

Introduction

As the first 10 years of the 21st century came to an end, writers and columnists searched for a name for this decade. More often than not their search was not satisfied. In the field of New York state government integrity and ethics, however, this decade could easily be known as the Decade of Upheaval. Indefensible behavior by government officials spanning the spectrum from embarrassing to criminal became more commonplace. The drumbeat for a statutory response grew and culminated with the passage of the Public Employee Ethics Reform Act of 2007. PEERA was purportedly designed to fully address the State’s ethics issues. Less than three years after its passage the law was under severe criticism for failing to address the problem and new “sweeping legislation” was under consideration, which would rollback certain PEERA “reforms” including abolishing the Commission on Public Integrity.

In New York, for more than 50 years since the Code of Ethics became law, state government officials have struggled with recrafting, redrafting, and retooling existing state statutes in the name of “sweeping change” to the ethics law which are packaged as a surefire way to end corruption in government. Each time, the law has fallen far short of the stated goal. But the blunt reality is that ethics statutes are often used as a foil for larger issues of personal behavior and corrosion of government processes. Ethics laws rarely have any chance of accomplishing the stark and lofty enforcement goals they are supposedly written to address, because unlike criminal statutes that is not the fundamental purpose of ethics laws.

The essence of ethics laws was succinctly captured by the Special Legislative Committee on Integrity and Ethical Standards in Government, which in 1954 stated:

This problem of ethical standards is not the simple issue of bribery and corruption on which there is no difference of opinion; it involves a whole range of border-line behavior, questions of propriety, and the question of conflict of interests …. Involved is not only the raw material of partisan politics but the lives and reputations of honorable men and women who have made a career of public service. Also involved are changing standards. Integrity in government has never been and probably never will be subject to an absolute standard…. Conduct in public office which was once condoned would now be universally condemned. A century ago it was taken for granted that legislators represented special interests; public officers who used inside information to feather their own nests were not condemned but envied; the use of public office for private gain was the order of the day. Today we have progressed far beyond these 19th century standards of political morality. The best evidence of this progress is that we…expect not only the fact of personal honesty but the absence of any reasonable suspicion of dishonesty or even impropriety.2

The landscape is littered with states and commonwealths including Kentucky, Connecticut, New Jersey, and now New York, which saw their version of the ethics laws and its regulators disintegrate under internal and external pressure. Often, the collateral damage of scandal washes over an ethics commission and the commission ends up being replaced with a “new and improved” commission (always of a different name), which in reality changes little.

With a seemingly perpetual cycle of failure or non-responsiveness, perhaps it is time to explore ethics and integrity issues in the context of the state constitution and to consider new ways to address erosion of government integrity at the state level.

I. The Role of Modern Ethics Regulation in State Constitutional Government

Following the Watergate scandal in the 1970s, Congress passed several pieces of legislation, most notably the Ethics in Government Act of 1978 (hereinafter “EGA”), designed to “repair the political process and rejuvenate public confidence in their elected officials.”3 The driving force behind
of power the Constitution sought to establish."5 Some have the three branches and the preservation of the equilibrium Act raised concerns about "the allocation of power among overlapping role under the federal Ethics in Government.

The backlash created by these new ethics laws, as well as those enacted subsequently, has been persistent, as public officers and employees have repeatedly challenged the legality of new laws regulating governmental ethics. Most frequently, the challenges have been to laws mandating disclosure of financial conditions, interests or relationships to the public. The public officers' weapon of choice, has, not surprisingly, been the Constitution of the United States. Public officials at all levels of government have challenged ethics laws on numerous constitutional grounds, including invasion of right to privacy, restrictions on the right to vote or hold office, discriminatory classifications, equal protection, due process, self-incrimination, vagueness, and over breadth. Although an exception to the general rule always exists, the state and federal courts analyzing these issues have generally found that financial disclosure laws do not offend the Constitution. Oftentimes, the courts primary justification for upholding these laws was the public's interest in deterring official corruption.

Along with the substantive regulations enacted by federal, state, and local governments also came a shift in the method of enforcement of ethics laws, from a concept of regulating legislatures who are directly answerable to the citizenry to an appointed commission enforcing the law against them. This too raises constitutional questions, as these newly created commissions, which were designed to deal with corruption within the executive and legislative branches of government, arguably could violate the separation of powers doctrine under certain circumstances. Justice Scalia recognized these concerns in his dissenting opinion in Morrison v. Olson, arguing that the judiciary's overlapping role under the federal Ethics in Government Act raised concerns about "the allocation of power among the three branches and the preservation of the equilibrium of power the Constitution sought to establish."6 Some have even analogized the power granted to the judiciary under the EGA to the English parliamentary system, arguing that:

The EGA creates a quasi-parliamentary system by merging the executive and judicial branches together for the purpose of investigating alleged criminal wrongdoing by high level officials. Fusing two branches of government for this limited purpose strengthens the judiciary branch at the expense of the executive branch. This shift in power is contrary to the intent of the Framers.6

Indeed, "no single branch of government may assume a power, especially if assumption of that power might erode the genius" of the system of checks and balances.7 "The erosion need not be great. Rather should we be alive to the imperceptible but gradual increase in the assumption of power properly belonging to another department."8 The mixed entity status enjoyed by ethics commissions, which can, at times, function in a legislative, executive, and judicial capacity, raises similar concerns to those recognized by Justice Scalia in Morrison.

In New York, as with the rest of the country, numerous constitutional issues relating to ethics laws enacted by the Legislature have been raised. In Watkins v. New York State Ethics Commission, for example, the plaintiff, a senior attorney with the New York State Department of Social Services, challenged the state's 1987 Ethics in Government Act provisions concerning financial disclosure on numerous federal and state constitutional grounds, including the right to privacy, freedom of association, Fourth Amendment due process, privilege against self incrimination, and equal protection.9 Balancing the rights and interest of the government employees, as citizens, against the rights and interests of the government, as employer, the Court found that the statute "unquestionably" furthered the "compelling state interest in deterring governmental corruption and in fostering public confidence in our system of government...."10 This principle, first pronounced by the Court of Appeals in Evans v. Carey noted above, is the lynchpin on which the ethics laws hang their constitutional validity.

This is not to say that state ethics laws, at times, have not run afoul of the Constitution. Indeed, the existing case law has clearly established that ethics laws, even though designed for the noble purposes of deterring government corruption and fostering public confidence in our system of government, must operate within the protections afforded under the Constitution. In Forti v. State Ethics Commission, for example, the Court of Appeals addressed a portion of the state ethics law that granted the Ethics Commission the ability to refer certain violations of the ethics laws to the "appropriate prosecutor" for criminal prosecution.11 The language of the referral mechanism in question stated that "only after such referral, such violation shall be punishable as a class A misdemeanor."12 Although the Court of Appeals upheld the constitutionality of the state law, the Court, in dicta, noted that the "provision for criminal prosecution only upon referral by the Ethics Commission [is] highly troublesome" and was likely violative of the doctrine of separation of powers.13 In 2007, with the passage of PEERA, this “troublesome” phrase was removed from the statute, perhaps creating new issues and frontiers for local district attorneys and the attorney general to charge and prosecute violations of the Public Officers Law.14
In addition to the doctrine of separation of powers, the First Amendment right to free speech has also been implicated by ethics reform, most notably in the landmark Supreme Court decision of *Buckley v. Valeo*. In *Buckley*, before the Court was a constitutional challenge to the Federal Election Campaign Act of 1971, a comprehensive effort by Congress to control and regulate campaign contributions and spending. Although the Court upheld many of the disclosure and reporting provisions, the Court held invalid on First Amendment grounds the limitations on campaign expenditures, especially those from the politician’s personal funds.

On January 21, 2010, the Supreme Court again revised the area of campaign contributions in *Citizens United v. Federal Election Commission*, reversing prior precedent in the area of campaign spending and invalidating part of the 2002 McCain-Feingold campaign finance law. The government’s argument for regulation of corporate political speech was a familiar one—“corporate political speech can be banned in order to prevent corruption or its appearance.” The Court, however, found that this interest, relied upon by the Court in *Buckley*, was only sufficient justification for the regulation of “quid pro quo corruption.”

The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

Favoritism and influence are not... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

While this sort of “generic favoritism” may be at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle, the Supreme Court’s implicit endorsement of the “fact of life” begs a fundamental question: Is the First Amendment now at odds with ethics regulation?

The treatment of government employees who are also attorneys is yet another area in the field ethics reform that crossed paths with constitutional doctrine, specifically, the separation of powers. In *Shaulis v. Pennsylvania State Ethics Commission*, the issue before the Supreme Court of Pennsylvania was whether a provision of the Public Official and Employee Ethics Act governing conflicts of interest of former government attorneys violated a provision of the Pennsylvania Constitution granting the Supreme Court exclusive authority to regulate the conduct of attorneys. The Court, as is usually the case, recognized the “sound rationale for prohibiting a former government employee from representing a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.” However, insofar as the state legislature was not vested with the power to enact this restriction, the Legislature’s attempt to regulate the ethical conduct of lawyers exclusively violated the Pennsylvania Constitution. While New York’s Constitution does not contain an express provision analogous to that of the Pennsylvania Constitution, the supremacy of the Court of Appeals in regulating the conduct of lawyers has long been justified based on the separation of powers doctrine.

II. Integrity Commissions as Panacea and Punching Bag

Although a purpose of ethics laws, “in promoting both the reality and the perception of integrity” in government, is to prevent unethical conduct before it occurs, the political and social landscape surrounding ethics reform during the past several decades suggests that a reactive, not proactive, purpose dominates the area of ethics reform. In fact, “[e]thics laws are typically a response to scandal, enacted with the immediate goal of stemming public or media outcry.”

Ethics commissions, whose power is derived from the ethics laws they enforce, follow a cyclical formula. Phase 1—a governmental scandal occurs. Phase 2—the public reacts, demanding remedial legal measures to deter and punish scandalous behavior. Phase 3—the Legislature appears its constituents, passing a law described by many as “sweeping reform.” But because the new laws were enacted “with the immediate goal of stemming public or media outcry,” the new laws are, unfortunately, “hastily designed.” Phase 4—a new scandal erupts, one not regulated by the existing ethical laws and, therefore, beyond the reach of the ethics commissions. As one New York Court noted, “The contours of corruptive practices and conflicts of interest are frequently impossible to discern until well after the fact.... [P]ractical experience has borne out that to underestimate the creative artifices and ingenuity of corrupt influences in these situations would be folly.” Phase 5—the ineffectiveness of existing ethics laws warrants no other action except dissolution of the former ethics commission. Phase 6—repeat as often as scandal and public pressure warrant.

Ethics reform in New York is a prime example of this type of “misdirection play”—blaming the lack of strong ethics laws for scandal. This can rightly be described as an intellectually dishonest approach of blaming the inanimate object, here the statute, for the anathema of a government that failed to meet our expectations.

The ever-present news reports of misconduct by government officials amply illustrate that the government’s coercive...
approach to ethics has neither prevented notorious and outrageous corruption by government officials, nor reduced cynicism about government service. More likely, the government’s heavily regulated workplace has led to what…has been described as “superficial compliance,” where employees learn to navigate around the detailed rules instead of complying with the broader ethical principles involved.27

If the solution were as easy as creating a new law, murder would have went out of vogue with Moses and the Ten Commandments and there would be no questions of whether buying a cup of coffee for a government employee is unethical.

Why is it so hard to get ethics laws right? Unlike statutes of general application, these laws directly affect the government officials and define the parameters of acceptable and unacceptable behavior. This is not to say that there is necessarily an overwhelmingly reflexive instinct to resist reasonable standards. It may simply be more difficult to find consensus among government officials on what the parameters should be.

There is another theory to posit. A review of the recent failings of state government officials would not on its face seem to support a cry for new laws. Indeed, over the last decade lawmakers who became law breakers have been held accountable by a number of federal and state agencies for unethical activity that in some cases rose to the level of criminal transgressions. The subjects’ names are widely known and there is no need to rehash them here. It is important, however, to consider that there have been numerous successful prosecutions and investigations of illegal behavior that at its core is based on unethical activity. To acknowledge that, however, removes the purported legality that at its core is based on unethical activity. To acknowledge that, however, removes the purported legality.

The general consensus appears to be that “there are limits on what an ethics code can do to assure the observance of high standards of conduct.”28 Among these limits are “the inability of language to define precisely all ethical obligations in a potentially vast range of factual settings, the difficulty of integrating moral principles with the type of mandatory standards found in codes, and the political compromises in the code-adoption process that often weaken codified ethical regulations.”29 Would raising the ethics commission to constitutional status end the cycle of blaming weak ethics laws for the trials and tribulations of a state government that some would argue is coming unbound from its ethical moorings?

III. Is Ethics and Integrity Regulation Deserving of Constitutional Treatment?

During Governor Paterson’s State of the State address on January 6, 2010, the Governor proposed “sweeping reform to fundamentally change the culture of Albany.”30 The reform agenda sought to, once again, drastically change existing ethics regulations, by seeking to “reduce campaign contributions; require disclosure of outside income; strip the pension from any public official convicted of a felony; phase in public financing of campaigns; and impose terms limits on all State office holders through Constitutional amendment.”31 The theme underlying the Governor’s call for ethics reform was again familiar—to remedy “what is still legal and rampant through the entire system of government. The corrosive effects of outside influence and inside decay have bred cynicism and scorn from the people of New York.”32

Weeks later, the New York State Legislature responded to the Governor’s call for reform, passing a “comprehensive” ethics reform bill requiring greater disclosure of outside sources of income for legislators, and activity of lobbyists, restoring an “independent” lobbying commission, and empowering a “bipartisan” enforcement unit within the New York State Board of Elections to impose strict adherence to campaign finance laws.33 But while the bill was quickly anointed the “strongest ethics reform bill in a generation,”34 Governor Paterson vetoed the bill, indicating that the bill “falls short” of his call for independent oversight of the Legislature.35 A majority of editorial boards around the state had panned the Legislature’s bill as inadequate. The Governor’s veto survived an attempt to override it.36

In the wake of Governor Paterson’s position that current ethics reform has not gone far enough, is it time to consider a Constitutional amendment covering governmental ethics? To remove the foil that ethics laws and the regulating commissions have become, is New York’s last remaining option to grant constitutional status to ethics laws and the regulating commissions?

If a moral issue, such as ethics, were to be deserving of constitutional status, it would not be the first time in our nation’s history that a primarily moral issue has received constitutional treatment. An excellent example of this is the constitutional amendment of Prohibition. During the pre-Prohibition era, alcohol was seen as a serious threat to the family, causing a “widespread belief that alcohol could disintegrate social and family loyalties and that this disintegration would be followed by poverty and crime and a frightful depth of conjugal squalor.”37 Ethics laws designed to remedy the moral deficiencies associated with political decision-making are the modern day equivalent of the early attempts to regulate alcohol. Indeed, the “push for Prohibition was in part recognition of the seriousness
of these dangers as well as an acknowledgment that earlier legislative measures had been inadequate to deal with the problem. 38 The only question, then, is whether the regulation of ethics by constitutional amendment would suffer the same fate as Prohibition.

Some states, such as Colorado and Oklahoma, have already elevated their ethics regulators to constitutional status. 39 Should New York do the same? What extra value does this have, if any? Arguably, the legal effect of the change would be mixed. The state constitutions, like state statutes, must generally yield to the principles established by the United States Constitution. Thus, the issues which arose in cases such as Buckley and Citizens United would still exist. On the other hand, an ethics commission established pursuant to a state constitution would address issues such as those raised in Shaulis, specifically, the separation of powers, and the conflicts between state constitutions and state laws. But what about the moral authority a constitutionally created ethics commission could wield? As a practical matter, any mention of a “constitutional right” carries with it an increased sense of importance in the court of public opinion. And, perhaps, the increased weight afforded to constitutionally created rights and entities by the public is the “push” ethics commissions need to combat the ethical dilemmas facing current public officers. But then again, perhaps the cyclical formula plaguing ethics reform will once again be followed, eventually bringing the ethics law back to where it started—responding to a government scandal.

Endnotes

6. Id. at 288.
8. Id.
10. See id.; see also Evans v. Carey, 40 N.Y.2d 1008, 1009 (N.Y. 1976).
12. Id. (quoting N.Y. PUB. OFF. LAW § 73 (14) (McKinney 1987)).
13. Id.
17. Id. at *30.
18. Id.
19. Id. at *32.
21. Id. at 695, 833 A.2d at 132.
22. Id.
23. PATRICIA E. SALKIN, ETHICAL STANDARDS IN THE PUBLIC SECTOR 100 (2d ed., 2008).
25. Id. at 619.
29. Id. at 726.
31. Id.
32. Id.
34. Id.
35. 2010 Veto Message, Number 1.
38. Id. at 562.
39. See COLO. CONST. art. XXIX, § 5; OKLA. CONST. art. XXIX.

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