of its current triadic legislature (Benjamin 2003, Benjamin 2004,). Benjamin points out additionally that, unlike the Federal Senate and House, there is no real distinction in the electoral basis of each chamber on the state level, since both the New York Assembly and the Senate are determined based on population, so that "it is no longer defensible" that are two different bases represented by a bicameral state legislature (Gotham Gazette quoting Benjamin, June 2, 2017). The Assembly consists of 150 members each representing a single district. The Senate is variable in terms of how many Senators may represent a single district, reaching 63 currently, but its default number is 50 members weighted towards New York City. Unlike federal bicameralism designed to ensure legislative fairness between states of varying population sizes, state bicameralism only furthers partisan reapportionment that distorts the Supreme Court's "one person one vote standard" (Benjamin 1997, p. 68).

While the original idea behind bicameralism in Albany was to provide healthy democratic competition over the legislative process (36 Fordham L. Rev. 307 (1967), it ended up only preserving an unwritten understanding allowing for a bipartisan partnership between careerists in the legislature. After all, as Benjamin bluntly puts it, "Professional legislators seek to hold onto their jobs" (2003, p. 9). Human self-interest has overwhelmed any original structural hope for an accountable democracy. Bicameralism on the state level in New York no longer makes any sense. It has been tried and it has failed.

Rebooting committees

Lachman notes that "in most modern legislatures, and certainly in Congress, committees are the center of legislative action" (2006, p. 47). However, as he goes on to write in citing the Brennan Center's devastating assessment of the democratic failure of Albany's committee system, "But not in New York" (Lachman 2006, p. 47). Finding that the Brennan Center scholarly findings matched up with his own anecdotal experience as a state senator, Lachman noted hardly any proposed bills – under 1 percent – ever received a public committee hearing (Id, p. 48). Legislators typically do not show up for committee meetings because elected legislators are expected to offer their votes based on proxy to their ruling party's ranking committee member based on how the chamber leader wants him or her to vote (Id., p. 30).

On the micro-level of the individual state assembly person or senator, there is no systemic way for an honest vote to devolve to any earnest elected official who arrives in Albany wanting to make a legislative difference. On the macro-level of constitutional democracy, the intention of a state constitution to allow for regional deliberative democracy is violated on a daily basis.

The most comprehensive set of reforms in this regard remains the Brennan Center's 2004 recommendations. Until this year, the legislature was the only body that could have voted on these changes, which has basically made them moot (Lachman 2006, p. 52). There is now a window to salvage some degree of constitutional integrity for New York state government by committee due to the prospect of a constitutional convention, and ultimately a voter referendum on reform if the convention occurs.

While we need not repeat here the Brennan Center's proposals*, these can be distilled down to two basic components: deliberation and openness. The heart of these detailed recommendations are the seemingly fundamental, but currently absent, requirements that legislators actually attend committee meetings, and that these meetings be forums open to the public and expert feedback. Transparency would be maintained through ongoing published records and reports of all committee proceedings. In addition, there would be public hearings on oversight over the agency relevant to a particular piece of legislation to ensure administrative implementation through the appropriate state agency (Brennan Center 2004, pps. viii-ix). Astoundingly, these core legislative behaviors are not now in place in New York.

Prospects for Democracy

We have selected and reviewed here the principles and reasons for two major overhauls of state government. Before concluding with a suggested emendation of the relevant language of Article III of the New York state constitution that covers the organization of the legislature, it is important to understand why we have chosen to combine these two proposals. The contribution of this paper is in this strategic coupling and its rationale.

Ultimately, we are dealing with an issue of government ethics. A corrupted legislative process begins and ends with corrupt legislators. Albany's statehouse has evolved into a club governed by three men who operate outside the boundaries of the democratic process, and that government by fiat has resulted in legislators more concerned with their

*See pages viii – x, Brennan Center for Justice, *The New York State Legislative Process: an Evaluation and Blueprint for Reform*, Jeremy M. Creelan and Laura M. Moulton, New York: NYU School of Law, 2004

own professional longevity than with good government. These are all too human consequences of a flawed system that has been allowed to flourish for decades. Ethics reform measures reported to date include changes such as making the prohibitions on members taking outside income, closing a loophole allowing large, largely anonymous donations from wealthy interests, and term limits (San Diego Union Tribune, December 13, 2015 David Klepper). However, these reforms are structural rather than penal, meaning that they are regulatory but do not actually act in a preventive manner in deterring in a very real, punitive manner the corruption of the public trust by individual legislators (Liebman 2017, p. 37). Legal scholar Bennett Liebman suggests that structural reforms are insufficient as corrections on widespread governmental ethics breaches. He seems to favor very detailed anti-bribery measures, but notes those have been ineffective in containing corruption in New York government since before the time of Boss Tweed (Id. 2017). Liebman's disheartening conclusion is that ethics reforms to date are insufficient, including those proposals made in anticipation of an upcoming constitutional convention. We must therefore think more broadly about the nature of state government itself.

A complete revamping of our legislature into one unicameral body with a transparent committee system envelops ethics reform, whether stated or not, by virtue of a more competitive, and therefore publicly accountable electoral process. It does not of course eliminate corruption altogether, but it provides some degree of containment by compelling a more deliberative electoral process from campaign to committee. At least

candidates and elected officials would be more individually bound and electorally pressured to meet constituent needs rather than just party leaders' demands.

But there is another dimension so far overlooked even by proponents of the marriage of unicameral legislators and a participatory committee process of transparent public proceedings. This platform offers a *clarity of message* that gives it a strategic advantage in advancing a progressive agenda. Clear, easily understood positions are typically more successful in political communication and eventual success as policy (Dewann and Myatt 2007).

The clearer the message, the more possible it is to actually realize. Ethics reform is viewed as too vague and debatable a term (Liebman 2017), but a unicameral legislature, for example, immediately conveys that we have moved from two chambers to one. If there is a constitutional convention, unicameralism and open committee meetings are messages quickly digested, enabling them to galvanize more support.

The New York State Constitution

Nebraska is the only state that has a unicameral legislature. It was a reform instituted to generate a less partisan body and it has worked. There are no party leaders in a small 49 person legislature, so that lawmakers can truly take bills on the merits of the issue. Furthermore, a unicameral legislature has supported a more open committee process. Finally, in terms of ethics, lack of the need for loyalty to legislative party leaders has resulted in less corruption because there are no majority chamber spokespeople to favor in exchange for member items of pay to play understandings (The Daily Beast, May 29,

2015, Betsy Woodruff). The clarity of message here has been matched by its substantive implications for a more competent and effective legislature.

Article III the New York State Constitution invests power in a bicameral legislature and then tellingly goes on to detail district apportionment for legislative candidates. This arena has been the source of partisan corruption in the New York statehouse leading to the three men in a syndrome dealt with in this paper. The other paper by this author offers a solution to gerrymandering if the Nebraska model is not adopted or accepted in full.

Article III of the Nebraska State Constitution is also brief but does not have to go through the complications of apportionment that the New York document does. In Section III -5 of the Nebraska constitution it abides clearly by the one person – one vote rule by stating unequivocally that any district approaching the population size requiring two legislators should be broken up into two districts, allowing for one legislator per district. The simplicity of the clause also sustains local representative democracy. The ethics hoped for by a clearer constitution based on a unicameral legislature also resulted in Nebraska in terms limits (Section III-12) and conflicts of interest clauses (III-16), neither of which is present in the New York constitution. A more effective and ethical legislative set of standards has unequivocally flowed from Nebraska's unicameral legislature.

The New York State Constitution ought to include language reinforces the one person one vote standard, and lays down clear guidelines for a transparent committee process. State constitutions are typically works of details informed by very particular local and regional interests, unlike the broadly grandiose prose of the federal constitution (Briffault 2003, p. 26). It is also important that sub-national constitutions reflect upon the

democratic process and the role of a non-federal legislative body (Id., p. 26), lest it end up corrupted after a few decades as has happened with the current iteration of New York's constitution. Local democracy matters because it is the democracy with which we live most moment to moment.

Ultimately, Briffault decides that the problem with the New York State legislature comes down to partisanship (2003, p. 24). He writes that because of the deeply embedded partisanship in a New York's bicameral legislature, in which the two party leaders of each chamber essentially determine the outcome of each legislative vote in a culture in which lawmakers do not need to show up for committee meetings or read bills, "there often is no real legislative vote" (Id., p. 24). A transformed unicameral legislature and committee system would clearly provide a more authentic legislative process. If we reach the point in New York of a constitutional convention, experts such as Benjamin, Galie, Bopst, and Briffault, might lead the way. It ought not be too arduous to come up with amending language for the New York State constitution given the Nebraska model.

Conclusions: Why do State constitutions matter anyway?

Briffault emphasizes that indeed, state constitutions matter because most governance ordinary citizens encounter everyday occurs at the subnational level. It is here, on the streets and in the institutions of our local regions and municipalities that we deal with "criminal justice, public safety, education, land use regulation, and neighborhoods" (2003, p. 24). While voters may pay less attention to state and municipal elections than to federal ones, state politics is in fact actually more salient on a daily basis, for it is at that level that most of our interactions with government occur (Id., p. 24). This is by way of

stressing the overriding democratic value of a state constitutional convention. Such an effort ought to be the priority not just of good government groups and a few dedicated experts. It should stand out also as a matter of importance to any political scientist or legal thinker who cares about the quality of our lives as citizens of a pluralist republic dedicated to the federalist model.

Galie and Bopst stated it most succinctly recently when writing "Regardless of what happens in Washington, we can adopt reforms that will correct the dysfunctions in government, reduce, if not eliminate, the pay – to – play culture in Albany, and place in our constitution policies and rights protections that reflect New York's distinct political culture. In an age of uncertainty and turmoil at the national level, we can seize the day" (2017, p. 4). Our goal is to find a way forward for state constitutions to address the need for a healthy democratic legislative structure that accounts for both government transparency and efficiency, allowing for full legislative participation while sustaining the public trust.

State constitutions, unlike the federal constitution, are finally reflections of the "diverse political complexion of each state" (Tarr and Williams 2006, p. 4). They are very local documents, idiosyncratic and deceivingly simple in their obvious concern about a reasonable local representation of competing interests.

Nonetheless, in the end, state constitutions are documents that determine the very essence of the government to which we most relate. It is the government of neighborhood and state, determining more than any other public regime the schooling local children receive, the physical security of our neighbors, and ultimately, the decency of our democracy.

The hallmarks of our era in its state politics consist of a legislative professionalization that has diminished the deliberative quality and productivity of our law-making capacity to legislate for the times in which we live, combined with a lack of even the most basic ingredients of transparency in American government such as a substantive and open committee process. Those trends must be reversed.

This study has provided the reasons and strategy as to how to accomplish that substantial goal. It serves to recall that, unlike previous studies advocating these changes, clarity of message is equally important for a successful effort to transform our politics. Pairing up two basic ingredients of state constitutional reform that can impact, in a political butterfly effect, other issues that also need constitutional amending, can be a powerful means towards a goal that is becoming ever more pressing in the State of New York.